**DEPARMENT OF EXCISE AND LICENSES**
**CITY AND COUNTY OF DENVER, COLORADO**

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**FINAL DECISION**

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**IN THE MATTER OF MARIJUANA BUSINESS LICENSES ISSUED TO AJS FEDERAL LLC; AJS EVANS LLC; SWEET LEAF LLC; DGP 38TH LLC; HERBAL WELLNESS; FEDERAL CORRIDOR LLC; DGP WALNUT LLC; DGP SMITH LLC; AND DGP ELATI LLC; ALL DOING BUSINESS AS SWEET LEAF (COLLECTIVELY REFERRED TO AS "SWEET LEAF" OR "RESPONDENTS"):**

**RETAIL MARIJUANA STORE LICENSES:**
**BUSINESS FILE #2017-BFN-0002513, AJS FEDERAL LLC, 468 S. FEDERAL BLVD.**
**BUSINESS FILE #2013-BFN-1068876, DGP ELATI LLC, 4125 N. ELATI STREET**
**BUSINESS FILE #2015-BFN-0002743, HERBAL WELLNESS, 4400 E. EVANS AVE.**
**BUSINESS FILE #2013-BFN-1069648, DGP 38TH LLC, 2647 W. 38TH AVE.**
**BUSINESS FILE #2013-BFN-1069644, DGP WALNUT, 2609 WALNUT STREET**
**BUSINESS FILE #2013-BFN-1070077, SWEET LEAF LLC, 5100 W. 38TH AVE.**
**BUSINESS FILE #2013-BFN-1069504, DGP SMITH LLC, 7200 E. SMITH ROAD**

**RETAIL MARIJUANA CULTIVATION FACILITY LICENSES:**
**BUSINESS FILE #2013-BFN-1070425, SWEET LEAF LLC, 136 N. YUMA STREET**
**BUSINESS FILE #2013-BFN-1069645, DGP WALNUT, 2609 WALNUT STREET**
**BUSINESS FILE #2013-BNF-1068877, DGP ELATI, 4125 N. ELATI STREET**
**BUSINESS FILE #2013-BFN-1068879, DGP ELATI, 4715 N. COLORADO BLVD.**
**BUSINESS FILE #2015-BFN-0007352, HERBAL WELLNESS, 1475 S. ACOMA STREET**

**MEDICAL MARIJUANA CENTER LICENSES:**
**BUSINESS FILE #2010-BFN-1045792, DGP WALNUT, 2609 WALNUT STREET**
**BUSINESS FILE #2010-BFN-1045809, SWEET LEAF LLC, 5100 W. 38TH AVE.**
**BUSINESS FILE #2015-BFN-0008409, AJS FEDERAL LLC, 468 S. FEDERAL BLVD.**
**BUSINESS FILE #2010-BFN-1045627, HERBAL WELLNESS, 4400 E. EVANS AVE.**
**BUSINESS FILE #2014-BFN-0003315, AJS EVANS, 4379 N. TEJON STREET**
**BUSINESS FILE #2010-BFN-1048434, DGP 38TH LLC, 2647 W. 38TH AVE.**

**MEDICAL MARIJUANA OPTIONAL PREMISES CULTIVATION LICENSES:**
**BUSINESS FILE #2014-BNF-0004042, AJS FEDERAL LLC, 136 N. YUMA STREET**
**BUSINESS FILE #2012-BFN-1061861, SWEET LEAF LLC, 136 N. YUMA STREET**
**BUSINESS FILE #2014-BFN-0004770, DGP 38TH LLC, 124 N. YUMA STREET**
**BUSINESS FILE #2015-BFN-0000384, FEDERAL CORRIDOR INC, 1475 S. ACOMA STREET**
**BUSINESS FILE #2012-BFN-1060600, HERBAL WELLNESS, 1475 S. ACOMA STREET**
**BUSINESS FILE #2014-BFN-0003959, AJS EVANS LLC, 1011 W. 45TH AVE.**
**BUSINESS FILE #2012-BFN-1060642, DGP WALNUT, 2609 WALNUT STREET**

