

19TH JUDICIAL DISTRICT COURT  
FOR THE PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

DOCKET NO. 1069404

SECTION: 25

THE RX GREENHOUSE, L.L.C., and SAJAL ROY

VERSUS

THE LOUISIANA BOARD OF PHARMACY

FILED: \_\_\_\_\_

DEPUTY CLERK

PETITION FOR WRIT OF CERTIORARI AND REVIEW

NOW INTO COURT come petitioners, The RX Greenhouse, L.L.C. and Sajal Roy (“Petitioners”) through undersigned counsel, who respectfully file this timely Writ of Certiorari for appeal of the Louisiana Board of Pharmacy’s denial of the Petitioner’s application for the Region 1, “Metropolitan,” Medical Marijuana License (“Subject License”), made on April 17, 2018, in accordance with LA R.S. §§ 37:1248 and 49:964.<sup>1</sup> Petitioners represent as follows:

INTRODUCTORY STATEMENT

The Louisiana Legislature has charged the Louisiana Board of Pharmacy (the “Board”) with “the authority and responsibility” to “regulat[e] the profession and practice of pharmacy in the interest of the health, safety, and welfare of the citizens of the state of Louisiana.”<sup>2</sup> The Board failed in its mission when it disregarded the findings of *its own* Application Review Committee (“ARC”) to award a license to operate a medical marijuana dispensary in New Orleans to H&W Drugs over the most highly-ranked applicant --- RX Greenhouse. Because there is no “substantial evidence” to support the Board’s “disregard” of the ARC’s recommendation, Petitioners request that this Court vacate the Board’s granting of a license to H&W.<sup>3</sup>

PARTIES

1. Petitioner, The RX Greenhouse, L.L.C., (“RX Greenhouse”) is a Louisiana limited liability company domiciled in the city of Lafayette in Lafayette Parish, at 201 Rue Beauregard, Suite

<sup>1</sup> See Exhibit A, April 17, 2018 Executed Board Order by the Louisiana Board of Pharmacy.

<sup>2</sup> <http://www.pharmacy.law.gov/index.cfm?md=pagebuilder&tmp=home&pid>

<sup>3</sup> See *Ford v. State, Dept. of Health and Hospitals*, 166 So. 3d 332, 337 (La. App. 1 Cir. 3/6/2015) (declaring that an agency decision is arbitrary when it “shows disregard of evidence” and capricious when it “has no substantial evidence to support it.”)

202, with its principal place of business at 3131 NN I-10 Service Road E Suite 100, Metairie, LA 70002. RX Greenhouse qualifies as a Small Business under 13 CFR 121, as amended.<sup>4</sup>

2. Petitioner, Sajal Roy (“Dr. Roy”), is natural person of the age of majority who resides in Allegany County, Maryland at 532 Washington Street Cumberland, MD 21502. Dr. Roy is the majority owner of RX Greenhouse.
3. Defendant, the Louisiana Board of Pharmacy (the “Board”), is an independent Board of the State of Louisiana, enabled by the Louisiana Pharmacy Practice Act, LA R.S. § 37:1161, et seq., and L.A.C. § 46:301, et seq.; and subject to the Louisiana Administrative Procedure Act, LA R.S. § 49:950, et seq.

#### FACTS

4. The Louisiana Legislature legalized marijuana for medical use through Act 261 of the 2015 Legislature, and Act 96 of the 2016 Legislature (the “Acts”).
5. The Acts directed the Board to develop and promulgate a comprehensive regulatory scheme for dispensing medical marijuana in Louisiana.
6. On August 20, 2017, the Board, pursuant to the Acts, and the Louisiana Administrative Procedure Act, promulgated regulations, L.A.C. § 46:2440, et seq. (the “Regulations”), which control medical marijuana dispensing in Louisiana.
7. The Acts and the Regulations provide that there shall be 10 licenses to dispense medical marijuana in the entire state; that one license shall be issued in each of 9 defined geographic regions; that each region shall have a competitive application process for the license available in that region; and that the tenth license shall be reserved to be issued at the Board’s discretion at some point in the future.<sup>5</sup>
8. The Regulations further provide that the applicants for these licenses shall be evaluated on 10 non-exclusive criteria including, particularly: character and fitness and potential detrimental effects on surrounding schools, religious institutions, non-profit organizations, and other

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<sup>4</sup> Under that section, the Small Business Administration defines a small business, classified as a pharmacy or drug store, as having less than \$27.5 million in gross receipts in a calendar year. RX Greenhouse cannot have any receipts as it was denied a license to operate. However, even RX Greenhouse’s most generous revenue expectations are below that amount for the first year of operation.

