IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19th JUDICIAL CIRCUIT

SARCOXIE NURSERY CULTIVATION CENTER, LLC, et al.	)	
Plaintiffs/Relators,	)	
v.	)	Case No. 19AC-CC00556
RANDALL WILLIAMS, et al.	)	Division: IV
Defendants/Respondents.	)	

PLAINTIFFS' SECOND MOTION FOR TEMPORARY RESTRAINING ORDER

Comes Now the Plaintiff/Relators, Sarcoxie Nursery Cultivation Center, LLC, and Sarcoxie Nursery Infusions Center, LLC, (collectively "Sarcoxie"); GVMS, Inc. ("GVMS"); Missouri Medical Manufacturing, LLC, and Missouri Medical Products, LLC, (collectively "Missouri Medical"); (Sarcoxie, GVMS and Missouri Medical are hereinafter collectively referred to as the "Plaintiffs"), pursuant to Rule 92.02, and based on newly discovered facts move this Honorable Court to issue a Temporary Restraining Order ("TRO") against the Defendants/Respondents Missouri Department of Health and Senior Services ("Department"), and Randall Williams and Lyndall Fraker, in their respective official capacities as Director of the Department of Health and Senior Services ("Department Director"), and Director of the Section for Medical Marijuana Regulation of the Department of Health and Senior Services ("Section Director"), (Department, Department Director and Section Director are hereinafter collectively referred to as the "Defendants").

Specifically, Plaintiffs request the following relief:

A. Restraining the Defendants from allowing any transfer of any Medical Marijuana Facility License ("MMFL");

B. Restraining the Defendants from allowing any changes in ownership for any initial Licensee;

C. Restraining the Defendants from granting any variances to Rules or policies related to: i.) any request to transfer an MMFL; ii.) ownership changes; or iii.) ownership and control rules; and

D. Restraining the Defendants from promulgating any Rule applicable to MMFLs, without notice to, and approval from this Court, and without providing the opportunity for the Plaintiffs to be heard before this Court on such proposed Rule;

And for such relief to remain in place until all appeals arising from the initial Denials by the Defendants are final, OR, until such time that the Defendants rescind the limitation on MMFLs. In support of this motion, Plaintiffs state as follows:

SUMMARY OF THE MOTION

First and foremost, Plaintiffs are not seeking to inhibit successful applicants from opening for business, or inhibit patient access to medical marijuana. Nor are Plaintiffs seeking to prevent any applicant who meets the minimum standards for an MMFL from being issued an MMFL. Plaintiffs share with others the desire for a robust medical marijuana program that ensures a competitive marketplace as required by Article XIV, Section 3(1)(h)(x) of the Constitution of the State of Missouri.

Plaintiffs share with others the desire for all applicants who meet the minimum standards to be issued MMFLs, and look forward to competing in the marketplace to serve patients' needs.

Defendants' actions however are contrary to ensuring a competitive marketplace as evidenced by their promulgation of a Rule to limit the number of MMFLs.

Defendants have exceeded their authority by ignoring the limitation they could not promulgate rules that would unreasonably restrict patient access and any rules promulgated are reasonably necessary for either patient safety or to restrict access to only licensees and qualifying patients. Article XIV, Section 3(1)(b).

Instead, the Defendants, through the promulgation of certain Rules and the adoption of certain policies, created a licensing process that is a complex, costly, opaque, inappropriate and unlawful obstacle course for the applicants, and more concerning, created unreasonable and unlawful geographic and economic barriers to Patients access to the medicine promised by a vote of the people, and guaranteed by Article XIV of the Constitution of the State of Missouri ("Article XIV").

Defendants licensing process defies logic and the law. They fail to follow even the unlawful, unconstitutional licensing process *they created.* They have failed, and continue to fail, to manage the licensing process in a manner that instills any confidence that the *interests of the Patients* are the primary focus of the licensing process as the Article XIV requires.

It is a licensing process that quite frankly is unmanageable, not just in the opinion of the Plaintiffs, but as evidenced by the Defendants own acts (amendments of Rules), and admissions (comments in support of such amendments to Rules, and comments regarding the number of requests for waivers and variances from Licensees). The Defendants' actions have resulted in a licensing process in which over half of the ***successful*** applicants, now Licensees, want to make *material changes* to their applications ("submitted business plan") through proposed changes in ownership structure or the location of the MMLF, and 100% of the unsuccessful applicants who filed Complaints appealing their Conditional Denials to the State of Missouri's Administrative Hearing Commission ("AHC") want to stand on their original application.

The statistics regarding the number of Licensees wanting to make location and ownership changes was first reported by Greenway Magazine[1] ("Greenway") on their website on April 23, 2020.[2] Defendant Department's Section for Medical Marijuana Regulation leaders, Defendant Section Director Fraker, Facility Licensing and Compliance Director Andrea Balkenbush ("Balkenbush"), and Section Deputy Director and Counsel Amy Moore ("Deputy Director"), participated in a webinar sponsored by *Missouri Medical Cannabis Trade Association ("MoCannTrade")*, a statewide trade association on April 22, 2020.

