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Court: Shawnee County District Court

Case Number: 2018-CV-000540

Case Title: Ken Selzer - Commissoner of Insurance State of Kansas vs. State of Kansas, et al.

Type: MEMORANDUM DECISION AND ORDER

SO ORDERED.

Richard D. Anderson

/s/ Honorable Richard Anderson, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWO

KEN SELZER, in his official capacity as COMMISSIONER OF INSURANCE for the STATE OF KANSAS Plaintiff, v. STATE OF KANSAS, LARRY CAMPBELL, in his official capacity as Director of Budget, JEFF COLYER, in his official capacity as Governor of the State of Kansas, SARAH L. SHIPMAN, in her official capacity as Secretary of the Department of Administration Defendants.	)	2018-CV-540

MEMORANDUM DECISION AND ORDER

Plaintiff Ken Selzer, Commissioner of Insurance for the State of Kansas, requests the Court enter a Temporary Injunction against the Defendants State of Kansas, Larry Campbell, in his official capacity as Director of Budget, Jeff Colyer, in his official capacity as Governor of the State of Kansas, and Sarah L. Shipman, in her official capacity as Secretary of the Department of Administration ("Defendants"). Plaintiff seeks to temporarily enjoin the named executive branch officials from sweeping funds from the Insurance Regulation Fund ("IRF") into the State General Fund ("SGF") during fiscal year 2019, arguing the sweeps would violate K.S.A. 75-7036(b) and Article 11, Sec.1 and 5 of the Kansas Constitution. In fiscal year 2018, the legislature authorized by legislation an $8,000,000 sweep from the IRF to the SGF and a similar

sweep for fiscal year 2019. In the budget for fiscal year 2019, however, the legislature attempted to restore funds which it had previously authorized to be swept but the Governor removed the restored funds with a line item veto. Thus, the first of four anticipated sweeps of funds for fiscal year 2019 is scheduled to begin on October 1, 2019. Plaintiff requests that the Court issue a Temporary Injunction prohibiting the proposed action by the named public officials until a final determination on the merits is made.

Defendants have filed a Motion to Dismiss challenging Plaintiff's standing to bring this action and the Court's subject matter jurisdiction. Defendants claim Plaintiff has not suffered and will not suffer any actual harm by virtue of the transfers because Plaintiff always has the option to increase the fees levied on the regulated entities in order to make up any budget shortfall. After careful consideration, the Court finds and concludes that Plaintiff has standing to bring this action and the Court has subject matter jurisdiction to decide this dispute. Accordingly, Defendants' Motion to Dismiss for lack of standing and subject matter jurisdiction is denied.

With respect to Plaintiff's Motion for a Temporary Injunction, the Court finds that Plaintiff has established a substantial likelihood of eventually prevailing on the merits. Plaintiff has demonstrated that the proposed sweeps likely violate the taxing provisions in Article 11, Sections 1 and 5 of the Kansas Constitution, as well as the Commerce Clause and the Fourteenth Amendment of the United States Constitution. Moreover, while persuasive reason has been presented that the sweeps also will likely violate K.S.A. 75-3036 and K.S.A. 40-112, Plaintiff has not yet shown sufficient ground for temporary injunctive relief based on the statues alone. However, in combination the constitutional grounds and statutory grounds have persuaded the Court that Plaintiff does have a substantial likelihood of ultimately prevailing on the merits.

Notwithstanding, Plaintiff's Motion for Temporary Injunction is denied because Plaintiff has not persuaded the Court that Plaintiff will suffer irreparable future injury and that Plaintiff does not have an adequate remedy at law.

STATEMENT OF FACTS

1. The Plaintiff Ken Selzer brings this action on behalf of the the Kansas Department of Insurance, which is a fee funded state agency. The Plaintiff's funds are statutorily separated from the SGF in an account called the Insurance Regulation Fund ("IRF").
2. The IRF was established pursuant to K.S.A. 40-112. Under K.S.A. 40-112(a), all expenditures of the IRF must be approved by the Commissioner.
3. The money in the IRF includes all fees received by the Plaintiff pursuant to any statute, and 1% of premium taxes received pursuant to K.S.A. 40-252. The primary payers into the IRF are insurance companies, agencies, and agents.
4. The Plaintiff does not receive funding from the SGF. The SGF receives 99% of all premium taxes collected by the Plaintiff.
5. On May 24, 2017, Governor Sam Brownback signed House Bill 2054 amending K.S.A. 75-7036 in part:

> (b) The following funds shall be used for the purposes set forth in the statutes concerning such funds and for no other governmental purposes. It is the intent of the legislature that the following funds and the moneys deposited in such funds shall remain intact and inviolate for the purposes set forth in the statutes concerning such funds . . . insurance department service regulation fund, K.S.A. 40-112, and amendments thereto . . .

