

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

MICHIGAN DEPARTMENT OF
AGRICULTURE AND RURAL
DEVELOPMENT,

Plaintiff,

Case No. 2020-_____-CZ

HON. _____

v

CAFÉ ROSETTA, LLC,

Defendant.

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**BRIEF IN SUPPORT OF PLAINTIFFS' EX PARTE MOTION FOR
TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Defendant, Café Rosetta, has blatantly and willfully been operating its food service establishment in a manner that the Plaintiff, Michigan Department of Agriculture and Rural Development (MDARD) has determined poses an imminent or substantial threat to the public health. Based on MDARD's determination that

Café Rosetta's continued operations posed an imminent or substantial threat to the public health, MDARD summarily suspended Café Rosetta's food service establishment license. An administrative hearing was held before Administrative Law Judge (ALJ) Lauren Van Steel who found that MDARD's summary suspension should be continued. Despite ALJ Van Steel's decision and order and despite that Café Rosetta does not currently have a valid food license, Café Rosetta has continued operating in violation of Michigan's Food Law, MCL 289.1101 *et seq.*

STATEMENT OF FACTS

Café Rosetta operates a food establishment located at 102 Fifth Street in Calumet, Michigan. Café Rosetta previously held a food establishment license issued by MDARD. Café Rosetta is a small diner that offers carryout and dine in services. Café Rosetta has not complied with the Michigan Department of Health and Human Services' (MDHHS) Epidemic Orders intended to curb the spread of Coronavirus. Specifically, Café Rosetta has failed to require social distancing, failed to require customers and staff to wear facial coverings, and continued to allow indoor dining. Under the Food Law, if the MDARD Director determines that an imminent threat to the public health, safety, or welfare exists, the MDARD Director may summarily suspend a food establishment license.

Michigan's efforts to curb Covid-19

On March 10, 2020, Governor Whitmer issued Executive Order 2020-4 declaring a state of emergency due to the breakout of COVID-19 in the State of

Michigan. COVID-19 is a respiratory disease that can result in serious illness or death. COVID-19 is caused by a new strain of coronavirus not previously identified in humans and it easily spreads between persons. To date, there have been over 466,000 confirmed cases of COVID-19 in the State of Michigan, resulting in over 11,700 deaths.

The Public Health Code gives the Michigan Department of Health and Human Services (MDHHS) “general supervision of the interests of health and life of people of this state,” MCL 333.2221(2), and requires it to “endeavor to prevent disease, prolong life, and promote the public health,” MCL 333.2221(1). MDHHS may “[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination; and to implement and carry out the powers and duties vested by law in the department.” MCL 333.2226(d). Further, MDHHS is authorized to issue emergency orders to address epidemics, pursuant to MCL 333.2253(1):

If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws.

On December 18, 2020, MDHHS issued its most recent Gatherings and Face Mask Order, which took effect on December 21, 2020, and remains in effect until January 15, 2021.¹ See attached Ex 2. The December 18, 2020 Order states that,

¹ MDHHS issued two prior epidemic orders that have been at issue in this case—the November 15, 2020 Gatherings and Face Mask Order and the December 7, 2020

“[t]he death rate is nine times higher than it was in early October, and there are more than 800 weekly deaths in Michigan.” The order concludes that “the COVID-19 pandemic continues to constitute an epidemic in Michigan” and “that it is necessary to restrict gatherings and establish procedures to be followed during the epidemic to ensure the continuation of essential public health services and enforcement of health laws.”

MDHHS’s order generally prohibits indoor gatherings at non-residential venues. See 12/18/2020 Gatherings and Face Mask Order, section 2(a)(2). A “gathering” is “any occurrence, either indoor or outdoor, where two or more persons from more than one household are present in a shared space.” *Id.* at section 1(g). Specifically, the order prohibits indoor gatherings at food service establishments except in “custodial settings, medical facilities, school and university cafeterias, shelters, and soup kitchens.” *Id.* at section 3(b)(1). Further, subject to limited exceptions, “[a]ll persons participating in gatherings are required to wear a face mask.” *Id.* at section 7(a). “Except as provided elsewhere in [the] order, a person responsible for a business . . . must prohibit gatherings of any kind unless the person requires individuals in such gatherings (including employees) to wear a face mask[] and denies entry or service to all persons refusing to wear face masks while gathered.” *Id.* at section 7(c).

Gatherings and Face Mask Order. (Ex 1.) Both orders contained substantially similar requirements for food establishments.

Café Rosetta's operations in violation of MDHHS's order

On November 23, 2020, the Western Upper Peninsula Health Department issued Café Rosetta a “Warning Order Finding Imminent Danger to the Public Health and Requiring Corrective Action” (Health Department Order). The Health Department Order stated that Café Rosetta was not requiring customers or employees to wear masks and the food establishment was open to the public for indoor dining. Based on its findings, the Western Upper Peninsula Health Department determined that Café Rosetta's operations posed an imminent danger to the health and lives of citizens in the County.