Balkenbush advised the participants,

> "*…that change facility requests have significantly slowed down the process of verification and, ultimately, commencement. She noted that between 70-80 percent of applicants have submitted change requests since receiving their licenses. Over half of applicants have applied to change something physical in their application, whether that is the location of their facility, a portion or all of their facility's blueprint, and even ownership changes."*

She went on to further advise the participants:

> *"The Section must analyze and approve these changes, extending the timeline to open the facility. Due to the vast number of these changes, the timeframe in which facilities are expected to open is even more unknown. Balkenbush then emphasized, 'as much as facilities can stick to their original application, the easier it will be to open facility doors.'"*[3]

For all practical purposes the Defendants action of creating an arbitrary, capricious and unlawful limitation on MMFLs, has created two *new* licensing processes: one with over half of the Licensees requesting what may be characterized as "material changes" to their original application, the other, the administrative appeals process in which the unsuccessful applicants are participating and hoping that the AHC will order Defendants to issue additional MMFLs, and if the AHC does

[1] Greenway Magazine, March 19, 2020 issue. Greenway Magazine's website represents it is a "Missouri Cannabis Industry Publication dedicated to the regulatory and political climate and culture of the cannabis industry in Missouri."
[2] https://mogreenway.com/2020/04/23/section-reveals-over-70-percent-of-licenses-have-changes-to-applications/
[3] Id.

not provide such relief, those appeals, over eight hundred (800) will be appealed to this Circuit Court. Plaintiffs would urge an alternative process to both: remove the limitation on MMFLs, simplify the application to one the same as, or similar to, those used by the Missouri Department of Agriculture for Hemp licenses, evaluate whether minimum standards are met, and then rank and award licenses to those applicants who meet the minimum standards.

The limitation on MMFLs causing the licensing process to create geographic and economic barriers to Patient access and not maintaining Patient access as the priority, is illustrated when reviewing the Defendants' actions when Natural Healthcare of Missouri (NHM") surrendered its MMFL for a Dispensary License on or about March 3, 2020, for its Booneville location[4]. The Defendants did not transfer the license to Seven Points Agro-Therapeutics MO, LLC, Foster-Gibson Investments LLC, or Canna Lux, LLC, the other applicants proposing a Booneville location. The Defendants instead transferred that license to BTMD Holdings, LLC's, Gravois Mills location.

Booneville patients are out of luck for a convenient Dispensary.

So much for patient access.

The Defendants empowered themselves with the ability to waive any Rule they promulgated if they felt there was "good cause", without defining what constituted "good cause". They promulgated Rules that were "special" in nature, and therefore unconstitutional, through which they awarded "bonus points" based upon an obscure, outdated economic development statistic, or what location in which Congressional and State House of Representatives District.

The Emergency Rules and Final Orders of Rulemaking were promulgated after applicants had submitted tens of thousands of dollars in nonrefundable deposits and entered into costly

[4] https://mogreenway.com/2020/03/19/facility-approval-list-changes-one-surrendered-license-and-one-contingent-approval/.

purchase and sale agreements or leases for real estate property in which they planned to locate their facilities. The applicants never had even a hint that the Defendants were going to award bonus points based upon geographic locations, zip codes and political districts until the Rules were first disseminated to the public six weeks before applications were due.

Then to pour salt on the wound, Defendants "amended" the Emergency Rule and Proposed Rule 19 CSR 30-95.040(4)(C)3.D., to allow any Licensee to change the location of their proposed facility from the location proposed in their application. This Rule change applies even to the Licensee who received bonus points and a License based upon being located in a particular zip code or political district, but who chooses upon award of the License to move out of that zip code or political district entirely.

Defendants did not announce this change until December 2, 2019, four months after submission of applications, and a little over three weeks prior to the award of Cultivation Facility Licenses. *See Missouri Register, Vol. 44, No. 23, Orders of Rulemaking, page 3136, Comment #4*, attached hereto as **Exhibit 1**, and incorporated herein.

The Defendants stated in explaining why they changed the Rule they were responding to a request from an attorney in private practice:

> "DHSS appreciates the thoughtfulness and thoroughness of this comment and agrees with many of the proposed standards for approving a change of location application. However, DHSS has not included such specificity in any of the other types of change approvals. *This was an intentional policy decision in order to leave as much flexibility as possible for applicants to present and for DHSS to grant such applications*…DHSS does find the alternative suggestion is reasonable as a way to express a general standard *without creating as high a bar for these approval requests*." (*Emphasis added*)

The Defendants, however, weren't done changing the rules of the licensing process. After the first awards of Cultivation Facilities Licenses, and almost five months after the initial application deadline for all facility licenses, the Defendants promulgated a new Rule, published

January 2, 2020, that in effect "closed the market" for future licenses to only those applicants who applied in August of 2019, and who received a "Conditional Denial" in response to their August 2020 applications. The Defendants explained:

> "The process of application review, particularly when the review must include application scoring, is costly and resource-consuming…". *See Missouri Register, Emergency Rules, pg. 7, Emergency Rule 19 CSR 30-95.028, Additional Licensing Procedures, EMERGENCY STATEMENT: Section 536.024.1(1) Compelling governmental interest*, attached hereto as **Exhibit 2,** and incorporated herein.

