

OCT 28 2019

Salt Lake County

By: _____
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

VIP VAPORS OF OREM, LLC dba VIP Vapors, a Utah Limited Liability Company, ALTERNATIVES, EMPIRE MERCHANDISE COMPANY SLC, LLC, a Utah Limited Liability Company, VAPOR UTAH LLC dba CURRENT VAPOR, a Utah Limited Liability Company, VAPOR UTAH LLC dba DRAPER VAPOR, a Utah Limited Liability Company, GREATER SALT LAKE TOP STOP L.L.C., a Utah Limited Liability Company, ASAL ENTERPRISES LLC dba HOV2, a Utah Limited Liability Company, V.O.S. Retail LLC, a Utah Limited Liability Company,

Plaintiffs,

vs.

JOSEPH K. MINER, MD, executive director of the Utah Department of Health, and the UTAH DEPARTMENT OF HEALTH,

Defendants.

**MEMORANDUM DECISION AND
TEMPORARY RESTRAINING ORDER
ENJOINING IMPLEMENTATION
AND ENFORCEMENT OF
TEMPORARY RULE R384-418-5**

Civil No. 190908334

Judge Keith A. Kelly

On October 22, 2019, Plaintiffs, which are all licensed Utah general tobacco retailers (“Plaintiffs”), filed a Motion for Temporary Restraining Order (“TRO Motion”). Plaintiffs seek an order temporarily enjoining Defendants Joseph K Miner, M.D., and the Utah Department of Health (“UDOH”) from implementing and enforcing *a portion of* the emergency rule entitled “Electronic-Cigarette Mandatory Warning Signage and Sale Restrictions,” found at R384-418

(“the Vaping Rule”). UDOH adopted that Rule on October 1, 2019, and it ultimately become effective on October 21, 2019. *See* Utah State Bulletin, October 15, 2019, Vol. 2019, No. 20 at pp. 136-39 (“10/15/19 Bulletin”).

UDOH filed its opposition to the TRO Motion on October 24, 2019, and the Court heard expedited argument on October 25, 2019.

After carefully considering the arguments, evidence and briefing of the parties, the Court grants the TRO Motion for the reasons discussed below. The Court’s Temporary Restraining Order is found at the end of the Memorandum Decision.

I. The TRO Motion Seeks to Preserve the *Status Quo* Allowing Plaintiffs to Sell Flavored Vape Products.

Specifically, the Plaintiffs seek to enjoin enforcement of temporary R384-418-5, which allows retail tobacco specialty businesses – but not general tobacco retailers – to sell “flavored electronic-cigarette products or flavored electronic-cigarette substances” (“Flavored Vape Products”).¹ Flavored Vape Products include those with non-tobacco flavors, such as those having “a taste or smell of any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb, spice, menthol or mint.” R384-418-2(6) & (7). Non-flavored vape products

¹ The full text of R384-418-5 is as follows:

Allowed and Prohibited Sale of Flavored Electronic-Cigarette Products.

(1) Only retail tobacco specialty businesses with a valid retail tobacco specialty permit issued by a local health department may sell flavored electronic-cigarette products and flavored electronic-cigarette substances.

(2) General tobacco retailers shall not sell flavored electronic-cigarette products or flavored electronic-cigarette substances.

(3) General tobacco retailers may sell non-flavored electronic-cigarette products and non-flavored electronic-cigarette substances.

(4) The sale of THC electronic-cigarette products and THC electronic-cigarette substances is illegal in the State of Utah unless the sale is made in compliance with Title 26, Chapter 61a, Utah Medical Cannabis Act, or Title 4, Chapter 41a, Cannabis Production Establishments.

having “a taste or a smell of tobacco” are not affected by the Vaping Rule. *See* R384-418-2(9) & R384-418-5(3).

The Plaintiffs do *not* seek an injunction against enforcement of other parts of the Vaping Rule, such as provisions requiring the posting of signs “warning consumers not to use electronic-cigarette products to consume unregulated THC electronic-cigarette substances.” R384-418-4(1).