<sup>5</sup> L.A.C. 24:2445(G).

institutions.<sup>6</sup>

9. The Regulations directed the Board to refer applications to a subcommittee (the “Application Review Committee” or the “ARC”), which would conduct an in-depth evaluation of the applications, and render a recommendation to the Board as to which applicant should receive the license for each region.<sup>7</sup> Pharmacy boards in other states, such as Connecticut and Ohio, that have awarded licenses for medical marijuana dispensaries established similar subcommittees to perform substantive, technical reviews of applications. In those states, the subcommittee’s recommendation of the most-qualified applicant for a particular license is almost *always* adopted by the full board. In States where the Board of Pharmacy does not oversee Medical Marijuana (Maryland and Arkansas), Commissions are formed that employ a similar practice of sub-committees to review the application content.
10. The Application Review Committee created an objective scoring system, by which they would evaluate each candidate on the enumerated subjective criteria set forward by the board, and rank the applicants by their total score on all criteria. The applicant who had the highest score, would therefore be most qualified under the criteria, and would become the Application Review Committee’s recommendation for the license in their respective region.
11. Pursuant to the Regulations, Petitioners, along with 7 other applicants, submitted applications to dispense medical marijuana in the Region 1 “Metropolitan” area, encompassing Orleans, Jefferson, Plaquemines, and St. Bernard Parishes.
12. RX Greenhouse submitted an application to operate a medical marijuana dispensary in the Greater New Orleans area. The president and CEO of RX Greenhouse, Sajal Roy, is a former Commissioner on the Maryland Board of Pharmacy and National Boards of Pharmacy. He is the only quadruple board-certified pharmacist in the United States (PharmD, CGP, CACP, CPSO, CSP). For the last year, Roy has operated a medical marijuana dispensary in Maryland.
13. RX Greenhouse submitted an application to the ARC that contained over nine hundred pages of supporting documents that demonstrated its unparalleled qualifications to operate a dispensary in New Orleans.

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<sup>6</sup> L.A.C. 24:2447(A)(15).

<sup>7</sup> L.A.C. 24:2447(A)(14).

14. On February 2, 2018, after 4 months of investigation, interviews, and deliberation, the Application Review Committee released its reports, including recommendations for each region. It recommended Petitioner, RX Greenhouse, to receive the license for Region 1. The other applicants were ranked from 2 to 8 based on the score they received by the Application Review Committee.
15. At a hearing on January 23, 2018, a Commissioner of the ARC represented to Dr. Roy that RX Greenhouse was, in fact, the highest scoring applicant in the entire state, regardless of region.
16. Applicants were then given an opportunity to withdraw their applications based on their ranking. Some applicants chose to do so, because the Board decided that the competitive proceeding would be a full adjudication, and that even though only one applicant in each region could be approved, denial of a license application would have to be reported to the National Board of Pharmacy. A denial constitutes a permanent, negative mark on the pharmacists' records, because any pharmacist who applies for a license to operate a dispensary or pharmacy in another state will have to note the denial of his application in Louisiana.
17. In effect, the Board forced applying pharmacists to gamble with their livelihoods in order to apply for this license.
18. Petitioner, as the applicant highest-ranked by the subcommittee formed expressly to conduct substantive, technical reviews of applications,, chose to move forward to the hearing.
19. On March 27, 2018, the Board convened to consider the applications from Region 1.<sup>8</sup>
20. The Board excluded the Application Review Committee from voting on the license itself. Additionally, the Chair of the Board, Mr. Carl Aron, recused himself from voting.<sup>9</sup> In sum, only a bare majority of Board members (9 out of 17) ultimately voted on the medical marijuana licenses.<sup>10</sup>
21. Moreover, until that hearing, the voting members had never seen the application materials from the applicants, the report and recommendations of the Application Review Committee, or any other evidence.
22. In effect, the Board completely isolated and screened the voting members of the Board from

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<sup>8</sup> See Exhibit B, Transcript of the March 27, 2018 Board of Pharmacy Hearing.