The Defendants created the "…*costly and resource-consuming* process."

As previously stated, the Defendants should have sought guidance from the Missouri Department of Agriculture, whose licensing application process for hemp cultivation, is incredibly simpler, more reasonable, thorough, and effective. *See Producer Registration Application and Agricultural Hemp Propagule and Seed Permit Applications*, attached hereto respectively as **Exhibit 3** and **Exhibit 4,** and incorporated herein.

In spite of the initial Rule, and two subsequent modifications to the Rule, the Defendants felt they needed to do more "tweaking" with even less transparency.

The Defendants issued a News Release April 14, 2020, attached hereto as **Exhibit 5**, and incorporated herein, that they allowed a Licensee to surrender its Dispensary Facility License ("DFL"), and then transferred that license to an unsuccessful Applicant ("Sister Applicant") that was under the same control and ownership ("Owner/Manager") as the Licensee. Although limited by law to having no more than five (5) DFLs, The Owner/Manager had submitted seven (7) applications seeking five (5) DFLs. In settling the case, the Defendants waived multiple Rules, and really in effect, threw out all of the Rules, and allowed the Owner/Manager/Applicant to pick the "preferred location" of the MMFL.

This transaction was done in the context of a settlement of the Owner/Manager/Applicant's Complaint to the AHC of the Defendants' decision to deny a DFL to the Owner/Manager/Applicant's "preferred location".

Allowing an Owner/Manager to pick the "preferred location" was done even though the Defendants professed they had created their scoring process to make sure licenses were issued in the location that the "transparent process" had determined was the best site for a dispensary facility. This was the reason for all of these Rules, to select the most deserving locations. When in fact, the Defendants' ridiculously complex, arbitrary and capricious, unlawful scoring process, resulted in creating a "closed" and "restrictive" market, to the economic benefit of the initial Licensees, and to the incredible detriment of Patient access.

In its news release, the Department stated:

> "Neither case involved allegations with regard to scoring, as both applicants received scores among the very top," the state said in the release.

Also quoted was Defendant Director Williams who stated: "These particular appeals were unrelated to scoring process concerns…"

Defendant Department and Defendant Director Williams made statements that were simply not true.

The Owner/Manager/Applicant, BeLeaf Medical LLC, ("BeLeaf") as the unsuccessful Applicant #9994, in its Petition to the AHC, attached hereto as **Exhibit 6,** and incorporated herein, made the following allegations**:**

> 36. In the absence of a rule-based tiebreaker, BeLeaf Medical LLC should have been afforded the option of choosing which of its dispensary facility license applications received the House District 79 bonus.
>
> 37. Alternatively, ***but for arbitrary and subjective scoring, erroneous or negligent scoring, computational errors, technological issues, and/or other unacceptable scoring-related mistakes***, BeLeaf Medical LLC's score on Application #9994 would have been higher than 1533.28, meaning it would have been the highest ranked dispensary (***Emphasis added.)***

BeLeaf absolutely expressed concerns and complained specifically about the scoring process, as did every other applicant who was denied a facility license and has filed a Complaint with the AHC, including the Plaintiffs in this case.

Equally troubling is that along with his untrue statement above, Defendant Director Williams stated:

"We remain committed to upholding our system of awarding licenses and will continue to defend the remaining appeals filed with the Administrative Hearing Commission…"

SALE OF LICENSE

An additional basis for which Plaintiffs seek this TRO is that the Defendants are complicit, if not wittingly, then unwittingly, in the sale and transfer of licenses between "related" and "unrelated parties", seeking not to go into the business but to make a profit from the sale of its license or licenses.

It appears that some Licensees acquired a license not to go into business, but for purely speculative purposes. In fact, the Deputy Director's husband participated in a "panel discussion" sponsored by MoCannTrade who states on their website[5] that they are:

> "…the largest, most influential cannabis trade association in Missouri, speaking with a unified voice to ensure a sensibly regulated and robust state medical marijuana program.

Their panel discussion was moderated by the "Outside General Counsel" for MoCannTrade, and who also represented the BeLeaf Company ("BeLeaf") before the AHC. Other participants included the attorney who recommended the Rule change to permit Licensees to change the location of their proposed facility upon award of a MMFL **see Exhibit 1**; the attorney who represented Green Precision Analytics, Inc., whose appeal to the AHC was settled at the same

[5] https://www.mocanntrade.org/cpages/about

time as BeLeaf and is referred to in the Defendants' news release regarding settlement of AHC appeals; the spouse of the Deputy Director; and finally the panel included a lobbyist who lobbies for BeLeaf and MoCannTrade. The panel discussion was for those applicants who were denied a license, but who may want to "partner" with successful Licensees regarding the following issues:

- Did you win licenses but need additional investors?
- Or maybe you didn't win a license, but still want to meet and partner with successful applicants?
- Would you like to ask Missouri's leading marijuana attorneys about issues like soliciting private equity investments or reporting ownership changes to DHSS?