Since they are all general tobacco retailers, the Plaintiffs can no longer sell Flavored Vape Products under R384-418-5 of the temporary Vaping Rule – even though their competitors that are retail tobacco specialty businesses may sell Flavored Vape Products. *See* Declarations of Plaintiffs. Through their TRO Motion, Plaintiffs are seeking to preserve the *status quo*.

II. UDOH Has Failed to Satisfy Utah Code §63G-3-304(1)(a) Requirements for Issuing R384-418-5 of the Temporary Vaping Rule on an Emergency Basis.

A. To Issue a Rule Without Following the Normal 120-Day Process, UDOH Must Find that Following the 120-Day Rulemaking Process Would “Cause an Imminent Peril to the Public Health, Safety, or Welfare.”

Under the Utah Administrative Rulemaking Act, state agencies such as UDOH may promulgate rules regulating persons and businesses in Utah when such rulemaking authority “is explicitly or implicitly authorized by statute.” Utah Code § 63G-3-201(2)(d). Agencies must comply with rulemaking procedures under Utah Code §63G-3-301, which requires a notice and comment period, and provides that new rules may take effect “no more than 120 days after the day on which the rule is published.” *Id.* §63G-3-301(12)(a)(ii). Specifically agencies are required to consider whether their proposed rules “will have a measurable negative fiscal impact on small businesses,” and if so, the agency is required to consider specific “methods of reducing the impact of the rule on small businesses.” *Id.* §63G-3-301(6).

In certain circumstances, public emergencies may require agencies to issue rules to take immediate effect – without waiting for the 120-day rulemaking process. But such emergency circumstances are limited as specified in Utah Code §63G-3-304, as follows:

- (1) All agencies shall comply with the rulemaking procedures of Section 63G-3-301 unless an agency finds that these procedures would:
 - (a) cause an imminent peril to the public health, safety, or welfare;
 - (b) cause an imminent budget reduction because of budget restraints or federal requirements; or
 - (c) place the agency in violation of federal or state law.
 - (2) (a) When finding that its rule is excepted from regular rulemaking procedures by this section, the agency shall file with the office:
 - (i) the text of the rule; and
 - (ii) a rule analysis that includes the specific reasons and justifications for its findings.
 - (b) The office shall publish the rule in the bulletin as provided in Subsection 63G-3-301(4).
 - (c) The agency shall notify interested persons as provided in Subsection 63G-3-301(10).
 - (d) The rule becomes effective for a period not exceeding 120 days on the date of filing or any later date designated in the rule.
- (3) If the agency intends the rule to be effective beyond 120 days, the agency shall also comply with the procedures of Section 63G-3-301.
(Emphasis added.)

Thus emergency rules, such as the Vaping Rule, that are issued without the Section 63G-3-301 due process requirements may be in effect for only 120 days. *Id.* §63G-3-304(2)(d). Further, in order to enact temporary emergency rules, the agency must find that following the 120-day rulemaking requirements would “cause an imminent peril to the public health, safety, or welfare,” or cause other harms not applicable in this case. *Id.* §63G-3-304(1) (Emphasis added.)

B. UDOH's Findings Focus on Illegal THC Vaping as the Justification for Emergency Issuance of the Vaping Rule – Not on Flavored Vaping Products.

The Vaping Rule is a temporary rule in effect until January 29, 2020. (Defendants' Memorandum in Opposition at 2.) UDOH issued it based on its authority under Utah Code §26-1-30(4) to "establish, maintain, and enforce rules necessary or desirable to carry out the provisions and purposes of this title to promote and protect the public health or to prevent disease and illness." *See* 10/15/19 Bulletin at p. 137.

UDOH's justification for issuing the emergency Vaping Rule focuses on unregulated tetrahydrocannabinol ("THC") obtained from the black market, which is illegal in Utah.