6. On June 26, 2017, Governor Sam Brownback signed Senate Substitute for House Bill 2002 ("H.B. 2002"), which authorized an $8,000,000 sweep of the IRF into the SGF in FY2018 and an $8,125,000 sweep of the IRF into the SGF in FY2019.
7. In response, the 2018 Legislature approved an $8,000,000 reduction of the sweep. House Substitute for S.B. 109 ("S.B. 109"), Sec. 43(b).
8. On May 4, 2018, Governor Jeff Colyer vetoed the proposed reduction of the sweep from the IRF. See Message from the Governor Regarding S.B. 109, available at http://www.kslegislature.org/li/b2017_18/measures/documents/sb109_enrolled.pdf.
9. The Plaintiff filed the Petition on July 12, 2018, requesting declaratory and injunctive relief, relief in *mandamus*, and a writ of *quo warranto*.
10. The Petition alleges that the portion of H.B. 2002, which transfers funds from the IRF into the SGF, violates K.S.A. 75-3036, the taxing provisions in Article 11, §§ 1 and 5 of the Kansas Constitution, the Commerce Clause, and the Fourteenth Amendment of the United States Constitution.
11. On July 19, 2018, the Plaintiff filed a Motion for Temporary Injunction.
12. The first of four scheduled sweeps for FY 2019 will be on October 1, 2018.

STANDARD OF REVIEW

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Under Kansas law, the requirement that a party must have standing is grounded in the doctrine of the separation of powers, which is implicit in our state Constitution. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008).

> Generally, to have standing, *i.e.*, to have a right to make a legal claim or seek enforcement of a duty or right, a litigant must have a "sufficient stake in the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy." [Citations omitted.] Under the traditional test for standing in Kansas, "'a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.'" [Citations omitted.] We have also referred to the cognizable injury as an "'injury in fact.'" [Citations omitted.] And this court occasionally cites the federal rule's standing elements that "a party must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." [Citations omitted.]
>
> As to standing's first element of establishing a cognizable injury, more particularly we have held that "a party must establish a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct." [Citations omitted.] The injury must be particularized, *i.e.*, it must affect the plaintiff in a "'personal and individual way.'" [Citations omitted.] It cannot be a "'generalized grievance'" and must be more than "'merely a general interest common to all members of the public.' . . ." [Citations omitted.]

Gannon v. State, 298 Kan. 1107, 1122–23, 319 P.3d 1196 (2014).

A motion to dismiss for lack of standing—which is a component of subject matter jurisdiction—is governed by K.S.A. 60-212(b)(1). *Kansas Nat'l Educ. Ass'n v. State*, 305 Kan. 739, 743, 387 P.3d 795 (2017). If the Court determines that it lacks subject matter jurisdiction, the Court must dismiss the action. K.S.A. 60-212(g)(3).

> Subject matter jurisdiction is vested by statute or constitution and establishes the court's authority to hear and decide a particular type of action. Parties cannot confer subject matter jurisdiction upon the courts by consent, waiver, or estoppel. Parties cannot confer subject matter jurisdiction by failing to object to the court's lack of jurisdiction. If a trial court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is required as a matter of law to dismiss it.

Chelf v. State, 46 Kan. App. 2d 522, 529, 263 P.3d 852 (2011).

"The burden to establish [the] elements of standing rests with the party asserting it." *Gannon v. State*, 298 Kan. at 1123. Furthermore,

> **[T]he nature of that burden depends on the stage of the proceedings because the elements of standing are not merely pleading requirements.** Each element must be proved in the same way as any other matter and with the degree of evidence required at the successive stages of the litigation. [Citations omitted.] So because the panel apparently waited until after the trial to dismiss some claims based on lack of standing, and the State has waited until the appeal to raise some standing arguments, the facts alleged to prove standing must be "'supported adequately by the evidence adduced at trial.'" [Citations omitted.] In these civil proceedings the preponderance of the evidence standard applies. [Citations omitted.] Under this standard the plaintiffs' evidence must show that "a fact is more probably true than not true." [Citations omitted.]

