

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

SUSANA CASTILLO, CLARISSA
VASQUEZ, VERONICA BOTELLO,
DULCE SOSTENES, DORAELIA
NUNEZ, MANUEL NUNEZ
MORALES, JR., TRUE BLUE BERRY
MANAGEMENT, LLC, a Michigan
limited liability company, SMELTZER
ORCHARDS CO., LLC, a Michigan
limited liability company, individually
and on behalf of all others similarly
situated,

Case No. 1:20-CV-751

Honorable Paul L. Maloney

Plaintiffs,

v.

GRETCHEN WHITMER, in her official
capacity as Governor of the State of
Michigan, and ROBERT GORDON, in
his official capacity as the Director of the
Michigan Department of Health and
Human Services, and GARY
MCDOWELL, in his official capacity as
the Director of the Michigan Department
of Agriculture and Rural Development,

Defendants.

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

I. BACKGROUND

On August 11, 2020 Plaintiffs' filed an Emergency Motion for Preliminary Injunction ("Emergency Motion") to prevent Defendants from enforcing Director Gordon's August 3, 2020 Emergency Order ("Order"). In response, the Court issued a briefing schedule, in which Defendants would respond by August 18, 2020, and Plaintiffs would reply by August 20, 2020. Therefore, a ruling is not expected until August 20 or after. Plaintiffs greatly

appreciate the Court's expedited schedule, but unfortunately, it has become clear that at least temporary action is required sooner.

In just the two days since Plaintiffs filed their Complaint and Motion, their worst fears are being realized. The State has sped up implementation of the August 3 Order and through its various agents, is visiting Michigan farms with the message "test or be fired." *See* Anthony Marr Declaration, **Exhibit A**. When this message was delivered to a group of migrant workers at Blue Star Farms, 20 of them left the camp. *See id.* at ¶ 14. The workers lost their jobs and Blue Star lost critical labor to pick a ripe crop. The State accomplished nothing.

Notwithstanding the State's press releases, forced COVID-19 testing is deeply troubling to Latino workers who have been singled out for selective enforcement. So much so that Migrant Legal Aid – an organization whose mission is to protect migrant workers – has asked the United States Department of Justice to intervene on workers' behalf to stop the State's forced testing. *See Exhibit B*. According to the workers' advocate, the Order is "a violation of their civil rights" and "no other similarly situated worker in Michigan will lose their job if they refuse testing." *See id.* Individual Latino workers at multiple farms are likewise voicing their opposition. *See Exhibit C*.

Even setting aside the State's aggressive implementation, in order to meet the August 24 compliance deadline, substantial actions – including the very testing opposed – would have to start well ahead of that time. COVID-19 testing takes days, if not longer, to complete. The Order itself acknowledges this and requires employers to submit a testing plan by August 10, 2020. *See* MDARD email, **Exhibit D**. The Order also required Employers to request that the State complete required testing by August 11, 2020 without any details of the testing plans or precautions. *See* Anthony Marr Dec. at ¶ 11, Exhibit A.

Blue Star believes it would be impossible to comply by the deadline if action toward compliance is not started now. *See id.* at ¶ 11. Lorrie Merker at MBG, a grower and cooperative of 250 blueberry and blackberry farms, believes that the deadlines were unobtainable to begin with, and the timeline for State assistance was too short to allow employers to confirm any details or precautions with State testing, or other testing options. *See* Lorrie Merker Declaration. at ¶ 11, **Exhibit E**. It is self-evident that accomplishing medical testing of hundreds of employees is a logistical nightmare requiring advance planning.

At present, workers and employers are in an impossible position. Though Plaintiffs strongly oppose the Order and believe it to be unconstitutional, if the Court were to disagree, they have no time to come into compliance by August 24. Thus, the mere threat of enforcement of the unconstitutional Order is resulting in workers leaving migrant camps and farm fields. Ms. Merker states workers will simply leave for other opportunities, if forced to test. *See id.* at ¶ 7. Furthermore, if the Order is not stayed immediately, growers will lose workers, resulting in a substantial risk of crop loss. *See id.* at ¶ 15.