**MEDICAL MARIJUANA-INFUSED PRODUCTS MANUFACTURING LICENSE: BUSINESS FILE #2013-BFN-1068155, SWEET LEAF LLC, 136 N. YUMA STREET**

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Procedural History

On December 14, 2017, the Department of Excise and Licenses (the "Department") issued an Order of Summary Suspension for the licenses held by SWEET LEAF LLC, AJS FEDERAL LLC, DGP ELATI LLC, HERBAL WELLNESS, DGP 38TH LLC, DGP WALNUT LLC, DGP SMITH LLC, and FEDERAL CORRIDOR INC., all doing business as Sweet Leaf, at multiple locations.

On December 21, 2017, Tom Downey, John Jennings, and Kira Suyeishi entered appearances on behalf of Sweet Leaf.

On January 2, 2018, the Department issued an Order to Show Cause requiring Sweet Leaf to appear at a hearing on January 12, 2018 (the "Hearing"), and show cause why the above referenced licenses should not be suspended or revoked for alleged violations of law or regulations.

On January 8, 2018, Sweet Leaf filed an unopposed motion to continue the Hearing, in which Sweet Leaf voluntarily waived the right to have a hearing on the summary suspension for thirty days. The motion was granted and the Hearing was set for Mach 14-15, 2018.

On February 23, 2018, Sweet Leaf submitted a request for discovery and a proposed Scheduling Order for the Hearing.

On March 6, 2018, the Department issued an Order encouraging the parties to exchange discovery, exhibit lists, and witness lists at their earliest convenience. The Order also provided that each party could submit pre-hearing briefs by March 12, 2018.

On March 7, 2018, the City provided discovery to Sweet Leaf. The City also submitted a Motion to Correct Typographical Errors requesting to fix typographical errors in the Complaint underlying the Order to Show Cause issued on January 2, 2018. Sweet Leaf filed a response on March 8, 2018 objecting in part to the motion (titled as a Response to Opposition).

Also on March 7, 2018, the City submitted a Motion for Protective Order concerning the introduction of testimony or evidence at the Hearing that may include medical marijuana patients' confidential records and information.

On March 8, 2018, Sweet Leaf submitted a Motion for Reconsideration of the March 6, 2018 Order issued by the Department. The motion requested that the Department issue a Scheduling Order with deadlines for the exchange of exhibits, exhibit lists, and witness lists.

On March 10, 2018, the Hearing Officer issued the following Orders: an Order Granting a Protective Order; an Order Granting City's Motion to Correct Typographical Errors; and an Order Denying Respondents' Motion for Reconsideration.

On March 12, 2018, Sweet Leaf filed a Pre-Hearing Brief with the Department (the "Pre-Hearing Brief").

On March 13, 2018, the City filed a witness list, an exhibit list, and a copy of its exhibits with the Department and Sweet Leaf.

On March 14, 15, 20, and 22, and April 3, 4, and 10, 2018, the Hearing was held at the Department.

On April 30, 2018, the Hearing Officer issued a decision recommending that all twenty-six of Sweet Leaf's licenses be revoked for violations of state and local law (the "Recommended Decision").

On May 11, 2018, Sweet Leaf submitted Respondent's Objections to Recommended Decision (the "Objections").

On May 17, 2018, the City submitted City's Response to Respondent's Objections to Recommended Decision (the "Response to Objections").

On May 17, 2018, Sweet Leaf submitted a Motion to Strike City's Response to Respondent's Objections to Recommended Decision (the "Motion to Strike").

On May 18, 2018, the City submitted City's Response to Respondent's Motion to Strike the City's Response to Respondent's Objections (the "Response to Motion to Strike").