Gannon v. State, 298 Kan. at 1123–24 (emphasis added). In a pre-discovery Motion to Dismiss based on claimed standing deficits in a petition, however, the Court must review the challenged petition and draw reasonable inferences from it. See *Bd. of Cnty. Commissioners of Sumner Cnty. v. Bremby*, 286 Kan. 745, 762, 189 P.3d 494 (2008). In such circumstances,

> [W]e accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom. If those facts and inferences demonstrate that the appellants have standing to sue, the decision of the district court must be reversed.

Bd. of Cnty. Commissioners of Sumner Cnty. v. Bremby, 286 Kan. at 751. Further,

> [W]hen a motion to dismiss for lack of personal jurisdiction is decided before trial on the basis of pleadings, affidavits, and other written materials without an evidentiary hearing, any factual disputes must be resolved in the plaintiff's favor and the plaintiff need only make a prima facie showing of jurisdiction. Standing, of course, is a question of subject matter jurisdiction, but we see no basis for an analytical distinction in how an appellate court should review a district court's order on a motion to dismiss based on standing from one regarding personal jurisdiction.

Friends of Bethany Place, Inc. v. City of Topeka, 297 Kan. 1112, 1122, 307 P.3d 1255 (2013).

For a public official to bring a declaratory judgment challenging the constitutionality of a statute, the public official must be able to demonstrate "(1) a cognizable injury suffered; and (2) a causal connection between that injury and the challenged conduct." *Bd. of Cty. Comm'rs of Johnson Cty. v. Jordan*, 303 Kan. 844, 854, 370 P.3d 1170 (2016) (citing *Solomon v. State*, 303 Kan. 512, 521, 364 P.3d 536 (2015)). "To demonstrate a "cognizable injury," . . . the person bringing the claim must show a personal interest in the court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct." 303 Kan. at 854. Where, for instance, a public official faces a "dilemma . . . in the performance of [their] official duties caused by an alleged conflict between a statute and a Supreme Court Rule[,]" the public official has standing to seek declaratory judgment as to the constitutionality of that statute. 303 Kan. at 854.

B. Motion for Temporary Injunction

K.S.A. 60-901 governs court-ordered injunctions. "An injunction is a court order to do or refrain from doing a particular act." *Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 61, 341 P.3d 607 (2014) (citing K.S.A. 60-901). As the Kansas Court of Appeals has observed, "The purpose of a temporary injunction is to preserve the status quo until the court can determine whether it should grant a permanent injunction." *Wing v. City of Edwardsville*, 51 Kan. App. 2d at 61.

Under Kansas Supreme Court precedent, a party seeking a temporary injunction must establish five separate elements:

> (1) a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability of suffering irreparable future injury; (3) the lack of obtaining an adequate remedy at law; (4) the threat of suffering injury

> outweighs whatever damage the proposed injunction may cause the opposing party; (5) and the impact of issuing the injunction will not be adverse to the public interest.

Downtown Bar & Grill, LLC v. State, 294 Kan. 188, 191, 273 P.3d 709 (2012). As the Kansas Court of Appeals has noted, in order to demonstrate a "substantial likelihood" of eventually prevailing, "'It is only necessary that plaintiffs establish a reasonable probability of success, and not an 'overwhelming' likelihood of success, in order for a preliminary injunction to issue.'" *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 22 Kan. App. 2d 537, 546–47, 921 P.2d 821 (1996) (quoting *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 463–64, 726 P.2d 287 (1986)).

CONCLUSIONS OF LAW

A. Motion to Dismiss

The Defendants' argument is straightforward: because the Plaintiff can always increase the fee, taxes, and assessments it levies on the entities it regulates, the loss of funds due to the "sweep" into the SGF has not actually caused the Plaintiff any harm. The Defendants also argue that, even if the Plaintiff cannot increase those fee assessments and tax levies in time to "avert some financial disaster," the Plaintiff could still obtain the necessary funds by obtaining a loan from the SGF, pursuant to K.S.A. 40-112(f).

The Plaintiff argues, first, that he cannot levy additional taxes and fees before the next sweep, as these are "collected on an annual basis[,]" and that it also cannot levy an assessment until, at the earliest, would be June 1, 2019. The Plaintiff also argues that assessments under K.S.A. 40-112(c) are "extraordinary," and have not been levied since, at least, 2011, and provides a number of reasons as to why the levy of a revenue-making assessment would be

problematic. More to the point, however, the Plaintiff asserts that an assessment on a regulated industry "would result in an unconstitutional government taking of protected funds" and that the regulated industry has threatened—or is likely to threaten—a lawsuit against the Plaintiff. The Plaintiff argues, thus, that in his official capacity his standing arises from a combination of the inability to perform the functions of the Kansas Department of Insurance, in light of the sweeps, and the threat of lawsuit from the regulated industry, should the Plaintiff impose any additional assessment on said regulated industry in order to make up the shortfall.