<sup>9</sup> Exhibit B, Transcript of the March 27, 2018 Board of Pharmacy Hearing, p.74:8 – 75:10

<sup>10</sup> The sitting chair, at that time Mr. Morris Rabb, only votes in case of a tie amongst the other voting members.

- the Committee who spent months reviewing hundreds of pages of materials, interviewing applicants, and inspecting the locations, policies, and procedures submitted by the applicants.
23. The March 27 hearing did not go smoothly. The voting members of the Board began the hearing by having a heated argument on the public record regarding the legality of their methods.<sup>11</sup>
24. Board Member Richard Mannino expressed concerns that the voting members were not made aware of the methods or reasoning used by the Application Review Committee. Mr. Mannino was unsure how the Board could consider their recommendations, because they had been kept sequestered from the actions of the Application Review Committee up until that point.<sup>12</sup>
25. The other Board Members shouted down Mr. Mannino's concerns. The Chair reasserted the importance of the committee, speaking to Mr. Mannino: "The other thing, you don't understand the process of the Board of Pharmacy. The Board of Pharmacy, we send things to committees. The committees work those things out, they come back to the full board and they present them to the full board. The *full board at that time* votes on it..."<sup>13</sup>
26. Despite this verbal exchange, the Board decided not to hear a full report of the Application Review Committee and did not vote on the ARC's recommendations at that time.
27. The Board did not supply the applicants with copies of each other's application, nor did they supply the applicants with a copy of any report generated by the Application Review Committee, even though this evidence was ostensibly used to make a final decision in each of their adjudications.
28. The voting members of the Board decided instead to recess until April 17, 2018, to give the voting members three weeks to review all of the materials which had already been reviewed by the ARC, in addition to new exhibits and any reports or recommendations made by the Application Review Committee.<sup>14</sup>
29. At the April 17, 2018 hearing, the voting members of the Board accepted additional evidence, and presentation.<sup>15</sup>

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<sup>11</sup> Exhibit B, Transcript of the March 27, 2018 Board of Pharmacy Hearing, p. 9:21 - 74:7.

<sup>12</sup> Id.

<sup>13</sup> Exhibit B, Transcript of the March 27, 2018 Board of Pharmacy Hearing, p. 22:4-11 [emphasis added].

<sup>14</sup> Exhibit B, Transcript of the March 27, 2018 Board of Pharmacy Hearing, p.83:16 – 84:23.

<sup>15</sup> The final transcript of the April 17th hearing was unavailable at the time of this filing, the factual allegations contained in this Petition are supported by a Verification and Affidavit attached to the Petition.

30. During this hearing, partners and advisers for each applicant presented and answered questions.
31. Notably, Troy Henry, a prominent New Orleans businessman and political figure who had not yet been publicly involved in this process, presented on behalf of H&W Drugs, which was the fourth-ranked applicant.
32. During his presentation, Mr. Henry and his brother Ruston Henry, the business owner, only briefly presented the merits of their application based on the criteria in the Regulations passed by the Board. The Henrys focused on “safety” due to their proximity to the New Orleans Police Department (“NOPD”) and argued they possessed the necessary knowledge because marijuana, according to the Henrys, is no different than diabetes medications.<sup>16</sup>
33. Oddly, the Henrys appeared to goad the Board, asking at one point “Are we even really here?”, which implied that the hearing was pointless if the Board did not vote against the recommendations of the Application Review Committee.
34. Additionally, the Henrys made numerous misleading and ill-informed statements during the presentation that the Board never challenged.
35. For example, whereas the medical marijuana sold at the RX Greenhouse dispensary would be grown at the Agricultural Centers at LSU and Southern University, the Henrys stated that the medical marijuana sold at their dispensary would be grown at the dispensary itself. But under clear and unambiguous state regulations, medical marijuana **cannot be grown at the dispensaries themselves**. Thus, the Henrys essentially admitted to an ignorance of the relevant state regulations during their presentation. The Board did not question the Henrys on this admission..
36. Further the Henrys stated that their location “shares a parking lot with the NOPD,” implying that the NOPD station was part of the same parcel of land as their proposed location. But in H&W’s formal application, it states that the NOPD station is across the street from their location. Upon inspection, the station has gated, private parking, and the NOPD parks only some units in an area of the parking lot behind and away from H&W’s location, from time to