## Background

This disciplinary proceeding concerns the practice of looping by medical marijuana centers and retail marijuana stores. Looping is the practice of making multiple one-ounce transfers of marijuana to the same customer within a single day. Recommended Decision, ¶¶ 84, n 2, 89, 121. The City alleges that Sweet Leaf's practice of looping violates C.R.S. 18-18-406(2)(b)(I), Colorado Department of Revenue Marijuana Enforcement Division ("MED") Regulation R 402(C)(3), 1 CCR 212-2, and MED Regulation M 403(D), 1 CCR 212-1.

Sweet Leaf fully acknowledges that it engaged in a looping scheme. Sweet Leaf argues that the scheme was lawful until January 1, 2018 when the above referenced MED rules were amended. Sweet Leaf believes that it exploited a gap in the law allowing marijuana businesses to make multiple one-ounce sales to the same customer within a single a day, as long as the customer left the premises and came back without the previously purchased marijuana. Hearing Recording, April 10, 2018 2:45 PM. Sweet Leaf employees and security guards noted that the practice of looping was so common that they routinely saw two or three loopers a day, that employees were aware that Sweet Leaf was selling marijuana to the same customers several times throughout the day, and that many of the loopers were nonresidents of Colorado. Recommended Decision, ¶¶ 83-105.

Sweet Leaf's actions undermine the entire regulatory scheme created by Amendment 64 and the General Assembly. Marijuana laws and regulations exist to ensure that the industry is highly-regulated and that "[l]egitimate, taxpaying business people, and not criminal actors, will conduct sales of marijuana." Colo. Const. art. XVIII § (1)(b)(IV). After the passage of Amendment 64, Governor Hickenlooper and Colorado Attorney General John Suthers sought guidance from the federal government. The response came indirectly in the form of a memorandum from Deputy Attorney General James Cole

to United States Attorneys. In the memo, Deputy Attorney General Cole directed U.S. attorneys to focus prosecutorial resources on certain enforcement priorities. Memorandum from James Cole, Deputy Attorney General, to U.S. Attorneys (August 29, 2013). Two of these priorities were preventing the diversion of marijuana from states where it is legal to states where it is not legal, and preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity. Id. The memo notes that "the [U.S. Department of Justice] guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement systems." Id. The memorandum also states that "[a] system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice."[1] Id.

Sweet Leaf's practice of artificially dividing a single transaction into multiple transfers of marijuana to the same customer was done for the purpose of evading quantity limitations on the sale of marijuana. This has directly led to results that weaken the robust system created Amendment 64 and state and local laws designed to implement marijuana legalization. Sweet Leaf's looping scheme has been a company practice since June 2016 and has resulted in multiple customers obtaining several pounds of retail marijuana in violation of state possession laws. In one case, a customer was found with three pounds of retail marijuana in his home. Additionally, at three medical marijuana center locations, approximately 5,550 pounds of medical marijuana were sold in looping transactions alone between June 1, 2016 and December 13, 2017. In one case, a patient purchased 446 pounds of marijuana, spending $577,480.32, in 137 days between March 3, 2017 and December 13, 2017. In at least four cases, nonresident customers were apprehended with up to three pounds of retail marijuana in their vehicles and admitted to buying retail marijuana from Sweet Leaf, returning to their home states where retail marijuana is not legal, and re-selling it on the black market. Consequently, Sweet Leaf's actions have put all other marijuana businesses in Denver and in Colorado at risk of federal enforcement.

The practice of looping has also adversely impacted neighborhood residents and was detrimental to the public health, safety and welfare. Neighbors observed looping customers deal drugs on their block, publicly consume marijuana in their yards, throw trash in the area, and become combative and argumentative when asked to leave residential property. Recommended Decision, ¶¶ 126-129. These interactions and observations caused neighbors to feel threatened in their own homes and consider moving away from the neighborhood. Id.