In *Bd. of Cty. Comm'rs of Johnson Cty. v. Jordan*, 303 Kan. 844, 370 P.3d 1170 (2016), the Kansas Supreme Court considered a petition for mandamus, brought by 21 boards of county commissioner against the Secretary of the Kansas Department of Revenue, among others, and "challenging a unique aspect of the State's statutory methodology for valuing real property for ad valorem taxation purposes." 303 Kan. at 845. As in the present case, the defendant Secretary claimed that the *Jordan* plaintiffs lacked standing for failure to allege a concrete, particularized injury; the court, however, concluded that:

> the Counties have standing because they are squarely faced with a dilemma. The ad valorem tax system in which they play an integral role in their respective taxing districts suffers from a constitutional flaw in their view. And while they are considered the client of the appraisal process, with their taxing district the end user of its result, the Counties are powerless to perform their constitutional duties as they see them due to the director's authority over both them and their appraisers and his decision to comply with the challenged statute until ordered otherwise by this court. **And if the process is allowed to unfold as contemplated by the statute, they foresee litigation from taxpayers affected by the statute, the loss of tax money for the payment of potential refunds, and possible penal action against county appraisers and other county officials.** Under these circumstances, we hold that the Counties have standing to bring this action challenging the constitutionality of K.S.A. 2014 Supp. 79-1460.

303 Kan. at 856–57 (emphasis added).

In the present case, the Plaintiff claims that the upcoming "sweeps" from the IRF into the SGF render the Plaintiff unable to actually perform its statutory duties, and that it would need to levy additional assessments in order to make up the shortfall—assessments that could not be made until, at the earliest, July 1, 2019. Moreover, the Plaintiff has presented an affidavit from Mr. Michael O'Neal, an attorney who represents "entities that pay fees assessed by the Kansas Insurance Department." Mr. O'Neal avers that,

> if the FY 2018 and FY 2019 sweeps were not challenged there was a good chance that carriers and entities paying into the Fund, some of which I represent, would challenge the assessments as it would appear the Department was collecting too much in fees or they would, in all probability, challenge any additional assessments by the Department which the Department determined were necessitated by the sweeps.

Affidavit of Michael O'Neal, filed Aug. 1, 2018. Additionally, while K.S.A. 40-112(f) permits the commissioner of insurance to certify "the amount of insufficiency" when "there exists in the insurance department service regulation fund a deficiency which would render such fund temporarily insufficient during any fiscal year to meet the insurance department's funding requirements"; upon receipt of the certification, the "director of accounts and reports shall transfer an amount of moneys equal to the amount so certified from the state general fund to the insurance department service regulation fund[,]" although any such amount must be repaid.

Taking the Plaintiff's allegations as true in this pre-discovery phase of the case, it appears that, ultimately, the Plaintiff is faced with a no-win scenario: he cannot, by statute, refuse to perform the duties of office, but, in order to finance the performance of those duties, the KDI must either seek a loan or levy an additional assessment, both of which would ultimately be

passed on to the regulated industry and, from it, to consumers. Thus, even if K.S.A. 40-112(f) permits the SGF to "loan" money to the Plaintiff in order to perform the required statutory duties, the Plaintiff is still placed in the position of having to levy an additional assessment under K.S.A. 40-112(c) and, thereby, bringing on the very lawsuit predicted by Mr. O'Neal's letter.

Under the circumstances and the standard of review implicated by the Defendants' Motion to Dismiss, the Court finds that the Plaintiff has demonstrated that he has standing to bring this action challenging the constitutionality of the "sweeps" from the IRF into the SGF. The Plaintiff has an interest in performing his statutory duties without the threat of impending litigation; the only way to perform those statutory duties in light of the "sweeps," he avers, is to levy an assessment that, he further claims, will force him to defend against almost certain litigation. The Court finds that this threatened injury is "fairly traceable" to the challenged action, *i.e.*, the "sweeps," and, therefore, that the Plaintiff has demonstrated that he has standing to bring this action. Accordingly, the Court proceeds to the merits of the Motion for Temporary Injunction.

B. Motion for Temporary Injunction

The Plaintiff asks the Court to issue a temporary injunction prohibiting the Defendants, their agents, and successors in office from enforcing the portions of H.B. 2002 that transfer funds from the IRF to the SGF. To prevail on the Plaintiff's Motion for Temporary Injunction, the Plaintiff must establish the following five elements:

> (1) a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability of suffering irreparable future injury; (3) the lack of obtaining an adequate remedy at law; (4) the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; (5) and the impact of issuing the injunction will not be

adverse to the public interest.