The Health Department Order required that Café Rosetta comply with all applicable public health laws and orders and submit a corrective action plan within 72 hours. But, in spite of the Health Department's Order, Café Rosetta continued to offer indoor dining and did not require customers or employees to wear face coverings.

Based on concerns raised by the Health Department, including consideration of coronavirus data in Houghton County where Café Rosetta is located, on November 25, 2020, MDARD issued Café Rosetta an “Order to Cease and Desist Food Operations” (Cease and Desist Order). (Ex. 3.) MDARD's Cease and Desist Order was hand delivered to Café Rosetta by the Western Upper Peninsula Health Department on the same date at 1:30 pm. At that time, Amy Heikkinen, owner of Café Rosetta indicated that she did not intend comply with the Cease and Desist Order. The MDARD's Cease and Desist Order was issued pursuant to the agency's authority under MCL 289.2113(3). The Cease and Desist Order was based on

MDARD's determination that Café Rosetta's continued operations would create an imminent or substantial threat to the public health. The Cease and Desist Order required that Café Rosetta immediately cease food operations.

On November 27, 28, and 30 and December 1, 2020, the Western Upper Peninsula Health Department conducted follow-up inspections and surveillance at Café Rosetta to determine compliance with MDARD's Cease and Desist Order. On each occasion the health department documented that Café Rosetta was operating in violation of the Health Department's Order and MDARD's Cease and Desist Order, was operating in violation of MDHHS's Gatherings and Face Mask Order, was continuing to offer indoor dining, and was not requiring customers or employees to wear face coverings.

Based on Café Rosetta's ongoing violations of the Health Department's Order, MDHHS order, and MDARD's Cease and Desist Order and the failure of Café Rosetta to take actions to protect the public, on December 2, 2020 MDARD determined that an imminent threat to the public health, safety, or welfare existed and summarily suspended a Café Rosetta's food service establishment license pursuant to MCL 289.4125(4). (Ex. 4, Summary Suspension.) A hearing on MDARD's summary suspension of Café Rosetta's license was scheduled for December 10, 2020 at 9:00 am before the Michigan Office of Administrative Rules (MOAHR) Administrative Law Judge (ALJ) Lauren Van Steel.

Summary Suspension Hearing and Order

The hearing on MDARD's summary suspension of Café Rosetta's food service establishment license was held on December 10, 2020. Café Rosetta appeared at the hearing, was represented by counsel, and offered evidence.

On December 21, 2020, following the administrative hearing, ALJ Van Steel issued her Decision and Order Continuing Summary Suspension. Specifically, ALJ Van Steel made factual findings including that:

12. From June 26, 2020 to date, the Western U.P. Health Department has notified 485 businesses of confirmed positive COVID-19 exposures (either of an employee or a customer during the contagious period), of which 181 (37.9%) positive exposures were in food establishments, per the credible testimony of Ms. Rule.

13. The Western U.P. Health Department uses the definition of an illness "outbreak" to be two or more affected individuals who have a common location, source or cause and similar symptoms. Of the 485 confirmed COVID-19 exposures, there were 50 businesses that met that definition of "outbreak". Of the 50 businesses, 36 or 72% were food service establishments, per the credible testimony of Ms. Rule.

* * *

17. From October 1, 2020, to December 9, 2020, the Western U.P. Health Department received a total of 330 complaints against businesses in its jurisdiction. Of the 330 complaints, 149 complaints received were against Respondent Café Rosetta. [Pet. Exh. 25].

* * *

20. Between November 12 and November 27, 2020, the Calumet K-12 school was closed based on a COVID-19 outbreak. There were 58 positive cases and 26 probable cases among staff and students who were required to be quarantined. In addition, there were 345 persons with close contact who were required to be quarantined during that time period. All the other schools in the county remained open, per the credible testimony of Ms. Rule.

21. The Centers for Disease Control and Prevention (CDC) identifies a COVID-19 "hot spot" based on the prevalence and risk of

infection in the community. Per Michigan Department of Health and Human Services (DHHS) data, as of December 8, 2020, Houghton County, which includes Calumet, was categorized at the highest risk category for COVID-19 based on the number of cases per million in the population, according to the credible testimony of Ms. Rule.

22. Local hospital capacity is considered in determining whether a local public health hazard exists. If a hospital is getting near capacity, the health department would want additional mitigation measures to be implemented in the community. The hospitals in the U.P. are at 80% adult ICU beds occupied. One local hospital in Houghton County is at 40% adult ICU capacity, of which 100% occupancy are COVID-19 patients. The other local hospital is at 61% total beds occupied, with 100% of their adult ICU beds occupied at time of hearing, per the credible testimony of Ms. Rule.

