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FILED
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4TH JUDICIAL DIST.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

21+ TOBACCO AND VAPOR RETAIL ASSOCAIATION OF OREGON, a domestic non-profit corporation; **NO MOKE DADDY, LLC**, a domestic limited liability company, doing business as **DIVISION VAPOR**; and **PAUL BATES**, an Individual,

Plaintiff,

v.

MULNOMAH COUNTY; a political subdivision of the State of Oregon,

Defendant.

Case No. 23CV03801

OPINION AND ORDER ON DEFENDANT MULTNOMAH COUNTY'S MOTION TO DISMISS

This case came on for hearing on June 15, 2023, on Defendant Multnomah County's ORCP 21 Motion to Dismiss Plaintiffs' Complaint For Declaratory and Injunctive Relief ("Complaint"). Plaintiffs appeared through their attorney, Tony L. Aiello, Jr. Defendant appeared through Assistant County Attorney Andrew Weiner. Defendant filed its motion to dismiss on March 21, 2023. Plaintiffs filed their response

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on April 17, 2023. Defendant then filed a reply in support of their motion to dismiss on April 27, 2023. On June 21, 2023, all parties filed a Stipulated Motion To Rule on the Pleadings As A Matter of Law. Because the parties agree that there are no disputed questions of fact present in this matter, the Court granted the Stipulated Motion by an Order dated June 22, 2023. The Court will therefore treat the pending Motion and Response as the functional equivalents of cross-motions for summary judgment pursuant to ORCP 47 C.[1]

For the reasons discussed below, the Court GRANTS Defendant's functional equivalent motion for summary judgment in its entirety and DENIES Plaintiffs' functional equivalent cross-motion for summary judgment in its entirety. Plaintiffs' Complaint For Declaratory and Injunctive Relief is DISMISSED WITH PREJUDICE.

DISCUSSION

Plaintiffs' complaint seeks a determination: (1) that Multnomah County Ordinance ("MCO") 1311, which was adopted by the Multnomah County Board of Commissions in December 2022, is unlawful and unenforceable; and (2) that the

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[1] As stated on the record at the June 15, 2023 hearing, the Court has granted the Motion for Leave to Appear as Amici Curiae filed on March 28, 2023, by various groups identifying themselves as the Public Health, Medical, and Community Groups. The Court has denied Plaintiffs' motion pursuant to ORCP 21 E to strike large portions of the Amici Curiae's filed Brief of Amici Curiae Public Health, Medical, and Community Groups In Support of Multnomah County's Motion to Dismiss.

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Multnomah County Tobacco Retail Licensure Program ("Multnomah Licensure Program") is likewise unlawful and unenforceable. MCO 1311 prohibits the sale of "Flavored Tobacco Products," a term of art defined at MCO 1311 Section 6. The Multnomah Licensure Program is a statutory tobacco retail licensure scheme adopted by Multnomah County in 2015.

Plaintiffs' Complaint includes two claims for relief. The Complaint's First Claim for Relief seeks a declaratory judgment pursuant to ORS 28.020 and comprises three counts. Count One alleges that Senate Bill ("SB") 587 expressly preempts MCO 1311.[2] Count Two alleges that SB 587 impliedly preempts MCO 1311. Count Three alleges that MCO 1311 violates Article VI, Section 10 of the Oregon Constitution. The Complaint's Second Claim for Relief also seeks a declaratory judgment pursuant to ORS 28.020 and comprises two counts. Count One alleges that SB 587 expressly preempts the Multnomah Licensure Program. Count Two alleges that SB 587 impliedly preempts the Multnomah Licensure Program.

A. SB 587 Does Not Expressly Preempt MCO 1311

SB 587 created a statewide tobacco retail license program. Plaintiffs argue that SB 587 preempts any authority Defendant may have once enjoyed to regulate the sale of

[2] SB 587 was adopted by the Oregon Legislature on June 26, 2021, signed into law by Governor Kate Brown on July 19, 2021, and carried an effective date of September 25, 2021. SB 587 is codified at ORS 134A.190-431A.220.