As a result, without a temporary stay, this Court's ruling on the Motion for Preliminary Injunction will come too late for many workers and employers.

II. LAW AND ARGUMENT

A. Plaintiffs Are Entitled to a Temporary Restraining Order.

Under Rule 65 of the Federal Rules of Civil Procedure, the district court has authority to issue temporary restraining orders. The Sixth Circuit has identified four factors for district courts to address when deciding whether to issue a temporary restraining order: "(1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by

issuance of a preliminary injunction." *FirstEnergy Solutions Corp. v. Flerick*, 521 Fed. Appx. 521, 525 (6th Cir. 2013); *see also Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992).

A temporary restraining order should issue if the moving party "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Little Caesar Enterprises, Inc. v. R-J-L Foods, Inc.*, 796 F. Supp. 1026, 1030 (E.D. Mich. 1992). Each of the four factors is supported in detail in Plaintiffs' brief in support of Preliminary Injunction (ECF No. 6), and will not be repeated here.

With respect to this request for a TRO, however, Plaintiffs merely seek a short delay; no longer than necessary for the Court to make a preliminary ruling. There is absolutely no prejudice to the State in doing so. The State has had five months to implement forced testing if it were so important; a matter of days will make no difference. In contrast, many Latino agricultural workers are being forced to make the decision to submit to racially targeted testing or walk away from work.

It must be emphasized that all the Court would be delaying is *forced* testing. Any worker subject to the Order could always volunteer to be tested, and the State, like always, is free to offer education, financial support and other assistance to Latino workers, including free, *voluntary*, testing.

B. Granting Temporary Injunctive Relief for a Class is Appropriate.

Courts within the Sixth Circuit grant temporary injunctive relief for classes. *See Cameron v. Bouchard*, No. CV 20-10949, 2020 WL 1929876, at *2 (E.D. Mich. Apr. 17, 2020), *modified on reconsideration*, No. CV 20-10949, 2020 WL 1952836 (E.D. Mich. Apr. 23, 2020). This is the case, even if class certification has yet to be achieved. *See Wright v. City of Cincinnati*, 450 F. Supp. 2d 831, 841 (S.D. Ohio 2006) (granting temporary injunctive

relief to members of a putative class prior to decision on class certification since the motion for class certification was likely meritorious).

Other Federal District Courts have done the same. *See Mays v. Dart*, No. 20 C 2134, 2020 WL 1812381, at *3 (N.D. Ill. Apr. 9, 2020) ("The plaintiffs seek classwide relief in the form of a temporary restraining order, but because the lawsuit was just filed there has not yet been a class certification ruling. This does not foreclose the possibility of relief for the plaintiffs at this stage, because a district court has general equity powers allowing it to grant temporary or preliminary injunctive relief to a conditional class."); *Lee v. Orr*, No. 13 CV 8719, 2013 WL 6490577, at *2 (N.D. Ill. Dec. 10, 2013); *New York State Nat. Org. For Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D.N.Y. 1988).

III. CONCLUSION

For the reasons set forth above, and in their Brief for Preliminary Injunction, Plaintiffs respectfully requests that the Court grant their Motion for a Temporary Restraining Order.

Respectfully submitted,
VARNUM LLP

Dated: August 13, 2020

By: /s/ Aaron M. Phelps
Ronald G. DeWaard (P44117)
Aaron M. Phelps (P64790)
Brion B. Doyle (P67870)
Seth B. Arthur (P82033)
333 Bridge St NW Ste 1700
Grand Rapids, MI 49504
(616) 336-6000
rgdewaard@varnumlaw.com
amphelps@varnumlaw.com
bbdoyle@varnumlaw.com
sbarthur@varnumlaw.com