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<sup>16</sup> Mr. Henry’s argument on this point was: when they get a new medication for diabetes, they don’t consult an expert on diabetes, they just sell it, so they should not be faulted for not having expert marijuana consultants like the other candidates, because marijuana is no different from diabetes medications. At no point did the Board ask Mr. Henry if, perhaps, it would be appropriate to consult a diabetes expert, if he had never dealt with that type of drug before.

time. The Board did not question or address this obvious discrepancy whatsoever.

37. The Henrys also referenced an issue brought up against other applicants regarding proximity to schools and churches. The Henrys represented that the location for the proposed dispensary did not have any problems with proximity to schools or churches. But according to H&W's formal application, the proposed dispensary is within 1000 feet of a church and a convent. These are places of worship, which the Regulations specifically list as areas of concern.<sup>17</sup> The Board did not question or address H&W's proximity to the church and convent.
38. Unlike the other applicants before them, many of whom were also native New Orleanians, the Board asked the Henrys strange, unsolicited questions regarding their struggles during Hurricane Katrina. These questions had absolutely no relevance to the issue of who was most-qualified to operate a medical marijuana dispensary in New Orleans.
39. Ultimately, the Board opted, without oral or written reasoning, to reject the Application Review Committee's recommendation and to grant the license to the fourth-ranked applicant, H&W Drugs, rejecting all others.
40. The denial of the application has had financial and professional impacts on RX Greenhouse and on Dr. Roy personally.
41. Despite opting to reject the ARC's recommendation, the Board never gave Dr. Roy the opportunity to withdraw his application in order to avoid having a mark on his record as a pharmacist.

### LAW AND ARGUMENT

42. Under the Louisiana Administrative Procedure Act, the Board does not have unfettered discretion to grant licenses to whomever they choose and in whatever manner they choose,; instead, the Board must make these decisions upon lawful procedure, on a basis which not arbitrary or capricious, and which is supported and sustainable by a preponderance of the evidence available to it, as determined by a court on review.<sup>18</sup>

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<sup>17</sup> Directing that the Board should consider "Whether the proximity of the proposed marijuana pharmacy will have a detrimental effect upon any place used primarily for religious worship...[or] convent"  
L.A.C. 46:LIII.2447(A)(15)(b)(iii).

<sup>18</sup> LA R.S. 49:963(G).

38. The Board's procedure was unlawful, because they did not provide each applicant with all evidence being considered against it, as required by LA R.S. 49:956(2).<sup>19</sup> In approving the license application of H&W Drugs and ignoring the recommendation of the Application Review Committee, the Board considered materials, such as internal memoranda and opinions, that were never made available to Petitioners for inspection, cross-examination, or rebuttal.
43. An administrative agency's decision should be set aside when its final decision is arbitrary and capricious.<sup>20</sup> A decision is arbitrary when it "shows disregard of evidence or the proper weight thereof" and a decision is capricious when it "has no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence."<sup>21</sup> An action by a state agency can also be considered arbitrary and capricious when it is unreasonable under the circumstances.<sup>22</sup>
39. The Board's decision was arbitrary and capricious because, despite the very detailed criteria established by the Board itself their decision was bereft of any justification as to why it chose to reject the recommendation of the Application Review Committee. Indeed, when an agency ignores the recommendations of *its own* technical experts, courts have found such an action to be arbitrary and capricious.<sup>23</sup>
40. The Board acted arbitrarily and capriciously, and its decision should be overturned. Petitioners, as the top-rated operation, should be awarded the dispensary license.
41. Petitioners do not contend that the Board acted arbitrarily and capriciously merely by disagreeing with the Application Review Committee. But when that committee made a recommendation based on the evidence submitted to meet evaluation criteria *developed by the Board*, and the Board then ignored that recommendation without citing any piece of

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<sup>19</sup> "All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence."