UDOH's official published reasoning for the emergency issuance begins as follows:

PURPOSE OF THE RULE OR REASON FOR THE CHANGE: Cases of vaping-related lung/pneumonitis injury initially spiked during the end of July 2019 and beginning of August 2019, both in Utah and nationally. As of 9/27/2019, nationally there have been 805 confirmed and probable cases of severe lung/pneumonitis injuries due to vaping in 46 states and 1 US territory. Nationally there have been 12 confirmed deaths in 10 states (California (2), Florida, Georgia, Illinois, Indiana, Kansas (2), Minnesota, Mississippi, Missouri and Oregon). Of those 46 states and 1 US territory, Utah is experiencing the highest number of cases per capita. In Utah, as of 9/30/2019, a total of 81 reports of potential illness have been received by the Utah Department of Health (UDOH) and local health departments, of which 71 are confirmed or probable cases of severe lung/pneumonitis injuries due to vaping, and 10 of the reports are under review. The purpose of this rule is to protect the immediate health, safety, and welfare of Utah youth and adults. UDOH has consistently received reports of approximately 10 new cases per week since August 2019. The lower case counts in September, both in Utah and nationally, are attributed to a reporting lag rather than an actual downturn in cases. UDOH plans to continue active surveillance of the vaping-related lung/pneumonitis injury outbreak by counting and classifying cases, as well as identifying exposures, not knowing how long the caseload will continue in the coming weeks or months.

Id. at 136.

In addition, UDOH gave the following Utah Code §63G-3-304(1)(a) analysis of its reasons for issuing R384-418 as an emergency rule, rather than waiting for the regular 120-day rule making period:

EMERGENCY RULE REASON AND JUSTIFICATION:

REGULAR RULEMAKING PROCEDURES WOULD cause an imminent peril to the public health, safety, or welfare.

JUSTIFICATION: Ongoing investigatory findings, both by the Centers for Disease Control and Prevention (CDC) nationally, and UDOH in Utah, related to the outbreak of cases of severe lung/pneumonitis injuries due to vaping have identified that patients are using unregulated electronic-cigarette products to vape THC obtained from the black market. Neither the national nor the Utah-specific investigation has identified any specific electronic-cigarette product, vaping product (devices, liquids, refill pods, and/or cartridges), substance that is linked to all cases. The majority of patients experiencing severe lung/pneumonitis injuries due to vaping both nationally (77%) and in Utah (94%; n=36 patients) self-reported using electronic-cigarette products to vape THC cartridges. Utah Public Health Laboratory testing of Utah case-associated THC electronic-cigarette substances identify that 89% of THC samples contain Vitamin E acetate. Some Utah patients also self-reported using electronic-cigarette products to vape nicotine substances (64%; n=36 patients). Pulmonologists treating the patients experiencing severe lung/pneumonitis injuries associated with vaping have stated the patients' medical imaging shows acute damage to their lungs. It is unknown what future medical costs these individuals will incur over the rest of their lives. In Utah, 14% of cases are between the ages of 10-19, 47% of these cases are between the ages of 20-29 and 31% of these cases are between the ages of 30-39 (n=71 patients).

Id. at 137 (emphasis added).

Additionally, UDOH issued an October 2, 2019 news release explaining why it was issuing its Vaping Rule on an emergency basis:

Emergency Rule to Address Vaping-related Illnesses
OCTOBER 2, 2019 FEATURED-NEWS

(Salt Lake City, Utah) – The Utah Department of Health (UDOH) today announced it has implemented a new, emergency administrative rule aimed at reducing the number of vaping-related lung injury cases. The rule requires all tobacco retailers that sell e-cigarette products to post notices regarding the dangers of vaping unregulated THC

products, and also restricts the sale of flavored e-cigarette products to retail tobacco specialty businesses.

Retail tobacco specialty businesses are permitted and inspected by local health departments; they are age-restricted retailers that primarily sell e-cigarettes and other tobacco products. Other retailers that sell tobacco products are defined as general tobacco retailers. General tobacco retailers will no longer be allowed to sell flavored e-cigarette products, but may continue to sell non-flavored e-cigarette products.

Utah has been hit especially hard in the national outbreak of lung injury cases, with 71 cases of vaping-related lung injuries being reported as of this week, and another 10 potential cases are under review. Forty-five of these individuals had to be hospitalized, and 26 of them spent time in the intensive care unit.

