STATE OF MICHIGAN

COURT OF CLAIMS

MARC SLIS, and 906 VAPOR,

Plaintiffs,

v

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

Defendants.
_____/

OPINION AND ORDER

Case No. 19-000152-MZ

Hon. Cynthia Diane Stephens

A CLEAN CIGARETTE CORPORATION,

Plaintiff,

v

GOVERNOR GRETCHEN WHITMER, and STATE OF MICHIGAN,

Defendants.
_____/

Case No. 19-000154-MZ

Hon. Cynthia Diane Stephens

Pending before the Court in this consolidated matter are plaintiffs' respective motions for preliminary injunction. Because the Court concludes that the balancing of the pertinent factors weighs in favor of granting relief, the motions for preliminary injunctive relief are GRANTED, and defendants are hereby enjoined and restrained from enforcing the emergency rules at issue until further order of this Court.

I. SUMMARY OF TESTIMONY AND FINDINGS OF FACT

The Court will dispense with a recitation of the relevant procedural history, because the same has already been set forth in the Court's prior opinion and order. More pertinent to the matter at hand is the testimony and evidence received at the October 8, 2019 hearing on plaintiffs' respective motions for temporary restraining order.

The plaintiffs presented several witnesses. They were: Marc Slis, Cary Lee, Ramona Lee, Dawn Every, Delicia Trice, David Haight, and Amelia Howard. Several witnesses testified to their history with burning tobacco consumption and the transition to vapor cigarettes. Two witnesses opined that they had improved health outcomes since they ceased consuming combustible tobacco. One witness, Ms. Trice, indicated that she would return to burning tobacco when her supply of flavored e-cigarette product was exhausted. The employees of A Clean Cigarette, Ms. Trice and Ms. Every, also addressed their prospective economic peril and life disruption should the sales at A Clean Cigarette continue to decrease. However, neither Ms. Trice nor Ms. Every, who testified regarding improved health outcomes, are parties to this case and therefore this Court cannot use their circumstances to determine irreparable harm. Their testimony was relevant to the issue of harm to the public as discussed in this opinion. Plaintiffs presented testimony challenging the efficacy of survey instruments concerning combustible tobacco and e-cigarette use by youth. This Court makes no findings of fact on either the methodology of or the conclusions drawn from the data other than to acknowledge that there is range of opinion regarding correlation and cause of youth consumption of burning tobacco and e-cigarettes. There was a consensus among the parties that youth "vaping" has grown exponentially.

The Defendants presented one witness, Dr. Joneigh Khaldun. It was she who made the scientific decisions regarding the Emergency Order. She was appointed in April 2019 to her post as Chief Medical Officer for defendant Department of Health and Human Services (DHHS).

After a review of all of the evidence presented the Court makes the following findings of fact on issues pertinent to the prayer for injunctive relief.

1. 906 Vapor is no longer a "going concern." Its inventory remains at its retail operation.

2. The business owner, Slis, has considerable business and personal debt such that resumption of business after expiration of the Emergency Order is unlikely.

3. Customers of 906 Vapor have begun purchasing product from out-of-state vendors.

4. A Clean Cigarette has shuttered one retail center and is in the process of closing four others.

5. A Clean Cigarette had a considerable internet operation that, like its retail stores, relied on sale of flavored nicotine product.

6. A Clean Cigarette internet operation has ceased advertising flavored nicotine product.

7. The "A Clean Cigarette" logo and name is posted on its retail operations, uniforms, e-cigarette cartridges and batteries.

8. Clean and Cigarette cannot be used together per Rule number 3(2), of the Emergency Order.

9. The shelf life of vaping product whether for open or closed container systems is ten months or less.

10. A Clean Cigarette has contractually committed to receive additional product bearing its logo.

11. Neither Plaintiff sold products to minors.

12. E-cigarette users who were patrons of the plaintiffs overwhelmingly use flavored nicotine product.

13. A Clean Cigarette has over two million dollars of unusable product.

14. In reaching the conclusion that an emergent danger was posed by e-cigarette use among persons under that age of 18 in Michigan, the Department cited numerous studies including the following:

    a. U.S. Surgeon General's Advisory on E-Cigarette Use among Youth, *Know the Risks: E-Cigarettes & Young People (2019)*, which expanded on the 2018 declaration of an epidemic of youth vaping.
    b. Wang TW, Gentzke A, Sharapova S, et al. *Tobacco Use Among Middle and High School Students-United States*, 2011-2017. MMWR Morbiddity and Mortality Weekly Report._2018; 67(22):629-633.
    c. CDC - National Youth Tobacco Survey (NYTS) - *Smoking & Tobacco Use, Smoking and Tobacco Use (2019)*, Michigan Profile for Healthy Youth, Michigan.gov (2019),
    d. KM Berry et al., *Association of Electronic Cigarette Use With Subsequent Initiation of Tobacco Cigarettes in US Youths,* PubNed.gov (2019), Villanti AC, Johnson AL, Ambrose BK, et al. *Flavored Tobacco Product Use in Youth and Adults: Findings from the First Wave of the PATH Study (2013-2014).* Am J Prev Med. 2017;53(2):139-151. doi:10.1016/j.amepre.2017.01 .026.
    e. Dai H. *Changes in Flavored Tobacco Product Use Among Current Youth Tobacco Users in the United States*, 2014-2017. JAMA Pediatr. Published online January 07, 2019173(3):282-284. doi:10.1001/jamapediatrics.2018.4595.

f. The latest publication for these documents was February 2019. Most of the underlying data was from instruments created prior to 2018. Many of the instrument relied upon common data sets .

15. The Department considered the passage of Public Act 18[1] when it recommended the emergency rules.

16. The Department had a basis for its determination that Public Act 18 would not be a significant deterrent to youth e-cigarette use. That basis was derived from the historic data on e-cigarette use in other states which adopted similar legislation to Public Act 18 prior to Michigan.

II. ANALYSIS

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

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

A. IRREPARABLE HARM

Caselaw has informed that a showing of irreparable harm to the party seeking injunctive relief is an "indispensable requirement" to obtaining such relief. *Michigan AFSCME Council 25*

[1] 2019 PA 18 prohibited the sale of e-cigarettes and other non-traditional products to minors.

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

In a prior opinion and order, this Court concluded that plaintiffs Slis and 906 Vapor failed to establish the necessary component of irreparable harm. Following the presentation of additional proofs at the October 8, 2019 hearing, the Court concludes that plaintiffs have now carried their burden of demonstrating irreparable harm. As it concerns plaintiff A Clean Cigarette,[2] the evidence presented establishes a loss of goodwill from the issuance of the emergency rules amounting to irreparable harm. See *Basicomputer Corp v Scott*, 973 F2d 507, 512 (1992). As noted in this Court's prior opinion and order, whether "the loss of customer goodwill amounts to irreparable harm often depends on the significance of the loss to the plaintiff's overall economic well-being." *Apex Tool Group, LLC v Wessels*, 119 F Supp 3d 599, 610 (ED Mich, 2015) (citation and quotation marks omitted). In a similar vein, an entity's loss of its competitive position in the marketplace may constitute irreparable harm as well. *Id.* For instance, where the challenged action has the potential to damage goodwill by causing customer

[2] The Court notes that some of A Clean Cigarette's employees testified that the inability to use flavored vaping products will drive them back to using combustible tobacco. While not unmindful of the effects on these individuals, the Court does not consider their testimony for purposes of determining whether a Clean Cigarette demonstrated irreparable harm as the moving party. See *Michigan AFSCME Council 25*, 293 Mich App at 149. Indeed, the employees are not named parties to this action.

confusion or loss of branding, the damages flowing therefrom are difficult to calculate and can support a finding of irreparable harm. See *Southern Glazer's Distribs of Ohio, LLC v Great Lakes Brewing Co*, 860 F3d 844, 853 (CA 6, 2017) (discussing the loss of a unique aspect of the plaintiff's business as an irreparable injury); *AM General Corp v DaimlerChrysler Corp*, 311 F3d 796, 831 (CA 7, 2002) (explaining that the loss of, or damage to, branding can amount to irreparable harm).

Returning to plaintiff A Clean Cigarette, the emergency rules—Rule 3(1)-(2)—ban plaintiff from using its tradename and branding. This is a name that not only hangs above the door of plaintiffs' establishments, but is part of a branding effort that appears on all of plaintiffs' products and even on its employees' uniforms. Hence, not only has plaintiff A Clean Cigarette lost a significant percentage of its sales and closed several stores already due to the ban, the ban will force plaintiff to rebrand itself entirely. In essence, the emergency rules will destroy plaintiff A Clean Cigarette's business as it currently exists as well as any branding or goodwill associated therewith. This is a significant loss of goodwill that cannot be compensated by economic damages. See *Apex Tool Group*, 119 F Supp 3d at 610. As a result, plaintiff A Clean Cigarette has demonstrated a unique loss to its business and to its branding that amount to irreparable harm. See *Southern Glazer's Distribs*, 860 F3d at 853.