<sup>20</sup> LA R.S. 49:963(G).

<sup>21</sup> *Ford*, 166 So. 3d at 337.

<sup>22</sup> *Ford v. State*, 166 So.3d 332, 337 (La. App. 1 Cir., 2015).

<sup>23</sup> See *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F. 3d 957, 973-74 (9<sup>th</sup> Cir. 2002) (finding decision of the United States Forest Service to be arbitrary and capricious when it "ignored the detailed and well-supported conclusions of its own scientists.")



evidence or any part of the criteria as its justification for doing so, it acted arbitrary and capriciously.<sup>24</sup>

42. , This license grant is the Board's first foray into the licensing of medical marijuana dispensaries, and its decisions will affect the health and well-being of citizens of Louisiana. Given the stakes, the Board's decision to award the license to the fourth-ranked applicant, who was mis-informed about the relevant state regulations and whose presentation was contradicted by its application, was arbitrary and capricious..
43. Jurisprudence on the federal Administrative Procedures Act offers more specific guidance on how this question should be addressed.<sup>25</sup> Particularly, an agency's decision should be seen as arbitrary and capricious when it: 1) relies on criteria which they were not intended to consider by the legislature; 2) fails to rely on criteria which they were directed to consider; 3) explains its decision in a way that runs contrary to the evidence; or 4) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>26</sup>
44. The Board's decision need only be arbitrary and capricious on one of the four recognized grounds; but, in this case, it is arbitrary and capricious on every single one of them.
45. For example, the Board's concern over the experiences of Troy and Ruston Henry during Hurricane Katrina has no relevance to the qualifications for operating a medical marijuana dispensary and was not intended to be considered by the Legislature. The Board also ignored H&W's proximity to a church and a convent, which establishes that the Board ignored relevant criteria.
46. The Board **wholly** failed to explain their decision to reject the Application Review Committee's recommendation in favor of the fourth-ranked candidate. Without such an

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<sup>24</sup> See Exhibit A, April 17, 2018 Executed Board Order by the Louisiana Board of Pharmacy (stating its reasoning, in its entirety, as "in consideration of the criteria specified in the Board's rule for marijuana pharmacies, and having considered the application materials and other exhibits, and having heard the testimony, observed the demeanor of the witnesses and weighed the credibility of each...").

<sup>25</sup> See, e.g. Durousseau v. LA State Racing Comm'n, 724 So.2d 844 (La. App. 4 Cir., 1998) (applying federal APA jurisprudence to interpret Louisiana's Administrative Procedures Act).

<sup>26</sup> Miccosukee Tribe of Indians of Fla. v. United States, 566 F.3d 1257, 1264 (11th Cir. 2009).

explanation, it is an inescapable conclusion that the Board's decision was contrary to the evidence available. For the same reason, the Board's assertion that this decision is rational based merely upon superficial reference to the criteria and evidence, without more, is so implausible that it cannot be ascribed to a difference in opinion, or to the expertise of the Board.

47. If the evidence considered by the board was only that which was given to Petitioners, its decision is not supported and sustained by a preponderance of the evidence.<sup>27</sup> If, however, the record shows that the Board relied upon evidence which was not made available to the Petitioners for cross-examination and rebuttal, then Petitioners were not afforded a fair hearing, and the Board should be ordered to conduct a hearing in which all evidence relied upon is made available to applicants. *See Bell Oaks, Inc. v. Louisiana Dep't of Health & Hosps.*, 96-1256 (La. App. 1 Cir. 6/26/97), 697 So. 2d 739.

48. Finally, if the Board did consider evidence not made available to Petitioners and other applicants, Petitioners are confident that this improperly considered evidence will further show that the Board's decision was not based on law, but on arbitrary, capricious, or otherwise inappropriate grounds.