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tobacco and inhalant delivery system products, or to license retailers who sell such products.

It is not disputed that, prior to the enactment of SB 587, Defendant enjoyed the authority to regulate the sales of these products and to enact and administer a licensing program for retailers of these products. Defendant has adopted a "home rule" charter, which provides (in Section 2.10) that Defendant "shall have authority over matters of county concern to the fullest extent granted or allowed by the constitutions and laws of the United States and the State of Oregon." Defendant therefore has the power to exercise authority over matters of county concern. *Multnomah Kennel Club v. Dep't of Revenue*, 295 Or 279, 281, 666 P 2d 1327, 1328 (1983) ("Multnomah County is a constitutional home rule county and therefore has the power to exercise 'authority over matters of county concern.'") (quoting Or Const, Art VI § 10).

Prior to the passage of SB 587, Defendant exercised this authority by enacting via ordinance the Multnomah Licensure Program. After SB 587 became effective, Defendant purported to continue to exercise this authority by adopting MCO 1311. The question presented by this portion of Plaintiffs' First Claim for Relief is whether that latter exercise of authority was expressly preempted by SB 587. If it was, then MCO 1311 is unenforceable and without legal effect.

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When considering whether a home-rule local government's authority to act has been preempted by state law, a court "begin[s] with the assumption that "'the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent.'" *Rogue Valley Sewer Servs. v. City of Phoenix*, 357 Or 437, 454, 353 P3d 581, 590 (2015) (quoting *City of La Grande v. Pub Employees Ret Bd*, 281 Or 137, 148–49, 576 P2d 1204, 1211 (1978)). Therefore, "only where the legislature '*unambiguously* expresses an intention to preclude local governments from regulating' in the same area governed by an applicable statute can that presumption against preemption be overcome." *Id. (quoting Gunderson, LLC v. City of Portland*, 352 Or 648, 663, 290 P3d 803, 811 (2012)).

Plaintiffs' express preemption argument relies primarily on its interpretation of two portions of SB 587: ORS 431A.218(2) and ORS 431A.220. Because these portions of SB 587 are critical to the analysis of the pending motions, they will be quoted at length.

ORS 431A.218(2) reads, in full:

> (2) Each local public health authority may:
>
> (a) Enforce, pursuant to an ordinance enacted by the governing body of the local public health authority, standards for regulating the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety *in addition to* the standards described in paragraph (b) of this subsection, including qualifications for engaging in the retail sale of tobacco products or inhalant delivery systems that are in addition to the qualifications described in ORS 431A.198;
>
> (b)

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(A) Administer and enforce standards established by state law or rule relating to the regulation of the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety if the local public health authority and the Oregon Health Authority enter into an agreement pursuant to ORS 190.110; or
(B) Perform the duties described in this section in accordance with ORS 431.413 (2) or (3).

(emphasis added).

ORS 431A.220 reads, in full:

A city or local public health authority that, on or before January 1, 2021, and pursuant to an ordinance adopted by the governing body of the city or local public health authority, *enforced standards described in ORS 431A.218(2)(a)* and required that a person that makes retail sales of tobacco products or inhalant delivery systems in an area subject to the jurisdiction of the city or local public health authority hold a license or other authorization issued by the city or local public health authority *may continue to enforce the standards* and require the license or other authorization on and after January 1, 2022.

(emphases added).

Plaintiffs read SB 587 to preempt a local public health authority's power to regulate the sale of tobacco or inhalant delivery system products, and to license the retailers of such products, except as provided for in ORS 431.A.218 and ORS 431A.220. As explained below, Plaintiffs read ORS 431A.218(2) to set a "floor" (found at ORS 431A.198, discussed below) for tobacco retail licenses. Plaintiffs understand ORS 431A.220 to allow local governments that were already enforcing at least that "floor" as of January 2021 to continue to do so. Plaintiffs also understand ORS 431.218(2) to allow

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these local public health authorities who were already enforcing that licensing "floor" as of January 2021 to additionally enact and enforce standards for products and licenses that are "in addition to" those already established.