“Mounting evidence points to the vaping of unregulated THC products as a possible reason for this outbreak,” said Dr. Joseph Miner, executive director of the UDOH. “Youth and young adults have been hit especially hard. We know many young people who vape THC initially vape nicotine, especially flavored nicotine. Moving these products to age-restricted specialty shops will restrict young people’s access to them and can reduce the number of users who eventually move on to vaping THC.”

Ninety-four percent of Utah cases self-reported vaping THC products, and 64 percent self-reported vaping nicotine. Of those who reported vaping nicotine, most purchased their products at Utah vape shops or convenience stores.

“One of our only tools for addressing this outbreak right now is communication. And being able to communicate directly with individuals who are most at risk of developing lung injuries is a top priority,” said Ryan Bartlett of the UDOH Tobacco Prevention and Control Program.

Retailers will have until October 7 to comply with the emergency rule, which will remain in place for 120 days. The UDOH will work to implement a permanent rule while the emergency rule is in place.

Public health agencies have long warned that the long-term effects of e-cigarette use are unknown, and e-cigarette products have never been proven safe for consumption or effective for quitting smoking.

For more information on the vaping-related lung injury outbreak in Utah visit <https://health.utah.gov/lung-disease-investigation>. To read the emergency administrative rule <https://health.utah.gov/wp-content/uploads/R384-418.pdf>.

UDOH 10/2/19 Press Release (found at <https://health.utah.gov/featured-news/emergency-rule-to-address-vaping-related-illnesses>) (“10/2/19 Press Release”) (emphasis added).

C. **UDOH Does Not Show that It Has Found a Causal Connection between the Stated Public Health Emergency Vaping Rule and Its Restrictions on Flavored Vape Products.**

Notable in UDOH's "Rule Analysis" and "Emergency Rule Reason and Justification" for the Vaping Rule is the lack of any justification for limiting the sale of legal Flavored Vape Products. *See* 10/15/19 Bulletin at p. 136-38. The word "flavor" does not appear anywhere in the UDOH's official analysis. The UDOH Investigation Report does not link the recent wave of lung illnesses to Flavored Vape Products but, instead, links the lung illnesses to these persons' use of black market THC cartridges. *Id.*

The word "youth" appears only once in UDOH's Rule Analysis, namely: "The purpose of this rule is to protect the immediate health, safety, and welfare of Utah youth and adults." *See* 10/15/19 Bulletin at p. 136.

UDOH's 10/2/19 Press Release does contain Dr. Miner's explanation of concerns about youth vaping, which refers to Flavored Vape Products:

"Youth and young adults have been hit especially hard. We know many young people who vape THC initially vape nicotine, especially flavored nicotine. Moving these products to age-restricted specialty shops will restrict young people's access to them and can reduce the number of users who eventually move on to vaping THC."

10/2/19 Press Release (emphasis added).

Lacking in this press-release explanation, however, is any reason why imminent peril would be created by following the normal 120-day process for creating a rule addressing "the number of users who eventually move on to vaping THC." *Id.* (emphasis added). Indeed, this explanation of "eventually mov[ing] on to vaping" is not given in UDOH's official Emergency Rule Reason and Justification. *See* 10/15/19 Bulletin at p. 137.

Significantly, Utah law generally restricts the sale of vape and other tobacco products to persons aged of 19 or older. *See* Utah Code §76-10-104.² And all of the Plaintiffs offer evidence in their declarations that they check purchasers' identification and do not sell tobacco products to persons under the age of 19. Thus, the practical effect of R384-418-5 of the temporary Vape Rule is to prevent the sale of Flavored Vape Products in stores where minors can see such Products, but cannot purchase them. Again, UDOH offers no explanation of why such visibility issues create an imminent peril that could not be addressed in the normal 120-day rulemaking process.

In sum, there are no findings or conclusions presented in UDOH's Analysis that determine, find or establish any evidentiary link or nexus between the recent wave of illnesses and Utah's adults allegedly vaping only legal Flavored Vape Products.