**WHEREFORE**, Petitioners, RX Greenhouse, L.L.C. and Sajal Roy, pray that this Honorable Court:

- 1) Issue and order to the Louisiana Board of Pharmacy that a complete hearing record in this matter, including transcripts from the April 17, 2018 Louisiana Board of Pharmacy Hearing, together with all documents, materials, reports and correspondence contained therein or related thereto, be returned to Court by the Louisiana Board of Pharmacy so that this matter may be heard and reviewed, including briefs and argument by this Court;
- 2) That, after trial of this matter, this Court render judgment in favor of Petitioners:
  - a) vacating the action of the Board of Pharmacy on April 17, 2018 granting the contested

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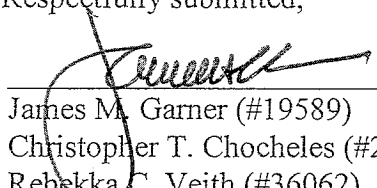
<sup>27</sup> Numerous exhibits were submitted to the Board against Petitioners at both hearings. Upon examination of the circumstances surrounding the submissions, one Board member speculated on the record that complaints had been "fake". The exhibits and Petitioners responses to these attacks are documented in the record of the April 17 hearing, which has not yet been published.

license to H&W Drugs; and

- b) declaring that
- i) the procedure imposed by the Board was unlawful, because evidence considered against the Petitioners was not made available to them for examination or review prior to, or even during, the hearing;
  - ii) the Board's procedure entirely disregarded testimony and facts presented which were heavily in Petitioners' favor, by extricating the Application Review Committee's reports and records from the public record of the hearing;
  - iii) that the lack of any rational basis for rejecting the recommendation of the Application Review Committee, and granting the license to the fourth-ranked candidate, constitutes an arbitrary and capricious action; and
  - iv) that the preponderance of the evidence presented at the hearing does not support or sustain the decision made by the Board; or
- 3) , in the alternative to the above-mentioned remedies, Petitioner prays that this Court remand this matter back to the Board of Pharmacy for rehearing where Petitioner can inspect, review, cross-examine, and rebut all evidence to be considered by the Board; or,
- 4) in the further alternative, Petitioner prays that this Court issue an order instructing the Board of Pharmacy to accept the recommendations of the Administrative Review Committee and award the contested license to Rx Greenhouse; and
- 5) in any case, for all court costs and attorney fees up to \$7,500.00 in accordance with LA R.S. 46:965.1.

Dated: May 17, 2018.

Respectfully submitted,

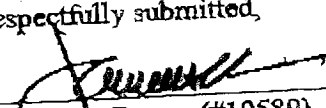
  
James M. Garner (#19589)  
Christopher T. Chocheles (#26848)  
Rebekka C. Veith (#36062)  
**SHER GARNER CAHILL RICHTER  
KLEIN & HILBERT**  
909 Poydras Street  
28<sup>th</sup> Floor  
New Orleans, La 70112  
Tel: 504-299-2100

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- i) the procedure imposed by the Board was unlawful, the Petitioners was not made available to them for even during the hearing;
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- 5) in any case, for all court costs and attorney fees up to \$7,500.00 in accordance with LA R.S 46:965.1.

Dated: May 17, 2018.

Respectfully submitted,

  
James M. Garner (#19589)  
Christopher T. Chocheles (#26848)  
Rebekka C. Veith (#36062)  
SHER GARNER CAHILL RICHTER  
KLEIN & HILBERT  
909 Poydras Street  
28<sup>th</sup> Floor  
New Orleans, La 70112  
Tel: 504-299-2100

**FILED**

MAY 14 2018

  
DEPUTY CLERK OF COURT

Fax: 504-299-2300

[jgarner@shergarner.com](mailto:jgarner@shergarner.com)

[cchocheles@shergarner.com](mailto:cchocheles@shergarner.com)

[rveith@shergarner.com](mailto:rveith@shergarner.com)

CIOLINO, PRITCHETT & ONSTOTT, LLC

D. Alex Onstott (LA #36611)

Max S. Ciolino (LA #36412)

1010 Common St.

Suite 2700

New Orleans, Louisiana 70112

Telephone: (504) 603-6691

[alex@cpolegal.com](mailto:alex@cpolegal.com)

[max@cpolegal.com](mailto:max@cpolegal.com)

ATTORNEYS FOR PETITIONERS

PLEASE SERVE:

Louisiana Board of Pharmacy  
Through its General Counsel,  
Carlos Finalet  
3388 Brentwood Dr.  
Baton Rouge, Louisiana 70806