See Missouri Medical Cannabis Trade Association Post-Licensure Industry Connect + Legal Roundtable Advertisement, attached hereto **Exhibit 7,** and incorporated herein.

One of the panelists, the spouse of the Deputy Director, encouraged "anyone a part of the community" to join MoCannTrade so that they could participate in the roundtable. He advised local media that individuals interested in the medical marijuana industry should consider joining MoCannTrade as the association works:

> "… very closely with the Department of Health, and they seem to have a great relationship with them," …, "the people who run it have a vested interest in trying to provide the best services possible."

See Medical marijuana roundtable to be held in Columbia Wednesday, KOMU.com mobile, attached hereto as **Exhibit 8**, and incorporated herein.

A little over thirty (30) days later at the Missouri Medical Marijuana Facilities Welcome Meeting the Deputy Director was giving guidance to Licensees on Missouri Rules and Regulations, including but not limited to, the Variance Request Process and Facility Change Requests. See pages 39-54 of https://health.mo.gov/safety/medical-marijuana/pdf/welcome-meeting-presentation.pdf,.

If there were not limitations on the number of licenses being awarded, the Plaintiffs would not be seeking the relief being sought in this Motion and in their Amended Petition.

But they have no choice but to do so given the fact the Defendants, by establishing a limitation on the number of MMFLs, created a "closed market".

They have no choice but to do so given the fact that the Defendants have raised concerns that Licenses are being offered for sale.

They have no choice but to do so given the fact that the Defendants have raised concerns that over half of the current Licensees are applying for "variances" from their initial application, or "waivers" from the Defendants' Rules in order to make changes to their initial application that could be considered "material changes", and if contained in the original application could have resulted in the License being awarded to some other deserving applicant.

They have no choice but to do so given the fact within this "closed market" the open efforts by those seeking, or seeking to assist those seeking, ownership structure changes, location changes, and other changes to the application that could be considered "material changes" and if contained in the original application could have resulted in the License being awarded to some other deserving applicant.

The Impact of the Director's Personal Interest

Most importantly, Plaintiffs have no choice but to do so given Defendant Williams' statement that the Defendants will persist in their defense of their current licensing process --- a process that is clearly an abuse of discretion in which they continue to unlawfully, unreasonably, arbitrarily, capriciously, and unconstitutionally create obstacles for Patients' access to voter-approved medical marijuana, as opposed to enhancing Patients' access to medical marijuana,.

This persistence is grounded in Defendant Director Williams' fierce personal opposition to medical marijuana, displayed in and through his testimony before the Oversight Committee in

which he compared marijuana usage to posing the same threat as opioid usage. He testified that it is his "personal position" that serves as the basis for the limitation on licenses.

It is clear that the Defendant Director, to the detriment of the citizens, businesses, and most importantly medical patients of Missouri, is unable to separate his personal beliefs from his official duties.

Plaintiffs seek this TRO to overcome this misguided persistence of the Defendants.

The Defendants have made a mockery of the process envisioned by the voters when approving Article XIV by maintaining an unreasonable, arbitrary and capricious and unlawful limitation on the number of licenses to be awarded. They have maintained this unlawful limitation even though they are aware of the open solicitation for the sale and transfers of licenses as a result of the "closed market" created by the Defendants to limit the number of MMFLs awarded.

They have maintained this unlawful limitation even though they are aware of the incredibly large number of Licensees who upon award are seeking permission for ownership and/or location changes, basically adopting an entirely new application process.

They have maintained this unlawful limitation on the number of licenses and the creation of a "closed market" thus preventing more deserving applicants of a license from doing business in this state, including but not limited to the business of farming.

They have maintained this unlawful limitation on the number of licenses knowing, and some might say intending, to obstruct patient access to medical marijuana.

Such actions by the Defendants are unlawful, unreasonable, arbitrary, capricious, and unconstitutional! This Court is urged to enter an Order to prohibit further transfer of licenses until this case is finally decided, or until the Defendants rescind the limitation on licenses and follow the Constitutional mandate to adopt only those rules that enhance patient access to medical

marijuana or are reasonably necessary for either patient safety or to restrict access to only licensees and qualifying patients.

The Constitution demands it.

INTRODUCTION

1. Plaintiffs filed a First Amended Petition seeking a Declaratory Judgment determining the Defendants violated Article I, Section 35 ("Right to Farm Amendment") and Article XIV ("Article XIV") of the Constitution of the State of Missouri, as well as Chapter 536 of the Revised Statutes of Missouri ("RSMo"), and further seeking Preliminary and Permanent Injunctions to prohibit Defendants from continuous and further violations of said Articles.

2. The Department was granted rule-making authority, but it does not have the authority to apply or enforce any rule or regulation that would impose an undue burden on any one or more licensees or certificate holders, any qualifying patients, or act to undermine the purposes of Article XIV.