To Plaintiffs' understanding, a local public health authority that was not enforcing the statutory "floor" as of January 2021 cannot enforce any pre-SB 587 ordinances relating to the sales of tobacco or inhalant delivery system products and licensing retailers of same, *and* cannot enact any *new* ordinances regulating these matters. As Plaintiffs see it, SB 587 entirely preempts such local public health authorities from such regulatory functions.

Plaintiffs concede that Defendant – a local public health authority[3] – had a local tobacco retail licensure program that was in effect prior to January 1, 2021 (the Multnomah Licensure Program). However, Plaintiffs aver that Defendant did not enforce all of the standards described in ORS 431A.218(2)(a) (which incorporates ORS 431A.198) on or before January 1, 2021. Plaintiffs therefore posit that Defendant does not meet the conditions of ORS 431A.220. Plaintiffs conclude that SB 587 therefore entirely preempts Defendant from enacting the new "standards" found in MCO 1311.[4]

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[3] ORS 431.003(7) defines a local public health authority" to include "[a] county government."

[4] Plaintiffs argue additionally that MCO 1311's prohibition of Flavored Tobacco Products is not a "standard" as described in ORS 431A.218(2)(a). Plaintiffs appear to

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The Court respectfully disagrees with Plaintiffs' interpretation of SB 587 because in the Court's view, Plaintiffs' interpretation is belied by the statute's text, context, and legislative history.[5] Indeed, in the Court's view the Oregon legislature intended almost the exact opposite of Plaintiffs' proposed statutory regime.

Beginning with the text of ORS 431A.218(2)(a), it appears to the Court that this statute plainly does not preempt local health authorities from passing ordinances regulating the retail sale of tobacco products and inhalant delivery systems. To the contrary, and with striking clarity, ORS 431A.218(2) expressly authorizes local health authorities to pass such ordinances, and states that such ordinances may establish

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conflate the licensing standards for *retailers* contained elsewhere in SB 587 with the "standards" that may be applied to "tobacco products and inhalant delivery systems" under ORS 431A.218(2). Notably, ORS 431A.18(2)(a) states that those standards "include" qualifications for retail licenses, but those standards also apply to the products themselves. To the extent that Plaintiffs' argument is that ORS 431A.218(2)'s authorization to enact and enforce "standards" that regulate the retail sale of tobacco and inhalant delivery systems products does not include the power to prohibit the retail sale of any particular tobacco or inhalant product, that argument is unsupported. SB 587 does not anywhere endorse any particular tobacco or inhalant delivery system product whose sale is per se allowed. In the absence of such statutory endorsement, the general principle Plaintiffs espouse – that the power to set standards for products does not include the power to prohibit certain products as falling outside permissible standards – is contrary to Oregon law. *Nw Advancement, Inc v. State, Bureau of Lab, Wage & Hour Div*, 96 Or App 133, 139, 772 P2d 934, 939 (1989).

[5] In discerning the legislature's intent in enacting SB 587, the Court has applied the well-established Oregon methodology of statutory interpretation, and has considered the statutory text, context, and any helpful legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009)

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standards "in addition to" those that SB 587 establish statewide. ORS 431A.218(2): "Each local public health authority may: (a) Enforce, pursuant to an ordinance enacted by the governing body of the local public health authority, standards for regulating the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety in addition to the standards described in paragraph (b) of this subsection, including qualifications for engaging in the retail sale of tobacco products or inhalant delivery systems that are in addition to the qualifications described in ORS 431A.198[.]").