Downtown Bar & Grill, LLC v. State, 294 Kan. 188, 191, 273 P.3d 709 (2012). The Court will address each of the five elements required for obtaining a temporary injunction.

1. Substantial Likelihood of Eventually Prevailing on the Merits

The Plaintiff claims that he has a likelihood of success on the merits of the claim because the transfer of funds from the IRF is an unauthorized transfer pursuant to K.S.A. 75-3036. K.S.A. 75-3036 states:

> (a) The state general fund is exclusively defined as the fund into which shall be placed all public moneys and revenue coming into the state treasury not specifically authorized by the constitution or by statute to be placed in a separate fund, and not given or paid over to the state treasurer in trust for a particular purpose, which unallocated public moneys and revenue shall constitute the general fund of the state. Moneys received or to be used under constitutional or statutory provisions or under the terms of a gift or payment for a particular and specific purpose are to be kept as separate funds and shall not be placed in the general fund or ever become a part of it.
>
> (b) The following funds shall be used for the purposes set forth in the statutes concerning such funds and for no other governmental purposes. It is the intent of the legislature that the following funds and the moneys deposited in such funds shall remain intact and inviolate for the purposes set forth in the statutes concerning such funds: . . . insurance department service regulation fund, K.S.A. 40-112, and amendments thereto, of the insurance department.

Plaintiff claims that the Governor's veto of S.B. 109, Sec. 43(b) violates K.S.A. 75-3036 because the veto approved the transfer of funds into the SGF that were statutorily designated to the IRF pursuant to K.S.A. 40-112; likewise, Plaintiff appears to claim that the Senate Substitute for H.B. 2002, which was codified at Chapter 104 of the 2017 Session Laws, violates K.S.A. 75-3036 for the same reasons. K.S.A. 75-3036(b) states: "The following funds shall be used for the

purposes set forth in the statutes concerning such funds and for no other governmental purposes," and then the statute lists the Insurance Department Service Regulation Fund as one such statutorily designated fund that cannot be used for other governmental purposes.

It is clear that the statute does not authorize any transfer of funds from the IRF into the SGF. However, Sections 43(c) and 44(c) of the Senate Substitute for H.B. 2002—which was codified at Chapter 104 of the 2017 Session Laws—provide that the sweeps are to be made, "notwithstanding the provisions of K.S.A. 40-112, and amendments thereto, or any other statute[.]" The Plaintiff cites no authority for the proposition that the Legislature cannot, by legislative enactment, create an ad hoc exception to a statutory requirement—except when that ad hoc exception violates Due Process or some other constitutional provision. Thus, the Court finds that Plaintiff has not been yet established for purposes of the temporary injunction which Plaintiff seeks that either the provisions of K.S.A. 75-3036(b) or K.S.A. 40-112, by themselves, prohibit these sweeps.

However, the Plaintiff also makes a constitutional argument, claiming that the sweeps set forth in Sections 43(c) and 44(c) of the Senate Substitute for H.B. 2002 violate the taxing provisions in Article 11, §§ 1 and 5 of the Kansas Constitution, the Commerce Clause, and the Fourteenth Amendment of the United States Constitution. Article 11, § 5 of the Kansas Constitution, on which the main thrust of the Plaintiff's argument is based, reads:

> No tax shall be levied except in pursuance of a law, which shall distinctly state the object of the same; to which object only such tax shall be applied.

The Kansas Supreme Court considered a similar set of circumstances, also based on a claimed violation of Article 11, § 5, in the case of *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 302

Kan. 656, 359 P.3d 33 (2015). In that case, the district court granted the State's motion to dismiss the claims of plaintiffs "who were required to pay fees to a State agency in order to practice their trade or transact business in Kansas", for lack of standing; the plaintiffs, like the Plaintiff in the instant case, sought judicial intervention when confronted with a legislative appropriation that swept funds from "various State agency fee fund accounts into which the respective plaintiffs had paid fees" into the SGF. 302 Kan. at 658. As with the present case, the Kansas Insurance Department was required to levy an additional assessment to cover the amount swept out of the specifically designated fund (in that case, the Workers Compensation Fee Fund, among others). 302 Kan. at 660–61. The plaintiffs took the position that:

> while they did not challenge the statutory authority of an agency to assess and collect fees for the legitimate purposes authorized in enabling legislation, they did challenge "the diversion of fee funds by the state into the State's General fund coffers and expended for purposes not authorized or contemplated by the enabling legislation allowing the collection of fees by regulatory agencies." In other words, the plaintiffs objected to their fees—which were assessed for a specifically authorized purpose—being appropriated and used by the State for public purposes as if they were general tax moneys.