The lack of such findings shows that UDOH has not met the requirements of Utah Code §63G-3-304(1) in issuing on an emergency basis R384-418-5, which prohibits general tobacco retailers – but not retail tobacco specialty businesses – to from selling Flavored Vape Products. UDOH simply has not shown using the normal 120-day rulemaking procedures to address the sale of legal Flavored Vape Products would “cause an imminent peril to the public health, safety, or welfare.” Utah Code §63G-3-304(1)(a).

² Amendments to §76-10-104 effective July 1, 2020 will increase this minimum age.

III. Plaintiffs Have Shown that Enforcement of R384-418-5 of the Temporary Vaping Rule Would Cause Irreparable Harm.

A. UDOH States that It Cannot Quantify the Effects of the Temporary Vaping Rule on Small Businesses.

In issuing the temporary Vaping Rule, UDOH admits that it cannot quantify the Rule's impact on general tobacco retailers such as the Plaintiffs:

◆ SMALL BUSINESSES: Emergency Rule R384-418 may result in a direct cost or benefit to businesses. The costs or benefits to businesses are unquantifiable and depend on the business designation and whether the business chooses to display the mandatory warning signs. Approximately 50% of Utah tobacco retailers are considered small businesses. Twenty percent (20%) of these small businesses (or approximately 170 retailers) are designated as age-restricted retail tobacco specialty businesses. As long as these retail tobacco specialty businesses display the mandatory warning signs, these businesses will be allowed to continue to sell flavored electronic-cigarette products and flavored electronic-cigarette substances. The small businesses designated as general tobacco retailers do not primarily rely on electronic-cigarette products to maintain their business operations. General tobacco retailers will no longer be allowed to sell flavored electronic-cigarette products and flavored electronic-cigarette substances. General tobacco retailers can continue to sell non-flavored electronic-cigarette products and non-flavored electronic-cigarette substances upon the condition they display the mandatory warning signs.

See 10/15/19 Bulletin at p. 137 (emphasis added).

Despite stating in its official "Notice of 120-Day Emergency Rule" that the "costs . . . to businesses are unquantifiable," *id.*, UDOH now argues that Plaintiffs should not suffer irreparable harm. UDOH avers that, by law, sales of tobacco products can constitute no more than 34% Plaintiffs' sales. Thus, UDOH argues that, because Flavored Vape Products are only a portion of the tobacco products sold, the harm should not be irreparable.

B. Plaintiffs Offer Evidence of Irreparable Harm Caused by Implementation and Enforcement of R384-418-5 of the Temporary Vaping Rule.

In contrast, each of the Plaintiffs offers testimony that it will suffer irreparable harm based upon loss of goodwill and likely being put out of business by the Vaping Rule. *See*

Plaintiffs' Declarations. They testify that, if the Vaping Rule is enforced, they will lose most, if not all, of the goodwill that they have developed through significant capital expenditure, word of mouth, customer service, and business management. *Id.* Further, they explain that they have numerous repeat adult customers who routinely purchase flavored electronic cigarette products and refer other adults to the store. They believe that their repeat customers will cease doing business with them if the Vaping Rule is allowed to stand as written and enforced. *Id.* They suggest that Flavored Vape Products are a principal draw of customers who also purchase other products.

Plaintiffs persuasively explain that specialty tobacco licensed retailers (“Specialty Vape Shops”) will have a distinct competitive advantage over them because those Specialty Vape Shops will not be prohibited from selling flavored electronic cigarette products as a result of the Vaping Rule. Plaintiffs credibly suggest that they will likely lose most of their repeat customer base to Specialty Vape Shops. *Id.*

Each of the Plaintiffs has submitted declarations stating their monthly overhead costs. Each has testified that, as small businesses, they reasonably anticipate that they will ultimately go out of business due to the loss of revenue from loss of sales of Flavored Vape Products and loss of customers given their continued overhead costs. *Id.* In sum, Plaintiffs persuasively argue that the loss of customers, and loss of sales of Flavored Vape Products and related customer purchases, would prevent them from covering their costs and continuing to operate their small businesses.