The text of ORS 431A.220 is neither contrary to nor in tension with ORS 431A.218(2). ORS 431A.220 applies to a city or local public health authority that wishes to continue to enforce standards and licensing requirements relating to the sale of tobacco and inhalant delivery system products that it had in place before the enactment of SB 587. A city or local public health authority may do so, so long as those standards and license requirements were in place via an enacted ordinance on or before January 1, 2021.[6]

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[6] This reading of ORS 431A.220 is supported by the legislative history, which makes plain that the among the purposes of ORS 431A.220 was to ensure that retailers who were already licensed locally would not, upon enactment of SB 587 *also* be required to acquire a state license. For example, the Staff Measure Summary for the so-called "-3 and -4 amendments" to SB 587 explained that these amendments would have the following effects:

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In context, these two statutory provisions work together to: (1) empower local public health authorities to continue to exercise their pre-existing authority to regulate the sales of tobacco and inhalant delivery system products; and (2) grandfather in such regulations that existed as of January 1, 2021, even if those regulations are not entirely consistent with the statewide regulations established by SB 587.

Rather than adopt this straightforward reading of SB 587, Plaintiffs instead offer a more tortured textual alternative. Plaintiffs note that ORS 431A.218(2)(a) describes the "standards" that may be enacted and enforced by local public health authorities as being "in addition to the standards described in paragraph (b) of this subsection, including qualifications for engaging in the retail sale of tobacco products or inhalant delivery systems that are in addition to the qualifications described in ORS 431A.198."

> -3 Provides that retailers operating in an area subject to the jurisdiction of a city or local public health authority with its own licensure requirements is not required to obtain additional licensure. Allows city or local public health authority that, on or before January 1, 2020, enforced standards for retail licensure to continue to enforce those standards.
>
> -4 Provides that retailers operating in an area subject to the jurisdiction of a city or local public health authority with its own licensure requirements is not required to obtain additional licensure.

Staff Measure Summary, Senate Committee on Health Care, March 10, 2023.

The -3 and -4 amendments were substantively adopted in SB 587 (with the deadline for preexisting local regulations moved to January 1, 2021).

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Plaintiffs read this text to mean that local health authorities may enact and enforce such standards *only if* they *also* as of January 1, 2021 enforced every single qualification contained in ORS 431A.218(2)(b)[7] and ORS 431A.198. Plaintiffs argue: "The Oregon legislature has required that, for a local licensure program to be legacied or continued pursuant to ORS 431A.220, the local licensure program must have at least the minimum standards and qualifications required for state licensure pursuant to an ordinance in effect on or before January 1, 2021." Plaintiff's Response at 7.

Plaintiffs' position is that Defendant fails this test because MCO 1311 (and indeed, the entirety of the Multnomah County Code ["MCC"]) did not, as of January 1, 2021, meet all of the minimum licensure standards and qualifications contained in ORS 431A.198. ORS 431A.198 contains numerous requirements that a retailer must meet to qualify for a state tobacco retail license under SB 587. Plaintiffs correctly point out that MCO 1311 and the MCC do not include every requirement established by ORS 431A.198. For example, MCO 1311 and the MCC do not contain any requirement that a

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[7] ORS 431A.218(2)(b) states that each local public health authority may:

(A) Administer and enforce standards established by state law or rule relating to the regulation of the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety if the local public health authority and the Oregon Health Authority enter into an agreement pursuant to ORS 190.110; or

(B) Perform the duties described in this section in accordance with ORS 431.413 (2) or (3).

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tobacco retail premises be "fixed and permanent" (ORS 431A.198(2)(a)) or prohibit such a premises from "an area that is zoned exclusively for residential use." (ORS 431A.198(2)(b)). Plaintiffs argue that these failures of replication as of January 1, 2021, are fatal to any attempt by Defendant to promulgate MCO 1311 or otherwise regulate tobacco sales and retail licenses, because SB 587 entirely preempts Defendant from such regulating activity.

Plaintiffs' reading of the statute is not persuasive.