3. Further, the Department's rule-making authority is limited to only those rules "***necessary*** for the proper regulation and control of the cultivation, manufacture, dispensing, and sale of marijuana for medical use, and for the enforcement of this section ***so long as patient access is not restricted unreasonably***, and, ***such rules are reasonably necessary for patient safety or to restrict access to only licensees and qualifying patients***." Art. XIV, Section 1.3(1)(b).

4. The Defendants also promulgated a Rule, known as the "Variance Rule", by which the Department "may waive, for good cause, provisions of this chapter on its own initiative or by request" any Rule it promulgated pursuant to Article XIV. 19 CSR 30-95.025(2).

5. As a result, the Defendants may waive any standard, or the Rule prohibiting the transfer of licenses for one year, or the recently promulgated Rule stating that if one of the

awardee's license was revoked, that license would be transferred to the awardee with the next highest score.

6. The result of such a Variance Rule is that there are really no Rules as the Department may transfer a license for any reason, at any time, if it feels justified to do so.

7. In fact, they have done so. *See* ***Exhibit 5***.

FACTS IN SUPPORT OF MOTION

8. Rule 92.02(a) authorizes this Court to issue a temporary restraining order, with notice upon the party against whom relief is sought, if the plaintiff demonstrates that the relief is necessary to prevent "immediate and irreparable injury, loss, or damage."

9. As required under Rule 92.02(a)(3), proper notice has been given to the Defendants.

10. Undersigned counsel first gave notice to Assistant Attorney's General Gerald M. Jackson and Ross Aaron Kaplan on April 27, 2020.

11. Plaintiffs incorporate by reference its contemporaneously filed Amended Petition. Paul Callicoat, M.D., has executed an Affidavit, attached hereto as **Exhibit 9** and incorporated herein, in which Dr. Callicoat verifies the filed Amended Petition and provides additional facts which form the basis for this Motion for a TRO.

12. The Amended Verified Petition filed with this case outlines known facts, including but not limited to, recent facts that were uncovered in ongoing hearings before the Missouri House of Representatives' Special Committee on Government Oversight ("House Oversight Committee").

13. Additionally, the basis for this TRO is derived from public documents, authored by or on behalf of Defendants that were distributed to the public on or about April 8, 2020.

14. With the voter approval of Article XIV of the Constitution of Missouri ("Article XIV") effective December 6, 2018, the Department was tasked with promulgating rules necessary for the proper regulation and control of the cultivation, manufacture, dispensing, and sale of marijuana for medical use and for the enforcement of Article XIV *so long as patient access was not restricted unreasonably*, and such rules were *reasonably necessary* for patient safety or to restrict access to only licensees and qualifying patients. See Article XIV, Section 3.(1)(b). (*Emphasis added*.)

15. On May 24, 2019, the Department issued Emergency and Proposed Rules under Chapter 95 of the Code of State Regulations, setting forth the criteria the Department intended to utilize to evaluate applicants for all MMFLs under the Medical Marijuana Program ("Program").

16. The Department limited the number of MMFLs to be awarded through the promulgation of 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A) and 19 CSR 30-95.080(1)(A)&(B), filed with the Office of the Missouri Secretary of State on May 24, 2019, effective June 3, 2019.

17. For all MMFLs, the Department established minimum standards and criteria that all licensees purportedly would have to satisfy in order to be qualified to receive a MMFL.

18. The Department promulgated some, but not all minimum standards and criteria that all Licensees purportedly would have to satisfy in order to be qualified to receive a MMFL pursuant to 19 CSR 30-95.025(4).

19. Article XIV required that when more applicants for MMFLs applied than the minimum number of licenses to be granted pursuant to Article XIV, Section 3(15)-(17), the Department was to establish a system to numerically score competing applicants.

20. Such system was to be limited to an analysis of the factors delineated in Article XIV, Section 3(1)(h) (the "Factors").

21. Presumably, the granted MMFLs would be those applicants that met the minimum standards and scored the highest with regard to the Factors.

22. While Plaintiffs believe that Defendants exceeded their authority and acted contrary to the Missouri Constitution, including but not limited to the provisions of Article XIV, with respect to the promulgation of the Rules at issue, this requested relief does not directly address the propriety of these Rules, but instead is focused on the immediate issue regarding transfers of licenses, change in ownership, or change in management and control.

23. On January 2, 2020, the Department issued Emergency Rule 19 CSR 30-95.028 which provides that all unsuccessful licensees who meet the minimum standards are now deemed to have "conditional denials" for the next 395 days.

24. If a Licensee is unable to meet the requirements of holding an MMFL, or is unable to become operational within a year, then that Licensee's MMFL would be awarded to the next applicant in numerical score rank that had yet to receive an MMFL

25. There is a high likelihood that the Department has awarded licenses to entities that do not meet the minimum standards and/or will not be able to become operational by one year.

