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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

COCINA CULTURA, LLC,

Plaintiff,

v.

STATE OF OREGON, et al.

Defendants.

Case No.: 3:20-cv-2022-IM

PLAINTIFF'S REPLY MEMORANDUM REGARDING ITS CONTINUING AND IRREPARABLE INJURY

[Pursuant to the Court's Order of November 30, 2020]

I. Defendants' Attempt to Increase the Burden on Plaintiff is Disingenuous.

Plaintiff sought a preliminary injunction on November 25, requesting an order that would enjoin Defendants from discriminating against it because of its owner's race. Two days later (and nearly three months after Plaintiff first applied for a grant), Defendant Contingent conveyed its rejection of the application. It identified one and only one reason for the rejection: the race of Plaintiff's owner, the exact kind of discrimination that the motion sought to prevent.

Defendants now claim that this little maneuver transformed Plaintiff's request from a negative injunction ("do not discriminate") to a mandatory injunction ("reconsider the rejected application"). Defendants' Memo. 5-6. Thus, according to Defendants, they have increased Plaintiff's burden on its motion, even after the motion was filed.[1]

But discrimination brings about an ongoing harm, rather than a discrete time-bound injury. A woman fired from a job (or not hired) because she is a woman continues to suffer harm long after the instant she is fired (or not hired), and is entitled to equitable relief. Thus, just as a "student group continued to be derecognized for excluding LGBTQ students" and "the First Amendment harm therefore continued in the absence of de-derecognition" (Memo. 11), Plaintiff's Fourteenth Amendment harm continues in the absence of Defendants treating her application in a non-discriminatory fashion. That is

1. In light of this argument that the Motion's request for relief must be modified to reflect their efforts to evade the original request for relief, defendants' argument that the request for relief is "impermissibly vague" (Memo. 6 n.2) is disingenuous.

why reinstatement and instatement, even if mandatory in nature, are common remedies in discrimination cases. *Franklin v. County School Bd.*, 360 F.2d 325, 327 (4th Cir. 1966) (reinstating black school teachers fired because of their race); *EEOC v. Liberty Mutual Ins. Co.* 346 F. Supp. 675, 677 (N.D. Ga. 1972) (ordering reinstatement of terminated employee to previously-held position on a motion for preliminary injunction after concluding that employee was likely terminated because of her complaints about unlawful employment practices and would suffer irreparable harm until reinstated).[2] Thus, Defendants' "too late" argument is too clever by half.

II. Defendants' Deposit of Funds with the Court Will Not Fully Compensate for Plaintiff's Ongoing Losses.

Defendants plainly mischaracterize Plaintiff's injuries as "having to wait for money." Memo. 8. And the premise of much of Defendants' argument is that the grant Plaintiff would be eligible for if her application were considered on a non-discriminatory basis (plus interest) serves as a cap on her damages. But Defendants never attempt to explain why this is so. If a steel company contracts to supply steel to an automobile manufacturer and fails to provide it, the automobile manufacturer's damages are not limited to the value of the missing steel, but also include any lost profits and

2. Irreparable harm is a requirement of both preliminary and permanent injunctive relief. *Evolv, LLC v. Joyetech USA, Inc.*, 2016 U.S. Dist. LEXIS 188078, at *12 n.4 (May 3, 2016). Accordingly, if the fact that wrongful conduct occurred in the past was sufficient to preclude injunctive relief, it would also preclude permanent injunctive relief following trial.

consequential damages as well (if, for example, the cost of replacement steel on the open market was higher than the contracted price). Thus, Defendants' assertion that they "have assured that full compensation to Plaintiff will be available should it prevail" (Memo. 9) is just wrong. Moreover, not only is it possible that Plaintiff's damages will be higher than the amount of the grant, but the fact that Plaintiff is attempting to retool its business entirely means that the losses likely will be very difficult to calculate.

III. Plaintiff's Continuing Loss of Customer Goodwill and Future Market Opportunities Constitutes Irreparable Harm.

Plaintiff's business enjoys a reputation and customer base built up over many years. By retooling her business methods in order to continue to serve existing customers in new ways, she is trying to preserve these pre-existing customer relationships and goodwill. Damage to reputation and customer goodwill is "difficult, if not impossible, to quantify in terms of dollars," and therefore constitutes irreparable harm. *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) (district court did not err in finding a threat of irreparable harm based upon customer confusion).

If Plaintiff lacks funds to pursue these alternative ways to reach her existing customers, she will also likely lose future opportunities to grow the business to reach new customers and new markets. Loss of the ability to solicit new customers constitutes irreparable harm. *Vonage Holdings Corp. v. Minn. PUC*, 290 F. Supp. 2d 993, 1003 (D. Minn. 2003) (finding irreparable harm where a company would be forced to stop serving its customers and stop soliciting new business). Likewise, a loss of growth in market

share constitutes irreparable harm. *Freedom Holdings Inc. v. Spitzer,* 408 F.3d 112, 114-15 (2d. Cir. 2005) (citations omitted). *See also Rogers Group, Inc. v. City of Fayetteville*, 629 F.3d 784, 790 (8th Cir. 2010) (upholding a finding of irreparable harm where plaintiff's ability to grow its operations, bid on new projects, and accommodate its customers' demands was impacted); *Coastal Distrib., LLC v. Town of Babylon*, 2005 U.S. Dist. LEXIS 40795, *61 (E.D. N.Y. July 15, 2005) (finding irreparable harm on the basis of loss of goodwill from existing customers, loss of future contracts, and loss of market opportunities).

The fact that Plaintiff's new business is in a start-up phase is particularly relevant in the irreparable harm analysis. *See Coastal Distrib., LLC v. Town of Babylon*, 2005 U.S. Dist. LEXIS 40795, *61-62 (E.D.N.Y. July 15, 2005) ("Critical to this Court's determination [finding irreparable harm] is the fact that [Plaintiff] is a start-up company attempting, . . . to establish a market in [a] developing industry. . . ."). *See also Digital Mentor, Inc. v. Ovivo USA, LLC*, 2018 U.S. Dist. LEXIS 11707, *4-5 (W.D. Wash. January 24, 2018) (finding a threat of irreparable harm to a small software start-up).

Since these damages will continue to arise in the future, they are inherently difficult to predict and inherently difficult to quantify.[3] *Howard Venture LLC v. Lively*,

3. Defendants argue that the "evidence of future harm must not be speculative and must be concrete" (Memo. 7). But they proceed to apply this principle to create a Catch-22 situation. Plaintiff's damages cannot be speculative; but it is likely they will be given its current situation, and that prospect constitutes irreparable harm. If Defendants are correct, then Plaintiff must provide "non-speculative, concrete" evidence to show that its damages *will* be speculative. Plaintiff here has done so by describing its efforts to

2010 U.S. Dist. LEXIS 62336, *3 (D.S.D. June 23, 2010) (finding a threat of irreparable harm based on the "inherent difficulty [of] proving [plaintiff's] losses based on what might have otherwise happened in the future between [plaintiff] and its customers and competitors).

IV. Conclusion

For the foregoing reasons, and the reasons set forth in its moving papers, Plaintiff respectfully requests this Court conclude that it has met its burden of showing irreparable harm and grant its motion for Preliminary Injunction.

Respectfully submitted,

Dated: December 4, 2020

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retool and create a new line of business while trying to preserve its goodwill in light of the pandemic. What other evidence would defendants have Plaintiff produce?

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