As for plaintiffs Slis and 906 Vapor, the proofs presented at the October 8th evidentiary hearing, contrary to the evidence presented prior to the issuance of this Court's prior opinion and order, support a finding of irreparable harm. Plaintiff Slis testified that he shuttered his business and that his customers have been obtaining their flavored vaping products from Wisconsin. In addition to losing customers, Slis substantiated his claim that he will lose his entire business because of the emergency rules. This is different from the loss of sales at issue in the prior

opinion and order issued in this matter, because the loss of one's entire business has been recognized as irreparable harm. See, e.g., *Girl Scouts of Manitou Council, Inc v Girl Scouts of United States of America, Inc*, 549 F3d 1079, 1090 (CA 7, 2008) (citation and quotation marks omitted) ("although economic losses generally will not sustain a preliminary injunction, there are exceptions where, as here, a remedy may come too late to save plaintiff's business"); *Performance Unlimited, Inc v Questar Pubs, Inc*, 52 F3d 1373, 1382 (CA 6, 1995).

B. LIKELIHOOD OF SUCCESS ON THE MERITS

The next factor to consider is the respective plaintiffs' likelihood of prevailing on the merits of their claim(s). Plaintiffs have asserted a number of theories as to why the emergency rules are invalid. Although plaintiffs have argued that DHHS has no rulemaking authority whatsoever, the Court need not specifically address that claim in order to conclude that plaintiffs have demonstrated a likelihood of success on the merits at this stage of the litigation. That is, assuming DHHS has rulemaking authority,[3] plaintiffs have demonstrated a likelihood of success on the merits of their claim that the rules are procedurally invalid under MCL 24.248(1). Regarding procedural invalidity, the Administrative Procedures Act (APA) permits an agency to dispense with the ordinary procedures for rule promulgation in emergency situations. In this respect, the APA provides for the promulgation of emergency rules at MCL 24.248(1), which provides that:

> (1) If an agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and

[3] See MCL 333.2226(d). But see MCL 333.2233(2); and *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000); *Verizon North, Inc v Pub Serv Comm*, 263 Mich App 567, 571 n 2; 689 NW2d 709 (2004).

> participation procedures required by sections 41 and 42 and states in the rule the agency's reasons for that finding, and the governor concurs in the finding of emergency, the agency may dispense with all or part of the procedures and file in the office of the secretary of state the copies prescribed by section 46 endorsed as an emergency rule, to 3 of which copies must be attached the certificates prescribed by section 45 and the governor's certificate concurring in the finding of emergency.

"An emergency rule is justified if three conditions are satisfied: (1) the agency finds that preservation of the public health, safety, or welfare requires promulgation of an emergency rule without following the notice and participation procedures required by section 41 and 42; (2) the agency states in the rule the agency's reasons for that finding; and (3) the governor concurs in the finding of emergency." *Mich State AFL-CIO v Secretary of State*, 230 Mich App 1, 21; 583 NW2d 701 (1998). A reviewing Court can invalidate emergency rules on the failure of one of the three requisite conditions. See *id.* at 22-25 (concluding that the rules at issue in that case did not pertain to the "public welfare" because they did not affect the "public at large" and instead only pertained to a union and its affiliated organizations). In *Mich State AFL-CIO*, the Court of Appeals rejected a more deferential "substantial basis" or "abuse of discretion" test for evaluating emergency rules. *Id.* at 19-20, 26. Instead, the Court treated a challenge to the procedurally validity of emergency rules, i.e., whether the conditions in MCL 24.248(1) were satisfied, "as an issue of statutory construction, which is a question of law that we review de novo." *Id.* at 24-25.[4]

[4] However, the *Mich State AFL-CIO* panel remarked that "we would arrive at this same conclusion"—invalidating the emergency rules at issue in that case—"even if the 'substantial basis' and 'abuse of discretion' tests enunciated in" a pre-1990, non-binding Court of Appeals decision—"are the appropriate tests." *Id.* at 25.