26. Defendants Fraker and Williams, have testified before the House Special Committee on Government Oversight that the Department did not verify *any* of the information in any of the awarded licensee's applications *prior* to awarding licenses.

27. Instead, the Defendants have opted to verify that awarded applicants actually meet the standards and were truthful in their applications *after* granting the awards.

28. But even now, this post-verification process has yet to begin in earnest, though licenses were initially awarded almost four months ago.

29. On or about January 28, 2020, the Department sent a *MMRP License & Compliance Guidance Letter* to successful applicants. A true and correct copy of this letter is attached as **Exhibit 10**, and incorporated herein.

30. In that letter, Andrea Balkenbush, Facility License and Compliance Director, states:

> [W]e are aware of concerns about how long it will take the Department to verify minimum standards and to process applications for change, once we are reviewing them. We are working hard right now to organize and prioritize everyone's needs. All licensees should have received a survey from us by now, and the information in your response will be critical in helping us with this task. We have every intent to quickly move through verification of minimum standards, however we are also aware that the time involved will be largely dependent on the particular circumstances of each facility.

Exhibit 10, pg. 3.

31. Thus, it is an almost certainty that awarded MMFLs will be rescinded or terminated by the Department prior to the expiration of the 395 days set forth in the Rule.

32. In fact, it has already occurred, as the Department authorized a Licensee to "swap out" dispensary licenses. *See* ***Exhibit 5***.

33. It is a significant likelihood that some successful applicants were nothing more than "straw applicants" who applied, but never intended to actually open and operate a facility, but instead, seek to sell licenses on the secondary market for a significant profit over the application fee.

34. On or about March 27, 2020, the Department issued *Guidance Document 2*, is attached hereto as **Exhibit 11**, and incorporated herein, a portion of which was directed to the issue of license transfers. In that letter the Department states:

> The Department continues to hear of entities discussing their intent to sell licenses to other entities as soon as such an application can be made. By rule, each licensee must be operating within a year of receiving its license. Furthermore, upon renewal, a licensee must be able to show how it has made a good faith effort to follow through on the assurances it made in its application. Perhaps most importantly, a large part of the application scoring system was focused on the leadership teams of the applicants, as well as the unique business models proposed by those individuals.

Exhibit 11, pg. 2-3.

35. The Department recognizes the risk of "straw applicants" in that Guidance Letter stating:

> "[L]icensees should not expect the Department to look favorably on a request to transfer a license if it is clear the licensee has never been invested in or capable of implementing its proposals. In short, if a licensee is already aware at this point in implementation that they will not be able to fulfill the proposals on which they were scored, the licensee should seriously consider surrendering its license. To persist in seeking a transfer of license under those circumstances is likely just delaying a revocation of license while conditionally denied applicants are anxiously waiting for their opportunity to step in.

Exhibit 11, pg. 3.

36. Additionally, the Department has recognized that it has in several cases, awarded multiple licenses to some applicants.

37. Acknowledging the perceived unfairness of this outcome, the Department has stated that it will review this issue during the verification of minimum standards.

38. In the Second Guidance Letter the Department further stated:

> In cases where an entity was awarded multiple licenses at the same location for the same proposed business venture, the Department will expect that licensee to surrender the excess licenses unless the licensee can explain how the original proposal requires the extra licenses… While this issue will certainly be raised during the minimum standards verification process, the Department encourages licensees with excess licenses as described here to either reach out to the Department to arrange for surrender or to explain why the multiple licenses are necessary to implement the original proposal.

Exhibit 11, pg. 3.

39. In fairness to Defendants, the regulatory scheme contemplates that risk and has a mechanism to protect against it. 19 CSR 30-95.040(4)(C)(1)(B) provides:

> If the entity to which the license or certification will be transferred is not owned by the same entities as was the entity to which the department originally issued the license or certification, the request may be submitted beginning January 1, 2021, and shall include at least the same information required for an initial application for license or certification.

40. However, the Department, by and through the promulgation of 19 CSR 30-95.025(2) ("Variance Rule"), granted itself the power to "waive, for good cause, provisions of this chapter on its own initiative or by request."

41. The Variance Rule provides no standards, criteria or any other factor that would imply any predictability when or why the Department would grant such a variance.

42. Additionally, this grant of authority to broadly issue variances is not restricted, as the Department purports to grant itself the authority to alter any rule or requirement in response to a request, or even on its own accord.

43. Additionally, the Department acknowledges that *de facto* transfers could occur through a significant change in ownership as well.

44. Under 19 CSR 30-95.040(4)(C)(2), a successful applicant may change ownership interests within the entity up to 10% without Department approval, and in any manner or amount above 10%, if so approved by the Department.

45. The Department recognizes that this Rule would allow an entity to effectively transfer a license through changing the ownership of the applicant entity.

46. In Guidance Document 2, the Department cautions that "[c]hanges in ownership in amounts that are effectively a transfer of license will be scrutinized to the same extent as a request to transfer and, as such, *may* be denied if filed before January 1, 2021." **Exhibit 11, pg. 2** (emphasis added).