In December 2017, the Department was made aware of Sweet Leaf's looping activities by the Denver Police Department. The Department immediately issued an Order of Summary Suspension on all twenty-six of Sweet Leaf's licenses issued within Denver. The Summary Suspension Order provided that there were reasonable grounds to believe that Sweet Leaf had engaged in deliberate and willful violations of state and local laws or regulations, and that the public health, safety, and welfare required emergency action. The Order of Summary Suspension alleged that Sweet leaf had violated C.R.S. § 18-18-406 and MED rules M 403(D) and R 402(C). The Department later issued an Order to Show Cause, after complaint

[1] Although the Cole Memorandum was rescinded on January 4, 2018, there is no reason to believe that the priorities identified in the memo are no longer priorities of the federal government as Attorney General Jeff Sessions similarly directs all U.S. Attorney to use "previously established prosecutorial principles." Memorandum from Jeff Sessions, Department of Justice Attorney General, to U.S. Attorneys (January 4, 2018)

from the City, directing Sweet Leaf to show cause why its licenses should not be revoked pursuant to D.R.M.C. § 32-22 for alleged violations of state law.

The Hearing took place over a period of seven days, during which the Hearing Officer took in evidence and testimony from over twenty-seven individuals, including undercover police officers, the Director of the City's prosecution unit, local law professors who specialize in marijuana law, and neighbors of Sweet Leaf's licensed premises. Recommended Decision, ¶¶ 9-13. The Hearing Officer also heard multiple interviews from Sweet Leaf employees, including the District Manager and Retail Operations Manager, security guards who conducted security services for Sweet Leaf, and Sweet Leaf customers who were later convicted for possession of marijuana. Ultimately, the Hearing Officer found that Sweet Leaf violated MED Rules M 403(D) and R 402(C)(3) because it sold marijuana in amounts exceeding the allowable limit; that Sweet Leaf violated C.R.S. § 18-18-406(2)(b)(I) because it knowingly sold more than one ounce of retail marijuana (or two ounces of medical marijuana) to several customers and patients, including undercover police officers; and that Sweet Leaf permitted violations of C.R.S. § 18-18-406 on the licensed premises of its medical marijuana centers and retail marijuana stores because it knew that, as a result of looping sales, several of its customers and patients possessed more than the allowable amounts of marijuana. Recommended Decision, ¶¶ 130-204. The Hearing Officer recommended that all twenty-six of Sweet Leaf's Denver licenses be revoked. Recommended Decision, ¶¶ 205-209. Sweet Leaf now urges the Director of the Department (the "Director") to reject the Recommended Decision.

## Findings and Conclusion

As an initial matter, Sweet Leaf requests that the City's Response to the Objections to the Recommended Decision be stricken. Motion to Strike, p. 2. The Recommended Decision states that Responses to Objections may be filed within five calendar days after receipt of Objections. The City's Response to the Objections was filed one day late. Sweet Leaf contends that "[d]eadlines are in place for management purposes, and any further delay in this matter will prejudice [Sweet Leaf]," and argues that the Response must be stricken. Id. The Assistant City Attorney responds that she was the only attorney assigned to represent the Department at the time of this proceeding, and that unforeseen circumstances arose with other work assignments. Response to Motion to Strike, p. 2-3. The Recommended Decision is not binding on the Department. *See* D.R.M.C. § 6-204(b) (stating the Recommended Decision is comprised of the Hearing Officer's recommended findings, conclusions, and decisions). Further, the Director notes that the City's Response to the Objections was filed only one day outside of the five-day window, and Sweet Leaf does not state why it has been prejudiced by the late filing. Accordingly, the Motion to Strike is denied and the City's Response shall be considered.

Additionally, on May 24, 2018, Sweet Leaf submitted requests to surrender retail marijuana store licenses 2013-BFN-1068876 and 2013-BFN-1069504 and retail marijuana cultivation facilities 2013-BFN-106887 and 2013-BFN-1068879. The Director retains the discretion to act on all applications and requests submitted to the Department. Den. Charter §§ 2.7.1, 2.7.2; D.R.M.C. §§ 32-1; 6-204(a). The Affidavits submitted by Sweet Leaf are requests to the Director "to immediately cancel, terminate, and void Respondent's license[.]" *See* Affidavit for Surrender of License, Revised 05/23/18. Allowing Sweet Leaf to surrender its licenses after the Hearing, and after a decision recommending revocation of all of its licenses would encourage all applicants who face license discipline to utilize the City's resources and move forward with a hearing without risking an unfavorable result, while possibly subjecting the