The Utah Supreme Court has explained: “Loss of business and goodwill may constitute irreparable harm susceptible to injunction.” *Hunsaker v. Kersh*, 1999 UT 106, ¶10. While it may

be difficult to predict the full effects of the emergency Vaping Rule, the Court is persuaded by Plaintiffs that enforcement of R384-418-5 of the temporary Vaping Rule would cause them irreparable harm through loss of business goodwill and threatening to put them out of business.

IV. Plaintiffs Have Met the Rule 65A Requirements for Obtaining a Temporary Restraining Order Enjoining Implementation and Enforcement of R384-418-5 of the Temporary Vaping Rule.

To obtain a temporary restraining order, a movant must satisfy the requirements of Utah R. Civ. P. 65A(e), as follows:

- (e) Grounds. A restraining order or preliminary injunction may issue only upon a showing by the applicant that:
 - (e)(1) The applicant will suffer irreparable harm unless the order or injunction issues;
 - (e)(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
 - (e)(3) The order or injunction, if issued, would not be adverse to the public interest; and
 - (e)(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

Plaintiffs satisfy each of these requirements.

First, as discussed in part III above, Plaintiffs have shown that they will suffer irreparable harm from UDOH’s implementation and enforcement of R384-418-5 of the temporary Vaping Rule.

Second, as discussed in part II above, UDOH has not provided findings that imminent peril would be caused by following the normal 120-day rulemaking process for adopting R384-418-5 of the temporary Vaping Rule. In contrast, Plaintiffs have shown irreparable harm from UDOH’s implementation and enforcement of R384-418-5.

Third, as discussed in part II, UDOH did not follow the requirements of Utah Code §63G-3-304 when issuing R384-418-5 of the temporary Vaping Rule. Since UDOH has not complied with Utah Code §63G-3-304 as to R384-481-5, it is not adverse to the public interest to enjoin enforcement of R384-481-5.

Fourth, since the Court has determined that UDOH failed to follow the requirements of Utah Code §63G-3-304 before issuing R384-418-5 of the temporary Vaping Rule, Plaintiffs have shown a substantial likelihood that they will prevail on the merits.

V. No Security Is Required.

Rule 65A(c)(1) imposes a security requirement unless the Court finds that posting security is not appropriate:

The court shall condition issuance of the order or injunction on the giving of security by the applicant, in such sum and form as the court deems proper, unless it appears that none of the parties will incur or suffer costs, attorney fees or damage as the result of any wrongful order or injunction, or unless there exists some other substantial reason for dispensing with the requirement of security.

It appears that issuance of this Temporary Restraining Order will not cause the Defendants to incur or suffer attorney fees or damage should this Order be determined to be wrongful. Further, this Order simply requires UDOH to follow its normal 120-day rulemaking process before restricting sales of Flavored Vape Products. Plaintiffs should not be required to post security in order for them to obtain an order requiring UDOH to comply with Utah Code §§63G-3-301 and 63G-3-304. This is a “substantial reason for dispensing with the requirement of security” under Rule 65A(c)(1).

VI. Temporary Restraining Order.

Based upon the foregoing, IT IS HEREBY ORDERED that DEFENDANTS JOSEPH K. MINER, MD, executive director of the Utah Department of Health, the UTAH DEPARTMENT OF HEALTH, and their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive notice, are ENJOINED from implementing and enforcing R384-418-5 of the Electronic-Cigarette Mandatory Warning Signage and Sale Restrictions, found in Utah State Bulletin, October 15, 2019, Vol. 2019, No. 20 at pp. 136-39.

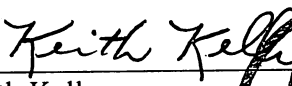
No security is required.

This temporary restraining order shall remain in effect until 5:00 p.m. on Friday, November 1, 2019.

The preliminary injunction hearing on Plaintiffs' Motion shall be heard starting at 9:00 a.m. on Thursday, October 31, 2019, and that hearing is expected to be completed on November 1, 2019.

Issued and Effective as of Monday, October 28, 2019 at 8:00 a.m.

By the Court:



Keith Kelly
District Court Judge