302 Kan. at 663. The Kansas Supreme Court, in reversing the district court's decision, determined both that the disposition of these funds did not constitute a political question and that the plaintiffs had standing to bring the claim, finding, among other things, that,

> In short, we reject the State's assertion that all moneys in the State Treasury are public moneys over which the State has unfettered, general appropriation powers. Here, the fee funds were composed of payments for a particular and specific purpose and, accordingly, they were to be kept as separate funds and not as part of the general fund.

302 Kan. at 673.

While the *Kansas Bldg. Indus. Workers Comp. Fund* court did not go on to address the

merits of the constitutionality of the "sweeps" due to the preliminary stage of the case, it also relied on an older opinion, also cited by the Plaintiff in the present case, that addressed a similar question. In *Panhandle E. Pipe Line Co. v. Fadely*, 183 Kan. 803, 332 P.2d 568 (1958), the Kansas Supreme Court considered a challenge to legislative enactments sweeping funds from the natural gas conservation fund—another fund based on fee assessments of a regulated industry—into the SGF. 183 Kan. at 804. The plaintiff, a member of the regulated industry, again argued that such a sweep was an unconstitutional tax in violation of Article 11, § 1 and 5 of the Kansas Constitution. 183 Kan. at 805–06. The Kansas Supreme Court, upon consideration of the parties' arguments, concluded that:

> At the outset, it is clear that under its police power the state may reimburse itself for the costs of otherwise valid regulation and supervision by charging the necessary expenses to the businesses or persons regulated. [Citations omitted.] A statute, however, is void if it shows on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation [citations omitted] or if more than adequate remuneration is secured [citations omitted]. **Where interstate commerce is involved and the statute shows that expenses other than those of legitimate supervision and regulation are defrayed from the assessments levied on the regulated businesses, or the income derived from the fees collected so far exceeds the expenses of regulation as to impugn the good faith of the law, it cannot stand, either under the commerce clause or under the Fourteenth Amendment to the Federal constitution.** (*Great Northern Ry. v. Washington, supra*, 300 U.S. at pages 160–161, 57 S.Ct. 397.)
>
> In the instant case, sections 55–609, 55–711 and 55–131, as amended, do not clearly authorize the commission to collect both its direct expenses and the indirect expenses of regulation resulting from the assistance of other departments and agencies.
>
> . . .
>
> Although the unchanged portions of 55–609, 55–711 and 55–131 do not authorize the collection of indirect expenses, the state would appear to

> maintain the amendments providing for the allocation of twenty per cent to the general revenue fund in themselves authorize the collection of indirect expenses and the $100,000 appropriated by senate bill No. 425 is to reimburse the state for indirect expenses.
>
> We cannot accept this contention. Neither senate bill No. 425 nor senate bill No. 428 expressly declares that the amounts transferred and appropriated to the state general revenue fund are to be used to reimburse other departments and state agencies for indirect assistance rendered the commission, nor do the bills specifically appropriate the amounts for such purpose**. Both bills, in clear terms, direct payment of the mentioned funds to the general fund of the state without any limitation, and the most reasonable inference to be drawn from both legislative acts is that the $100,000 and the twenty per cent are to be used indiscriminately for all general expenses and obligations of the state.** Such legislative acts, in spite of the presumption of validity [citations omitted], show on their face that some part of the exaction is to be used for a purpose other than the legitimate one of regulation, and for that reason senate bill No. 425 and the second sentences of sections 2, 3 and 5 of senate bill No. 428 are void.
>
> **When a regulatory measure openly becomes a revenue enactment, that portion thereof which exacts revenue fails as a valid exercise of the police power.** We are of the opinion that senate bill No. 425 and the second sentences of sections 2, 3 and 5 of senate bill No. 428 amount to a tax and a revenue measure levied under the guise of a regulatory fee, and violate article 11, section 1 of our state constitution, the commerce clause and the Fourteenth Amendment of the Federal constitution. It therefore follows that the judgment of the trial court is affirmed.