47. The Department's use of the word "may" rather than "shall" in the Guidance Document only confirms the Department will consider allowing *de facto* transfers through ownership changes prior to January 1, 2021.

48. An administrative agency acts unreasonably and arbitrarily if its decision is not based on substantial evidence.[6]

49. Capriciousness concerns whether the agency's action was whimsical, impulsive, or unpredictable.[7]

50. To meet basic standards of due process and to avoid being arbitrary, unreasonable, or capricious, an agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or 'gut feeling'.[8]

51. An agency must not act in a totally subjective manner without any guidelines or criteria.[9]

52. Indeed, under the Variance Rule, the Department is effectively free to make any decision it wants.

53. It is an exception that swallows the entire regulatory scheme.

54. The standards for granting or denying a waiver can be whatever the Department chooses.

55. As such, without the Court's intervention, there is no basis for Plaintiffs, those similarly situated, or the public in general to have assurance that the Department will actually honor its January 1, 2021, waiting period on license transfers, as the Defendants are free under

[6] *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.,* 34 S.W.3d 266, 281 (Mo. Ct. App. 2000).
[7] Id.
[8] *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 893 (Mo. App. 1995).
[9] Id. at 893–894.

their own arbitrary policy to selectively waive the waiting period under their assumed variance powers.

56. Moreover, given that the Department has opened the door for *de facto* transfers to occur through ownership changes that "may" be approved prior to January 1, 2021, under their guidance, it is clear that the same could be accomplished through this means.

57. There is no way for the Plaintiffs, nor other similarly situated applicants, to even know that their rights have been affected if the Department chooses to grant such a waiver, and allows such a transfer to occur prior to the January 1, 2021.

58. There is also no provision which mandates that the Department's waivers or variances are required to be actually published or to otherwise be made publicly available.

59. As of the date of filing this motion, there appears to be no public information readily or easily identifiable on the Department's website listing which, if any variances, have been sought, denied, or granted.

60. Conditionally denied applicants are harmed by any "straw" transfers.

61. Allowing a successful applicant to transfer its license to another entity, would deprive the conditionally denied applicant next in line a license.

62. Additionally, it is difficult to know who is ready and able to immediately assume responsibilities as an applicant, as it is likely that several conditionally denied applicants may drop out, given the financial carrying costs associated with maintaining a business that is "ready to go" but cannot realize any revenue due to a lack of license.

63. The risk that many conditionally denied applicants will "drop out" is heightened by due to recent development that the AHC's appeal process has become an undue hardship with an artificial bottleneck.

64. Despite the fact that there are well over 800 MMFL appeals ongoing—there are only three AHC commissioners that can hear the appeals.

65. The Department has further delayed the appeal process, requesting 45 to 60 day extensions to file an Answer in nearly every single AHC appeal.

66. In those appeals where an answer has been filed, the Department has asked to delay discovery for two months so as to put out "uniform discovery."

67. Despite the fact that there is no authorizing rule in the AHC for "uniform discovery" for a licensure appeal, it is clear that these tactics have the effect to delay consideration of the merits of any appeal.

68. On information and belief, some AHC Petitioners have been told by the AHC that it will be 1 to 2 years to actually have a hearing on the merits of any appeal, and that some hearings may occur well after that.

69. The delay in hearing AHC appeals works to the advantage of "straw applicants" and multiple license holders.

70. Even if the Department was to respect its original commitment to not consider transfers for one year, given the AHC delay and the financial carrying costs for Licensees, "straw applicants" will be able to take advantage of denied applicants even if transfers are not considered until after January 1, 2021.

71. Unless restrained until after the AHC appeals have been exhausted, the Defendants will only be supporting "straw applicants," and rewarding them for providing insincere and misleading representations on their medical marijuana facility applications.

THE RISK THAT THE DEPARTMENT WILL TRANSFER LICENSES PRIOR TO JANUARY 1, 2021

72. While the Guidance Letters that have been released to date condemn the practice of "straw applicants" and multiple license holders, the Department's documents never state that the Department will prohibit transfers by those entities or make any commitment about its actions with regard to this issue.

73. Indeed, the Department merely says that it will "not look favorably" on a transfer by applicants, rather than any commitment about the issue.

74. In the case of an ownership change that creates a *de facto* transfer, that such a request "may be denied," leaves open the possibility that Department may nonetheless allow such transfers to occur.

75. On March 4, 2020, Defendants gave testimony to the House Oversight Committee on Government Accountability.

76. The Department Director Williams testified that the head of compliance for the Medical Marijuana Facilities program was the Deputy Director.

77. The Deputy Director also testified at the hearing and stated that she was tasked with overseeing licensing compliance.

78. The Deputy Director's responsibilities at the Welcome Meeting for Facilities was to explain, among other issues related to the Rules, variance requests and facility change requests.

79. The Deputy Director was also tasked by Defendants with providing information regarding the transfer waiting period to the Committee, as she also has oversight of future license transfers.