First, Plaintiffs' reading of ORS 431A.218(2)(a)'s description of the "standards" that may be enacted and enforced by local public health authorities requires one to accept that the Oregon Legislature intended to impose a "fortune-telling requirement" on local public health authorities. Under Plaintiffs' interpretation of ORS 431A.218(2)(a), a local public health authority may enact standards for the sale of tobacco and inhalant delivery system products *only if* the local public health authority had enacted ordinances that replicated the requirements of ORS 431A.198, and had done so by no later than January 1, 2021. Of course, as noted in footnote 1, *supra,* the requirements of ORS 431A.198 were not themselves enacted by the Oregon legislature until June 26, 2021. In other words, Plaintiffs are arguing that local public health authorities had to by January 1, 2021 enact ordinances that included all of the requirements found in a statute that did not exist on January 1, 2021.

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To agree with Plaintiffs' reading of the statute, then, one must also agree that the Oregon legislature made the decision to strip local public health authorities of all of their ability to regulate the sale of tobacco and inhalant delivery system products unless the local health public authority had – through incalculable serendipity or astounding prognostication – by January 1, 2021, correctly guessed each of the standards the legislature would choose to enact in ORS 431A.198 almost six months later. Divining such a bizarre and arbitrary legislative intent here requires a leap of imagination that is beyond the Court's abilities.

The much simpler reading of "in addition to" and the one strongly suggested by the text and context of ORS 431A.218(2)(a) and OR 431A.220 is that the legislature intended to convey that when local public health authorities enact their own "standards," they are not limited to the "standards described in paragraph (b) of this subsection, including qualifications for engaging in the retail sale of tobacco products or inhalant delivery systems that are in addition to the qualifications described in ORS 431A.198." That is to say, local public health authorities are empowered by this section to enact "standards" that go *beyond* — viz.: "are in addition to" — the statewide licensing "floor" established by SB 587.

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This understanding of the rather straightforward text is further supported by SB 587's legislative history. The Staff Measure Summary for SB 587, as introduced, explained the intended operation of the statute this way:

> Allows local public health authority to enforce local standards for regulation of sale of tobacco products and inhalant delivery systems or enforce state standards for regulation of sale of tobacco products and inhalant delivery systems.

Staff Measure Summary, Senate Committee on Health Care, SB 587, March 1, 2021. It appears apparent, then, that the legislature intended that a local public health authority would maintain the right to regulate tobacco products and inhalant delivery systems.

To make a long discussion only slightly longer: SB 587 expressly authorizes Defendant to enact and enforce ordinances that establish standards for regulating the retail sale of tobacco products and inhalant delivery systems. This is what MCO 1311 does. Its ban of "Flavored Tobacco Products" (as that term is defined in the ordinance) is plainly a standard that regulates the retail sale of tobacco products and inhalant delivery systems. SB 587 therefore does not expressly preempt MCO 1311.

B. <u>SB 587 Does Not Impliedly Preempt MCO 1311</u>

SB 587 does not impliedly preempt MCO 1311 for the same reasons that it does not expressly preempt MCO 1311. Again, to the contrary, SB 587 expressly authorizes Defendant to enact and enforce ordinances that establish "standards for regulating the

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retail sale of tobacco products and inhalant delivery systems." MCO 1311 is just such an ordinance.

C. MCO 1311 Does Not Violate Article VI, Section 10 of the Oregon Constitution

Plaintiffs' argument that MCO 1311 violates Article VI, Section 10 of the Oregon Constitution is unavailing. Article VI, Section 10's provides that: "A county charter may provide for the exercise by the county of authority over matters of county concern." Or Const Art VI, Sec. 10. Plaintiffs allege that SB 587 has "specifically authorized the statewide sale of tobacco products, favored or unflavored." Complaint at ¶ 55. In Plaintiffs' view, MCO 1311 is therefore unconstitutional because it "interferes with the scope of the conduct authorized by SB 587, prohibiting that which the state of Oregon has authorized." Complaint at ¶ 56. Plaintiffs believe that "[it] is a matter of state concern, and not county concern, whether to prohibit or permit the sale of tobacco products, flavored or unflavored." Complaint at ¶ 57.