183 Kan. at 806–08 (emphasis added).

The case relied on by the *Panhandle* court for its core proposition regarding the validity of the use of regulatory assessments—*Great N. Ry. Co. v. State of Washington*, 300 U.S. 154, 57 S. Ct. 397, 81 L. Ed. 573 (1937)—provides further discussion of the limits on the powers of government to use assessments levied on regulated entities for supervisory purposes:

> In the exercise of its police power the state may provide for the supervision and regulation of public utilities, such as rail roads; may delegate the duty to an officer or commission; and may exact the

> reasonable cost of such supervision and regulation from the utilities concerned and allocate the exaction amongst the members of the affected class without violating the rule of equality imposed by the Fourteenth Amendment. **The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution.** A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is prima facie reasonable. If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law it cannot stand either under the commerce clause or the Fourteenth Amendment. The State is not bound to adjust the charge after the fact, but may, in anticipation, fix what the legislature deems to be a fair fee for the expected service, the presumption being that if, in practice, the sum charged appears inordinate the legislative body will reduce it in the light of experience. Such a statute may, in spite of the presumption of validity, show on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation and may, for that reason, be void. And a statute fair upon its face may be shown to be void and unenforceable on account of its actual operation. If the exaction be clearly excessive it is bad in toto and the state cannot collect any part of it.

300 U.S. at 159–61 (emphasis added) (footnotes omitted).

The parties devote only a small amount of space to their analysis as to the constitutionality of the sweeps in the instant case. However, from the evidence presented, it appears that the Plaintiff has established a substantial likelihood that it can demonstrate that the IRF is funded by assessments levied against regulated entities and that the sweeps from the IRF to the SGF are intended to pay the general bills of the State, rather than the reasonable cost of supervising and regulating the regulated industry, in apparent violation of the Commerce Clause and the Fourteenth Amendment of the United States Constitution. Furthermore, the Plaintiff has established a substantial likelihood that it can demonstrate that the sweeps from the IRF to the SGF, for the apparent purpose of defraying costs other than those for which the sums were

originally assessed, violates Article 11, § 1 and 5 of the Kansas Constitution. While this determination is not conclusive and may be modifiable upon presentation of further evidence, the Court finds that, under the first element of the temporary injunction test, Plaintiff has established a substantial likelihood that it will ultimately prevail on the merits.

2. Reasonable Probability of Suffering Irreparable Future Injury

The Plaintiff alleges that there is a reasonable probability that it will suffer irreparable future harm because the Plaintiff will be unable to perform its statutory functions without its operating funds. The Plaintiff's operating funds are used for expenditures such as salaries and wages, contractual services, and building maintenance. The Plaintiff claims that transferring $8,000,000 in FY2018 and $8,125,000 in FY2019 from the IRF into the SGF would account for 47% and 44% of the Plaintiff's funds in 2018 and 2019. The affidavits submitted by the Plaintiff generally support these figures, and further demonstrate that the sweep of $8,000,000 in FY2018 exceeded the total amount of other expenditures for the IRF ($7,613,646.60) for the entire year.

But the Plaintiff has not provided factual support for its allegation that, "The sweeping of 47% of KID's funds in 2018 and 44% in 2019 would require KID to drastically reduce services or make new assessments." Plaintiff's Memorandum in Support, at 6. Indeed, the affidavits presented demonstrate that the KID's operating expenses for FY2018 amounted to only $7,613,646.60, but that the total revenue collected amounted to $17,956,372. In other words, although the Plaintiff's affidavits demonstrate that reductions in staff or services would be seriously deleterious to the Plaintiff's mission, they do not demonstrate that the sweeps would necessitate such a reduction in services. A similar problem drags down the Plaintiff's argument that "KID is at risk of losing accreditation status if the sweeps continue and the insurance

department is unable to perform its statutory duties. While KID would remain open for business, it is unlikely KID could operate to the level required to maintain accreditation." Plaintiff's Supplemental Brief, at 3. Again, sparse, if any, evidentiary support is offered for the premise that the Plaintiff *will* or *is likely to* lose accreditation as a result of the sweeps, particularly in light of the relatively small size of its (apparently) essential operating budget—which Plaintiff's counsel characterized as the result of doing more with less—relative to the amount taken in by the IRF overall in FY2018. As the Defendants argue, there is no reason to suspect that the numbers for FY 2019 will differ in any significant way.