80. Defendant Williams admitted to the Committee that the Department had identified early in the medical marijuana program's inception a potential conflict of interest with the Deputy

Director based on her employment and association of her spouse, who has represented medical marijuana facility applicants.

81. Counsel for the Department determined that the appropriate course of action was to "wall off" the Deputy Director from applicants handled by her husband.

82. Defendants then testified the Deputy Director was not "walled off" from the solicitation and selection of a third party vendor, who ultimately would review applications for licenses, including those applications submitted by her husband's clients.

83. Two days after the award of licenses for cultivation facilities, Missouri Cannabis Association (MOCANN), a trade association, hosted a roundtable at the Tiger Hotel in Columbia. *See* ***Exhibit 7.***

84. This roundtable discussion centered on a discussion of immediately transferring licenses from successful applicants to unsuccessful applicants on the secondary markets.

85. As stated on the flyer, Mr. Blake Markus, the Deputy Director's spouse, is listed as a panelist/attorney discussing transfers.

86. Mr. Markus also appeared on KOMU news suggesting unsuccessful applicants to join MoCannTrade as "they work very closely with the Department of Health, and they seem to have a great relationship with them."

87. Markus, however, failed to include the fact he was married to the Deputy Director and Counsel for the Section.

88. Mr. Markus also suggested that unsuccessful applicants should participate in the roundtable discussion if they had "something to offer people who were granted licenses."

89. That news report is publicly available at https://www.komu.com/news/medical-marijuana-roundtable-to-be-held-in-columbia-wednesday.

90. The Department has already acknowledged that the Deputy Director and her spouse's work in the medical marijuana field at least creates the "appearance" of a conflict, but Defendants have made no apparent effort to address the apparent conflict between the Deputy Director oversight of transfers and variances and her spouse's solicitations and participation in the same field.

91. Regardless of whether there is any actual impropriety, the risk that the Department will avail itself of its own standard-less "variance" powers and grant transfers prior to January 1, 2021, without notice to any one, is real and immediate.

92. The risk that the Department will also, nonetheless, grant a change in ownership that effectively transfers a license prior to January 1, 2021, is also real and immediate.

93. Guidance Document 3, attached hereto as **Exhibit 12**, and incorporated herein, specifically addresses "change in ownership".

94. In addition, it contains the following suggestion as well:

> "…any dispensary considering this option that did not initially propose that design should contact its licensing specialist to determine whether an application for a material change to physical design will be necessary."

95. With judicial intervention now, the Court can assure the public that the Department will follow its own waiting period that it announced and formalized as a regulation.

96. There is no counter-veiling harm in granting this preliminary injunction—the Department will simply be held to the representations that it made to the General Assembly on March 4, 2020, and to the public in connection with its original rulemaking.

97. If, for some reason, the Department does believe that it must dispense with the waiting period for the public good, the proposed preliminary injunction still allows the Department to do so, but only through the rulemaking process with notice to the Court.

98. There, unlike granting a variance, the reasoning must be made publicly in writing and with full comment from the community.

REQUESTED RELIEF

WHEREFORE, Plaintiffs pray that the Court:

A. Restrain the Defendants from allowing any transfer of any Medical Marijuana Facility License ("MMFL") until such time that all appeals arising from the initial Denials by the Department, conditional or otherwise, are final, OR, until such time that the Department rescinds the limitation on MMFLs as such limitations were promulgated pursuant to 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A) and 19 CSR 30-95.080(1)(A)&(B);

B. Restrain the Defendants from allowing any changes in ownership under 19 CSR 30-95.040(4)(C))(2) for any successful marijuana facility applicant that would effectively create a transfer of a license until such time that all appeals arising from the initial Denials by the Department, conditional or otherwise, are final, OR, until such time that the Department rescinds the limitation on MMFLs as such limitations were promulgated pursuant to 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A) and 19 CSR 30-95.080(1)(A)&(B);

C. Restrain the Defendants from granting any variances pursuant to 19 CSR 30-95.025(2), related to any request to transfer an awarded MMFL until such time that all appeals arising from the initial Denials by the Department, conditional or otherwise, are final, OR, until such time that the Department rescinds the limitation on MMFLs as such limitations were promulgated pursuant to 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A) and 19 CSR 30-95.080(1)(A)&(B); and

D. Restrain the Defendants from promulgating any Rule, emergency or otherwise, applicable to MMFLs without notice to, and approval from, this Court and, without providing the opportunity for the Plaintiffs to request a hearing before this Court on such proposed Rule until such time that all appeals arising from the initial Denials by the Department, conditional or otherwise, are final, OR, until such time that the Department rescinds the limitation on MMFLs as such limitations were promulgated pursuant to 19 CSR 30-95.050(1)(A), 19 CSR 30-95.060(1)(A) and 19 CSR 30-95.080(1)(A)&(B).

Respectfully Submitted,

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/s/Joseph P. Bednar, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he did on this 27th day of April, 2020, deliver a copy of the foregoing by e-filing to counsel of record in this proceeding

/s/Joseph P. Bednar, Jr.