Plaintiffs argue that the emergency rules in this case are procedurally invalid because: (a) there was no genuine emergency; and (b) the rules do not advance the public health, safety, or welfare. While the Court disagrees with plaintiffs' assertion about the latter point,[5] it nevertheless agrees that plaintiffs have demonstrated a likelihood of success on the former point. The Court's analysis on this issue should not be mistaken for a judgment on the policy goals sought to be achieved by the emergency rules, nor should it be construed as a final determination on the merits. There is no serious dispute with respect to whether a vaping-use crisis exists among youth. Rather, and in accordance with the statutory requirements for promulgating emergency rules in contravention of the APA's normal procedures, the Court's focus is on the emergent nature of the problem. The plaintiffs have convinced the Court that defendants' proffered reasons for the emergency declaration have fallen short. It is not enough under MCL 24.248(1) for DHHS merely to identify a problem. Because an emergency rule—like any other agency rule—has the force and effect of law, the Court must find appropriate justification for the agency's short-cutting of the normal procedures for rulemaking outlined in the APA. See *Mich State, AFL-CIO*, 230 Mich App at 21.

[5] In essence, plaintiffs argue that the rules cannot pertain to the public health because they only relate to a small subset of the population—youth. The emergency declaration is not as limited as plaintiffs have characterized it in this case. The emergency declaration—and evidence on which it relies—pertains to all youth in this state. This is not an individual or limited class, but instead is one that affects the community at large. Cf. *Mich State AFL-CIO*, 230 Mich App at 21-22 (finding that emergency rules were not directed at the public at large when they only applied to a union and its affiliated organizations). Adopting plaintiffs' position in this case would essentially mean that no emergency rule could be valid unless it pertained to the entire population. Indeed, if the "youth" and/or middle school and high school students in this state are too narrow of a subset of the population, it is difficult to imagine any rule that would pass muster. Hence, at least on this stage, and on the arguments presented, plaintiffs have not shown a substantial likelihood of success on the merits with respect to this argument.

To that end, and without issuing a final determination on the merits of the issue, plaintiffs have the more convincing position with respect to their assertion that the identified problem does not *require* the promulgation of emergency rules in derogation of the APA's ordinary procedures. As was more fully borne out by the testimony and evidence received at the evidentiary hearing, the underlying data supporting the emergency declaration was available to DHHS *at the latest* in February 2019, and in some instances even earlier than that. The emergency declaration cites and relies on this stale information in support of the finding that an ongoing emergency exists. Despite the availability of the information, DHHS waited for eight months—during which the APA procedures largely could have run their course, had they been initiated—before declaring an emergency. While not purporting to set a limit on how current or contemporaneous data must be in order to establish an emergency, the Court finds that defendants' lengthy period of inaction, combined with the old data, undermines the emergency declaration in this case. This is particularly so in light of defendants' lack of convincing argument regarding the delay. In seeking to justify the delay, defendants cite the fact that it was not until April 2019 that Dr. Joneigh Khaldun was appointed as Chief Medical Executive for DHHS. This appointment, argue defendants, set in motion the promulgation of the emergency declaration. The Court is not convinced by such an assertion, however. DHHS existed as a department and it was charged with protecting the public health and welfare long before Dr. Khaldun's appointment. Yet, DHHS delayed in taking action, despite having all of the information it now cites as necessary for doing so. Thus, and at this stage of the litigation, defendants have undercut their own assertions of an emergency by the fact that they demurred on taking action for nearly a year, and in the case of some information even longer than that, after they were in possession of the information cited in support of the emergency declaration. While

the record in this case established that this is an area that could very well benefit from rulemaking, plaintiffs have, on the proofs and arguments presented at this stage, convinced the Court that the problem sought to be addressed did not *require* casting aside the APA's normal procedures under the circumstances. See *Mich State, AFL-CIO*, 230 Mich App at 21. Indeed, an agency cannot create an emergency by way of its own failure to act. As pointed out in plaintiff's briefing, federal courts addressing emergency rulemaking by federal agencies have commented that an agency's inaction or delay undercuts the notion that an emergency exists. See *Council of Southern Mountains, Inc v Donovan*, 653 F2d 573, 581 (DC, 1981); *Washington Alliance of Tech Workers v United States Dep't of Homeland Security*, 202 F Supp 3d 20, 26 (D DC, 2016), aff'd 857 F3d 907 (2017).