* * *

47. In issuing the Emergency Suspension Order, Petitioner MDARD took into consideration Respondent Café Rosetta's violation of the DHHS Emergency Order as an imminent threat to the public health, safety and welfare, the findings by the Western U.P. Health Department that Café Rosetta's conduct constituted an imminent threat to the public health, and the investigation facts submitted to MDARD by the Western U.P. Health Department, per the credible testimony of Mr. Padden. [Ex 5, 12/21/20 Decision and Order Continuing Summary Suspension, pp 7–9, 13.]

Based on the findings of fact, ALJ Van Steel concluded that “Café Rosetta has failed to comply with COVID-19 mitigation measures required for the protection of the public, contrary to the repeated instructions, warnings, cease and desist and other orders of the local health department (Western U.P. Health Department), the Michigan DHHS, and Petitioner MDARD.” (*Id.* at pp 14–15.) Further, ALJ Van Steel found that MDARD's “Emergency Suspension Order [was] not based solely upon [Café Rosetta's] non-compliance with another authority's order or law, but it is based upon the detailed and well-documented findings by MDARD, through the accredited local health department, of an imminent public health threat posed by

[Café Rosetta’s] ongoing non-compliance with COVID-19 pandemic mitigation measures.” (*Id.* at p 15.) ALJ Van Steel concluded that “a preponderance of the evidence shows that Respondent Café Rosetta has engaged in conduct that constitutes an ongoing imminent threat to the public health, safety, and welfare under section 4125 of the Michigan Food Law, MCL 289.4125.”

Café Rosetta’s operations after MOAHR’s determination to continue the summary suspension

The December 21, 2020 Decision and Order Continuing Summary Suspension was served on MDARD, Café Rosetta, and Café Rosetta’s attorney by email on December 21, 2020. Following the issuance of the Order, both MDARD and the Western Upper Peninsula Health Department conducted follow-up investigations at Café Rosetta. On December 22, 2020, the Western Upper Peninsula Health Department conducted surveillance at Café Rosetta after receiving a complaint regarding Café Rosetta’s continued operations. The Western Upper Peninsula Health Department observed that an open sign was posted in the window by the front door, customers entering and leaving the establishment, and customers seated in the front window of the facility on that date. Additionally, an MDARD inspector purchased a carry out order from Café Rosetta on December 22, 2020. (Ex 6, K. Painter Affidavit.) The inspector observed that the establishment was open for indoor dining and that approximately 17 customers were seated and eating or drinking. (*Id.*) The inspector purchased a carry out order and obtained a receipt. (*Id.*)

Café Rosetta has not had a license to operate a food service establishment since MDARD summarily suspended the license on December 2, 2020. Michigan's Food Law provides that a person cannot operate a food establishment unless licensed by MDARD. MCL 289.4101(1). Café Rosetta's current operations not only pose an imminent or substantial threat to the public health, but also are in violation of Michigan's Food Law because Café Rosetta does not have a food establishment license.

ARGUMENT

In determining whether to issue a preliminary injunction, a court must consider four factors: (1) whether the applicant will suffer irreparable injury if the relief is not granted; (2) the likelihood that the applicant will prevail on the merits; (3) the harm to the public if the injunction issues; and (4) whether the harm to the applicant absent temporary relief outweighs the harm to the opposing party if relief is granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998). Plaintiff bears the burden of demonstrating that the factors weigh in its favor. MCR 3.310(A)(4). In this case, all four factors weigh in favor of MDARD's request for a temporary restraining order.

I. MDARD, as well as the public, will suffer irreparable harm without the injunction.

The demonstration of irreparable harm is an indispensable requirement of obtaining a preliminary injunction. *Michigan AFSCME Council 25 v Woodhaven-Brownstown School Dist*, 293 Mich App 143, 149 (2011). As ALJ Van Steel

concluded, Defendant's continued failure to comply with MDHHS Orders, Local Health Department Orders, and MDARD's summary suspension, places the public health at risk. Based on local data, the local health Department and MDARD have concluded that Café Rosetta's continued operations that permit indoor gatherings and dining, do not require employees or staff to wear facial coverings, and do not require social distancing, create an imminent threat of increased coronavirus transmission in the local community.