community and City staff to multiple hearings. The Recommended Decision came after the review of a substantial amount of evidence and testimony from twenty-seven witnesses over the course of seven days. Pursuant to D.R.M.C. § 32-29, a licensee who has had its license revoked is precluded from applying for a license of a similar type for a year. Allowing Sweet Leaf to circumvent this restriction would ignore the time and effort invested by neighbors, Denver police officers, Department staff, and City attorneys. Therefore, the Director rejects Sweet Leaf's request to surrender its licenses and enters the following decision.

In its Objections, Sweet Leaf alleges that the Recommended Decision "erroneously interprets the law, misconstrues evidence, incorporates inadmissible evidence, and is arbitrary and capricious." Objections, p. 2. The Director, upon review of the entire record, including all supplementary exhibits, responses, and objections, finds no factual or legal grounds to reject the Hearing Officer's findings or recommendation. Therefore, the Recommended Decision is adopted as the Final Decision of the Department. Each of Sweet Leaf's objections will be addressed below.

**1. The Hearing Officer correctly found that Sweet Leaf violated state and local laws and regulations.**

The Hearing Officer found that Sweet Leaf's looping scheme, in which Sweet Leaf employees regularly conducted multiple transfers of one ounce of marijuana to the same customer in a single day, violated MED Rules R 402(C) and M 403(D), and C.R.S.§ 18-18-406(2)(b)(I). Sweet Leaf contends that the Hearing Officer reached an erroneous legal conclusion without analyzing the applicable law, and that the Hearing Officer "made up facts" in reaching this conclusion. Objections, p. 2-4; 6-7.

**a. The Hearing Officer's conclusion of law that looping may be a violation of MED Rules M 403(D) and R 402(C)(3) is valid and supported by the record.**

Sweet Leaf admits that looping occurred at its centers and stores in Denver. Pre-Hearing Brief, p. 17. The question before the Director turns on whether looping violates state law. The Hearing Officer properly concluded that Sweet Leaf's practice of looping violates MED Rules M 403(D) and R 402(C)(3). Contrary to Sweet Leaf's objections, the Director concludes that the Hearing Officer did not "create out of whole cloth her finding that multiple sales in a day constituted a single sales transaction." Objections, p. 3. At the Hearing, the City and Sweet Leaf disagreed on the meaning of single "sales transaction" as the phrase is used in MED Rules R 402 and M 403. Sweet Leaf argued that each of the one-ounce sales to the same customer in a single day constituted a separate transaction. Recommended Decision, ¶ 137. The City contended that multiple one-ounce sales to the same customer in a single day should constitute a single sales transaction. Recommended Decision, ¶ 133.

MED Rule R 402(C)(3), as it existed at the time that Sweet Leaf was engaging in looping practices, prohibited a Retail Marijuana Store and its employees "from selling more than one ounce of Retail Marijuana flower or its equivalent in Retail Marijuana Concentrate or Retail Marijuana Product during *a sales transaction to a customer*" (emphasis added). MED Rule M 403(D), as it existed at the time, prohibited a Medical Marijuana Center and its employees "from selling more than two ounces of Medical Marijuana or its equivalent in Medical Marijuana-Infused Product *during a sales transaction* to a patient unless that patient has designated the Medical Marijuana Center as its primary center and supplied it with

documentation from the patient's physician that allows the patient more than two ounces of Medical Marijuana or its equivalent in Marijuana-Infused Product" (emphasis added).