The flaw in Plaintiffs' reasoning is that it again ignores the plain language and meaning of ORS 431A.218(2). As noted above, Defendant enjoys the power to exercise "authority over matters of county concern." *Multnomah Kennel Club*, 295 OR at 279, 666 P 2d at 1329. Plaintiffs' argument that SB 587 rendered the prohibition of certain tobacco and inhalant delivery system products a matter of exclusively state concern is

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belied by SB 587 itself. As noted earlier, ORS 431A.218(2)(a) authorizes "each local public health authority" to "[e]nforce, pursuant to an ordinance enacted by the governing body of the local public health authority, standards for regulating the retail sale of tobacco products and inhalant delivery systems for purposes related to public health and safety ***. This section of SB 587 not only fails to purport to make the enactment and enforcement of such standards (including standards of prohibition for certain products) a matter of exclusively state concern, but it *expressly authorizes* Defendant (as a local public health authority) to enact and enforce such standards.

Plaintiffs' argument that MCO 1311 "interferes with the scope of the conduct authorized by SB 587" therefore must fail, because MCO 1311 is entirely within the scope of conduct expressly authorized by SB 587. MCO 1311 therefore does not violate Article VI, Section 10 of the Oregon Constitution.[8]

D. SB 587 Does Not Expressly Preempt the Multnomah County Tobacco Retail Licensure Program

Plaintiffs allege that SB 587 expressly preempts the Multnomah Licensure Program. Plaintiffs aver that in order for the Multnomah Licensure Program "to continue pursuant to ORS 431A.220, the program must have, on or before January 1,

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[8] It i not necessary to the resolution of this Claim for Relief to determine whether the Legislature may through legislation render something "a matter of exclusively state concern." Here, even if the Legislature *could* do such a thing, is has not attempted to so do through SB 587.

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2021 and pursuant to an ordinance, 'enforced standards described in [ORS 431A.218(2)(a) and required that a person that makes retail sales of tobacco products or inhalant delivery systems in an area subject to the jurisdiction of the city or local public health authority hold a license or other authorization issued by the city or local public health authority." Complaint at ¶ 60 (quoting ORS 431A.220).

This is the same argument Plaintiffs put forward in favor of their allegation that SB 587 explicitly preempts MCO 1311. It is rejected here for the same reason as it was in the earlier context. ORS 431A.220 does not require (through its reference to ORS 431A.218(2)(a)) that for a pre-existing tobacco and inhalant delivery system retail licensing program enacted pursuant to ordinance by a city or local public health authority to survive, it must have enacted by January 1, 2021, all of the requirements later enacted by ORS 431A.198.

E. SB 587 Does Not Impliedly Preempt the Multnomah County Tobacco Retail Licensure Program

SB 587 does not impliedly preempt the Multnomah County Tobacco Retail Licensure Program for the same reasons it does not explicitly preempt the Multnomah Licensure Program.

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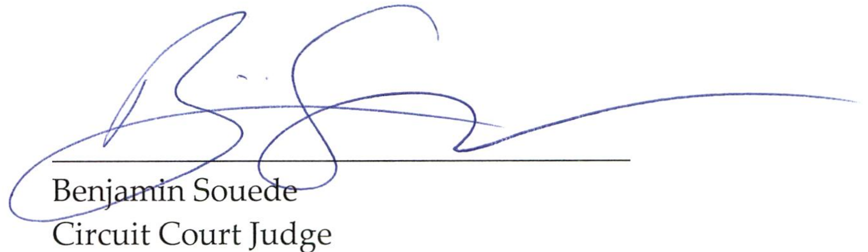
CONCLUSION

Defendant's motion to dismiss, considered as the functional equivalent as a motion for summary judgment, is GRANTED. Plaintiffs' cross-motion for summary judgment is DENIED. Plaintiffs' Complaint for Declaratory and Injunctive Relief is DISMISSED WITH PREJUDICE.

Defendant will prepare and submit a form of judgment consistent with this Order.

Dated this 1st Day of September, 2023.



Benjamin Souede
Circuit Court Judge