Moreover, as the Defendants point out, the *Kansas Bldg. Industry Workers Compensation Fund* case stands for the proposition that regulatory agencies "are charged with the responsibility to regulate and supervise the particular operations to which the respective funds apply. They are not granted the discretion to cease operations if they run out of money, but rather it is their responsibility to raise the funds necessary to carry out their statutorily mandated responsibilities." 302 Kan. at 683–84. Thus, rather than reduce services to make ends meet, it is the Plaintiff's responsibility to raise the funds necessary to continue operation, either through the (potentially unconstitutional) levying of additional assessments on the regulated industry or, more reasonably, by taking out a temporary loan from the SGF pursuant to K.S.A. 40-112(f) during the pendency of this litigation. While the Court has already addressed the harmful consequences brought on by the need to repay such a loan, the Plaintiff has also failed to demonstrate why an ultimate judgment against the Defendants would be insufficient to remedy such harm.

Thus, while the Court finds that the Plaintiff has certainly demonstrated that, if his

allegations are true, he will be harmed by the continued sweeps, he has failed to demonstrate that such harm is irreparable. The line item veto exercised by the Governor has created the potential of a loansharking dilemma for the Commissioner. The legislature attempted to restore the funds which it had authorized in a prior legislative session to be swept. The Governor's veto removed the funds which the legislature tried to restore. Now in the meantime Commissioner Seltzer may or will be forced to do more with less, delay or defer regulatory activities, borrow funds, or engage in a combination of these tactics, until the ultimate merits of his claim can be decided and it is determined whether the money will be ordered to be repaid by final judgment. The harm may be substantial but it is not irreparable.

3. Lack of an Adequate Remedy at Law

The Plaintiff has failed to demonstrate that, if it obtains a loan from the SGF pursuant to K.S.A. 40-112(f) in order to make up any shortfall occurring due to the sweeps, a subsequent judgment from this Court will be insufficient to provide a remedy for any constitutional violation. Critically, the loan mechanism set forth in K.S.A. 40-112(f), combined with the nature of the harm otherwise alleged (a loss of operating funds), appears to be perfectly amenable to judicial remedy, should the Plaintiff ultimately succeed in establishing that the sweeps violate the United States Constitution and the Kansas Constitution and/or the state statutes.

4. Threat of Suffering Injury Outweighs Damage Potentially Caused by the Proposed Temporary Injunction

The Plaintiff asserts that the threatened injury to the Plaintiff outweighs any damage the injunction may have on the Defendant. The Plaintiff alleges that serious injury will result if the funds are transferred to the SGF because the Plaintiff will not be able to perform its statutory

duties. The Plaintiff further claims that the Defendants will not be seriously impacted by the imposition of a temporary injunction. The Court agrees: the amount swept from the IRF to the SGF is dwarfed by the overall amount of revenues that, the Plaintiff alleges, the SGF will take in overall in FY2018 and FY 2019. However, as noted above, the injury to the Plaintiff, in this case, is not irreparable, by virtue of K.S.A. 40-112(f), and, should the Court ultimately find for the Plaintiff, an adequate remedy at law exists to completely rectify any injury suffered by the Plaintiff by virtue of having to seek such a loan.

5. Impact of Issuing Injunction Will Not Be Adverse to Public Interest

The impact of issuing a temporary injunction is not adverse to the public's best interest because if the funds from the IRF are transferred into the SGF, the Plaintiff will have to drastically reduce its services. These services, which include building maintenance and contractual services, ultimately benefit the public. Additionally, the Plaintiff claims that a temporary injunction is in the public's best interest because if the Defendant is permitted to transfer funds from the IRF into the SGF, then insurance companies will be forced to pass additional assessments on consumers in increased premiums. Also, although the SGF is used for many purposes that are beneficial to the public, the funds transferred from the IRF make up a very small percentage of the total amount of the SGF's revenue. The public's interest would not be harmed by the imposition of a temporary injunction because it arguably could protect consumers from increased premiums, ensure the public that the Plaintiff would continue to render its services efficiently, and the amount of money transferred into the SGF is not a large enough sum that it would have an adverse effect on the public if the money was not permitted to transfer into the SGF.

Nevertheless, the lack of a showing of irreparable injury, combined with the existence of an adequate remedy at law, precludes this Court from issuing a temporary injunction. Thus, the Court denies the Plaintiff's Motion for Temporary Injunction.

CONCLUSION

For the reasons stated above, the Court DENIES Plaintiff Ken Selzer's Motion for Temporary Injunction. The Court further DENIES the Defendants' Motion to Dismiss.

This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

Richard D. Anderson
District Judge, Division 2

CERTIFICATE OF MAILING

I hereby certify that the foregoing **Memorandum Decision and Order** was filed electronically and deposited in the U.S. Mail or delivered interoffice mail, on the date stamped on the order, providing notice to the following:

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