Neither the Colorado Medical or Retail Marijuana Codes, nor the MED rules provide a definition for "sales transaction." On May 22, 2017, the MED issued a Statement of Position explaining its interpretation of what could constitute a single sales transaction subject to the quantity limitations of MED R 402(C)(3) (the "Position Statement"). City's Exhibit C-8. The Position Statement is published on the MED website and states: "[w]hat constitutes a 'single sales transaction' when determining compliance with Rule R 402(C), 1 CCR 212-2 is dependent on the facts and totality of circumstances of each individual case . . . Sales that are structured as multiple, stand-alone transactions may be viewed by the [MED] as an attempt to evade quantity limitations on the sale of Retail Marijuana, resulting in recommendation for administrative action." The MED Position Statement also clearly states that a person in possession of more than one ounce of retail marijuana or its equivalent is acting unlawfully, citing C.R.S. § 18-18-406. Id. Position Statements are issued to provide guidance for matters that are likely to be applicable to all marijuana licensees, and a Position Statement may be adopted by the state licensing authority as a Final Agency Action. MED Rule R 104(E); Hearing Recording, April 10, 2018 10:01 AM. Moreover, Sweet Leaf was warned by a MED criminal investigator in August 2016 that "[a]ccording to 'higher-ups' at MED, if you do more than one transaction with an individual, you are sending them away with more than ONE OUNCE, which violates State Law of having more than one ounce on your person (even if that person has taken a transaction to their home or car)." Pre-Hearing Brief, p. 6. Despite this explicit guidance and warning about possible enforcement, Sweet Leaf continued to engage in looping practices at several of its retail and medical locations.

Thereafter, the MED rules were amended to clarify that a single transaction include multiple transfers to the same customer during the same business day where the employee knows or reasonably should know that such sale would result in the customer possessing more than the quantities of marijuana allowed by state law. *See* 1 CCR 212-2 R 402(C), effective January 1, 2018 and 1 CCR 212-1 M 403(D.5), effective January 1, 2018.

Sweet Leaf argues that the Position Statement and MED rules did not provide a clear definition for what constituted a sales transaction and that there was a gap in the law until the provisions defining a sales transaction became effective on January 1, 2018. Pre-Hearing Brief, p. 16; Hearing Recording, April 10, 2018 10:03. The Director agrees with the Hearing Officer that this argument is uncompelling. See Rec. Dec. ¶ 138. One of Sweet Leaf's witnesses stated that the Position Statement was useless to the public, and that he could not advise a potential client based on the information provided. Hearing Recording, April 10, 2018 10:04 AM. However, the same witness later testified that under the circumstances he would advise a client that there is a risk of enforcement if the client engages in looping because the MED could view multiple sales transactions as a single transaction. Hearing Recording, April 10, 2018 10:12 AM. While the Position Statement does not provide a definition of "single sales transaction," it clearly states that "what constitutes a 'single sales transaction'... must be based on the facts and totality of circumstances of each individualized case, with the [MED] seeking to identify attempts to evade quantity limitations of Retail Marijuana sales." Exhibit C-8. The Director concludes that the Position Statement clearly provides that transactions structured as multiple, stand-alone transactions, may be viewed as a single sales transaction depending on the facts and totality of the circumstances. Accordingly, the Director finds that the Hearing Officer correctly interpreted the law.

**b. The Hearing Officer's finding of fact that Sweet Leaf's looping sales constituted unlawful single sales transactions pursuant to MED rules is valid and supported by the record.**

In determining whether multiple sales to the same customer constitute a single transaction, the Hearing Officer considered "whether the multiple sales were made by the same Sweet Leaf budtender, the budtender's knowledge of making multiple sales to the same customer that exceed the one-ounce [or two-ounce for medical marijuana] limitation, and the proximity in time between multiple sales." Recommended Decision, ¶ 140. The factors considered by the Hearing Officer to determine which sales were in violation of the MED rules are reasonable and thoroughly examined. The Hearing Officer heard testimony from police detectives, reviewed video of the marijuana sales, analyzed receipts of the purchases, and heard testimony from a MED analyst regarding a report compiled by the MED of Sweet Leaf medical sales records. The Hearing Officer then applied each of the factors above to purchases made by undercover police officers and the transfers of marijuana identified in the MED report. Recommended Decision, ¶¶ 141-167. After reviewing this evidence, the Hearing Officer found that the budtenders recognized repeat customers, and the budtender had actual knowledge that he was selling more than one ounce of retail marijuana to the same customer and that the customer possessed more than one ounce of marijuana based on the time between sales (less than 30 minutes). Recommended Decision, ¶ 141. As a result, the Hearing Officer found twenty-six transactions exceeding one ounce for retail marijuana and six transactions exceeding two ounces for medical marijuana. Id. Accordingly, the Director adopts the Hearing Officer's finding that Sweet Leaf's looping scheme resulted in twenty-six transactions in violation of MED Rule R 402(C) and six transactions in violation of M 403(C)(3).