In light of the above, the Court concludes that the record, at least at this juncture, does not substantiate the declaration of an emergency which necessitated dispensing with the APA's normal rule-making procedures which afford the public meaningful opportunities to be heard. Therefore, plaintiffs have demonstrated a likelihood of success on their assertion that the emergency rules are procedurally invalid. See *Mich State AFL-CIO*, 230 Mich App at 24 (concluding that emergency rules were "procedurally invalid because the [agency's] finding did not meet the statutory threshold imposed by the Legislature" in MCL 24.248(1) for promulgating emergency rules). This factor weighs in favor of granting the preliminary injunctive relief requested by plaintiffs.[6]

[6] Because the Court finds a likelihood of success on the merits of the claim that the emergency rules are procedurally invalid, it need not comment extensively on plaintiffs' remaining challenges to the rules. Nevertheless, the Court disagrees, at this stage of the litigation, that the substance of the emergency rules fails to pass muster for the reason that they are arbitrary and

C. BALANCE OF HARMS

The Court will next balance the harms at issue: that is, it must weigh the harm that would occur to the parties seeking the injunction should the injunction not issue against the harm to the opposing party if the injunction is granted. See *Davis*, 296 Mich App at 613. As noted above, plaintiffs have demonstrated the risk of irreparable harm in this case if injunctive relief is not granted. And based on the asserted irreparable harm, plaintiffs have carried their burden of demonstrating that they face the greater risk. See *Mich AFSCME Council 25*, 293 Mich App at 157. Indeed, defendants have not articulated a harm that will befall *them*[7] if injunctive relief issues. Nor will defendants necessarily suffer harm if they are made to comply with the APA's established procedures for rulemaking before implementing rules that regulate vaping products. See *Mich Chamber of Commerce v Land*, 725 F Supp 2d 665, 698 (WD Mich, 2010). Thus, the harm to defendants as state entities is neither compelling nor noteworthy. This factor also weighs in favor of granting the requested preliminary injunctive relief.

D. HARM TO THE PUBLIC INTEREST IF INJUNCTION ISSUES

The final factor to consider, harm to the public, has compelling interests on both sides of the issue. On the one hand, the harm to the public if the injunction issues is that flavored vaping products will continue to be available and that an unquantified number of youth will illegally begin to use the products or will continue to use them in violation of the laws of this state. As noted by the testimony taken in this matter, as well as the studies and scientific literature cited by

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capricious. See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 650 n 8; 873 NW2d 842 (2015) (employing deferential standards of review to such a challenge). Nor is the Court, at least at this stage of preliminary review, convinced by the constitutional claims asserted by plaintiffs.

[7] Rather, as will be addressed in the next factor, defendants only argue the harm to the public interest at large.

defendants, the risk that youth will try vaping products or that they will continue to use vaping products is exacerbated by the existence of flavored products. And as noted by some of this same evidence, the risks to youth who use vaping products are real and substantial. The public therefore, undoubtedly faces a risk of harm if the requested injunctive relief were to issue.

On the other side of the equation, however, plaintiffs have presented proofs to show that there is a real risk of harm to a segment of the public should injunctive relief not issue. In this regard, there is evidence in the record supporting the notion that many adult users of flavored vaping products are former cigarette or combustible tobacco users. There is also evidence to substantiate the notion that, if flavored vaping products are banned, these adult users of flavored vaping products will return to more harmful combustible tobacco products. Plaintiffs produced testimony and literature citing improved health outcomes for former combustible tobacco users who switch to vaping products. These outcomes could, and likely would, be lost under the emergency rules. Furthermore, there was evidence presented at the hearing that plaintiffs made significant efforts to steer combustible tobacco users toward vaping products, particularly the flavored variety, as a means of combustible-tobacco avoidance. Thus, plaintiffs have presented evidence that at least some segment of the population will be harmed by the vaping ban effectuated by the emergency rules.

To conclude on this factor, the Court acknowledges that there are harms, and potentially significant ones at that, that will arise if injunctive relief issues, or if injunctive relief is denied. In light of the same, the Court finds that this factor does not weigh significantly in favor of, or against, the issuance of the requested injunctive relief.

E. WEIGHING THE FACTORS

After analyzing the pertinent factors, the Court concludes that three of the factors favor the issuance of injunctive relief and that the final factor is neutral. And on balance, the Court concludes that plaintiffs have carried their burden of presenting a compelling case for the issuance of preliminary relief. See *Mich Consolidated Gas Co v Mich Pub Serv Comm*, 389 Mich 624, 641; 209 NW2d 210 (1973). As a result, a preliminary injunction will issue so as to "preserve the status quo so that a final hearing can be held without either party having been injured . . . ." See *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998).

III. CONCLUSION

IT IS HEREBY ORDERED that plaintiffs' respective motions for preliminary injunction in these consolidated cases are GRANTED, and that defendants, along with their officers, agents, and employees are hereby enjoined and restrained from enforcing the September 2019 "Protection of Youth from Nicotine Product Addiction Emergency Rules" until further order of this Court.

This is not a final order and it neither resolves the last pending claim nor closes the case.

October 15, 2019

Cynthia Diane Stephens
Judge, Court of Claims