The risk posed by Café Rosetta is not only to its employees and patrons, but also to the community at large. The CDC describes how Café Rosetta is operating as being in the highest risk category for restaurant and bar operations. (Ex. 7, CDC Considerations for Restaurant and Bar Operators.) Because coronavirus can be transmitted by individuals who show no signs of being ill, patrons and staff of Café Rosetta may unwittingly be spreading the virus to others in their community. As both the MDARD inspector and local health department inspector observed, Café Rosetta's patrons do not go to Café Rosetta and stay there indefinitely—instead they go there to eat and leave potentially taking with them a dangerous virus that can be passed to their families, neighbors, colleagues, and communities. The result is that it is not only Café Rosetta that bears the burdens of their risky operations, but instead the entire community.

Further, a licensee that willfully and wantonly ignores both MDARD's Cease and Desist Order and Summary Suspension Order and continues to do so after a hearing is conducted and the issuance of the Summary Suspension Order is

continued by an impartial ALJ, threatens the authority and credibility of the regulatory agency as well as the broader rule of law. A regulatory agency that cannot enforce its laws is like the toothless lion. If there are no consequences for violating the MDARD Director's Orders, MDARD's authority and credibility are diminished, not just in the area of food safety, but across all other regulatory programs. This harm not only damages MDARD and its regulatory programs, but it also damages the public at large that depend on those regulatory programs to keep them safe.

Without an injunction preventing Café Rosetta's continued operations without a valid food establishment license, MDARD and the public will suffer irreparable harm.

II. MDARD is likely to succeed on the merits of their claim because operation of a food service establishment without a license is prohibited.

Second, MDARD is likely to succeed on the merits of this case. The clearest issue before this court is that Café Rosetta is operating without a valid food service establishment license. The Food Law defines "food" as "articles used for food or drink for humans or other animals, chewing gum, and articles used for components of any such article." MCL 289.1107(m). The Food Law defines "food establishment" as "an operation where food is processed, packed, canned, preserved, frozen, fabricated, stored, prepared, served, sold, or offered for sale. Food establishment includes, but is not limited to, a food processor, a food warehouse, a food service establishment, and a retail grocery. . . ." MCL 289.1107(p). Defendant Café Rosetta

is selling and offering food for sale and, therefore, is a food establishment as defined by the Food Law.

The Food Law provides that a person cannot operate a food establishment unless licensed by MDARD. MCL 289.4101(1). Café Rosetta’s food service establishment license has been suspended. (12/21/20 Decision and Order Continuing Summary Suspension.) Because Café Rosetta does not have a food service establishment license, they are operating a food establishment illegally and in violation of MCL 289.4101(1).

Further, the Food Law provides that:

In addition to the remedies provided for in this act, the department may apply to the circuit court for, and the court shall have jurisdiction upon hearing and for cause shown, a temporary or permanent injunction restraining any person from violating any provision of this act or rules promulgated under this act irrespective of whether or not there exists an adequate remedy at law. [MCL 289.5111.]

MDARD is likely to succeed on its claim that Café Rosetta is operating without a license in violation of the Food Law and that MDARD is entitled to an injunction to prevent continued violations.

III. The harm to MDARD and the public if the injunction does not issue outweigh any harm to the Defendants.

The third and fourth factors address the balance of harms if injunctive relief is issued. The interests of MDARD and the public overlap considerably in this situation, and the potential harm from Defendants’ continued failure to comply with the summary suspension outweighs the harm to Café Rosetta. Undoubtedly, Café Rosetta is harmed by the summary suspension—it prevents Café Rosetta from

operating its business and generating income. But Café Rosetta, like all other food establishments in Michigan, is required to be licensed by MDARD and is required to operate in a manner that does not pose an imminent or substantial threat to the public health. Café Rosetta is no longer licensed to operate a food establishment. Café Rosetta was afforded due process, including notice and an opportunity for a hearing. Café Rosetta also has the right to appeal MOAHR's continuation of the summary suspension. But Café Rosetta cannot operate a food establishment without a food establishment license.

Although MDARD understands the burden that has been placed on food service establishments during this pandemic, that burden does not mean that any establishment can place the public health at risk. In this case, MDARD and the local health department have concluded that Café Rosetta's continued operations pose an imminent threat to the public health. That risk to the public—along with the risk that restrictions for all businesses will be extended because a few refuse to comply with directions from health experts and perpetuate the spread of Covid-19—outweighs the harm done to Café Rosetta.

CONCLUSION

Café Rosetta no longer has a license to operate a food establishment. Despite this, Café Rosetta continues to offer food for sale. Further, Café Rosetta's operation continues to be conducted in a manner that poses an imminent or substantial threat to the public health. Because Café Rosetta is not licensed to operate a food

establishment and because all four factors weigh in MDARD's favor, a temporary restraining order to immediately cease Café Rosetta's food operations is necessary.

RELIEF REQUESTED

For these reasons, Plaintiffs seek an immediate order from this Court that prohibits Café Rosetta from continuing to operate a food establishment without a valid license issued by MDARD.

Respectfully submitted,

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