**c. The Hearing Officer's finding of fact that Sweet Leaf's looping sales constituted unlawful sales of marijuana under C.R.S. § 18-18-406(2)(b)(I) is valid and supported by the record.**

The Hearing Officer also found that each of the thirty-two transactions identified above also constitute separate violations of C.R.S. § 18-18-406(2)(b)(I). C.R.S. § 18-18-406(2)(b)(I) makes it a crime to "knowingly dispense, sell, distribute, or possess with intent to . . . sell, or distribute marijuana or marijuana concentrate; or attempt, induce, attempt to induce, or conspire with one or more other persons, to…sell, distribute, or possess with into to . . . dispense, sell, or distribute marijuana or marijuana concentrate" except as otherwise authorized by law. C.R.S. § 18-1-501 provides that "[a] person acts 'knowingly' or 'willfully' with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists . . ." C.R.S. §§ 18-18-406(4) and (5)(a)(I) make it a crime to possess certain amounts of marijuana. When a criminal statute is applied in a civil or administrative proceeding, the burden of proof is by preponderance of the evidence. *Colorado Dog Fanciers, Inc. v. City and County of Denver*, 820 P.2d 644, 649 (Colo. 1991); *Snyder v. Colorado Podiatry Board*, 100 P.3d 496, 502 (Colo. App. 2004).

The sales made by Sweet Leaf budtenders to Denver undercover police officers are only lawful if they were conducted in compliance with MED rules and regulations. As explained above, in each of these transactions, the Hearing Officer found that the budtender knowingly made marijuana sales that were larger than one ounce because the budtender recognized the same customer making multiple purchases of marijuana over a short period of time. Recommended Decision, ¶¶ 141-147; 165-167. Therefore, in each of these transactions the Sweet Leaf budtender violated C.R.S. § 18-18-406(2)(b)(I).

**d. Sweet Leaf was complicit in its customers' possession of unlawful amounts of marijuana in violation of C.R.S. § 18-18-406.**

The Hearing Officer found multiple instances where customers of Sweet Leaf possessed unlawful amounts of marijuana in violation of C.R.S. § 18-18-406. In fact, many of those customers were criminally convicted of those crimes shortly after shopping at Sweet Leaf. Recommended Decision, ¶¶ 151-158. Sweet Leaf contends that it cannot be liable for its customers' unlawful possession of marijuana under a complicity theory because "the City must prove actual intent by [Sweet Leaf]." Objections, p. 8.

C.R.S. § 18-1-603 is generally applicable to all state crimes, and provides that "[a] person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, abets, advises, or encourages the other person in planning or committing the offense." The Colorado Supreme Court has held that only "knowledge by the complicitor that the principal is engaging in, or about to engage in, criminal conduct" is required to establish "intent to promote or facilitate the commission of the offense." *People v. Wheeler*, 772 P.2d 101, 103–04 (Colo. 1989).

Sweet Leaf budtenders recognized repeat customers and were aware of the one ounce marijuana limit as evidenced by the notice they provided to customers. Recommended Decision, ¶ 75, 87, 93, 139. With this knowledge budtenders continued to sale marijuana to customers. Recommended Decision, ¶¶ 37, 40, 43, 56, 59, 68. In many instances, employees affirmatively directed these customers that they could purchase multiple ounces if they left the premises, went to their cars, and then returned to purchase more marijuana. Recommended Decision, ¶¶ 18, 28, 82. The Hearing Officer determined that Sweet Leaf employees knew that customers possessed more than an ounce of marijuana when they sold them additional ounces and actively aided and abetted illegal possession of marijuana. Recommended Decision, ¶ 149. Accordingly, the Director concludes Sweet Leaf was complicit in its customer's unlawful possession of marijuana.

**2. The Hearing Officer properly found that revocation is an appropriate penalty pursuant to D.R.M.C. § 32-22(4), (5), and (8).**

The Denver Retail Marijuana Code, §§ 6-200 through 6-220, article V, chapter 6 of the Denver Revised Municipal Code (the "D.R.M.C."), governs the licensing of retail marijuana businesses in the City and County of Denver. The Denver Medical Marijuana Code, §§ 24-501 through 24-515, article XII of chapter 24 of the D.R.M.C., governs the licensing of medical marijuana businesses in the City and County of Denver. Disciplinary actions against retail marijuana business licenses are subject to D.R.M.C. § 6-219, and disciplinary actions against medical marijuana businesses licenses are subject to D.R.M.C. § 24-514. Both ordinances incorporate the provisions of D.R.M.C. chapter 32 for suspension, revocation and other licensing sanctions. Having found that Sweet Leaf's looping scheme violates state law and that Sweet Leaf permitted violations of state law on its licensed premises, the Hearing Officer correctly found that revocation or suspension is an appropriate penalty pursuant to D.R.M.C. § 32-22(4), (5), and (8).

Sweet Leaf argues that the Director may only consider D.R.M.C. § 32-22(8) in determining whether to discipline Sweet Leaf because subsections (4) and (5) were not stated in the City's complaint. Pre-Hearing Brief, ¶ 7; Hearing Recording, April 10, 2018 2:50 PM. However, due process only requires that Sweet Leaf is given "adequate notice of opposing claims, a reasonable opportunity to defend against

such claims, and a fair and impartial decision." *Davis v. State Board of Psychologist Examiners*, 791 P.2d 1198 (Colo.App.1989). Additionally, "the only matters an administrative board may properly consider at a quasi-judicial hearing are those included in the notice upon which the hearing is based." *Spedding v. Motor Vehicle Dealer Bd.*, 931 P.2d 480, 485 (Colo. App. 1996), *as modified on denial of reh'g* (June 20, 1996), *cert grant* (Jan. 27, 1997). The Order to Show Cause issued in this matter cites D.R.M.C. § 32-22 as the basis for discipline of Sweet Leaf's licenses, not just subsection (8) of D.R.M.C. § 32-22. The subsections identified by the Hearing Officer to revoke Sweet Leaf's licenses were subsections (4), (5), and (8) which provide as follows:

> In addition to any other penalties prescribed by the Revised Municipal Code, the director may, on his own motion or on complaint, and after investigation and a show-cause hearing at which the licensee shall be afforded an opportunity to be heard, suspend or revoke any license previously issued by him for any violation of any of the following provisions, requirements, or conditions:
>
> (4) The licensee, either knowingly or without the exercise of due care to prevent the same, has violated any terms of the provisions pertaining to the license or any regulation or order lawfully made under and within the authority of the terms of the provisions relating to the license;
>
> (5) Any fact or condition exists which, if it had existed or had been known to exist at the time of the application for such license, would have warranted the director in refusing originally to issue such license;
>
> (8) The licensee, or any of the agents, servants or employees of the licensee, have violated any ordinance of the city or any state or federal law on the premises or have permitted such a violation on the premises by any other person; provided, however, this paragraph shall not apply to permitted behavior on the premises concerning the possession, consumption, display, or use of cannabis or cannabis accessories as may otherwise be permitted by the Revised Municipal Code or state law;

**a. The Hearing Officer's conclusion of law that Sweet Leaf is liable for the conduct of its employees pursuant to D.R.M.C. § 32-22(8) is valid and supported by the record.**

Sweet Leaf contends that the Hearing Officer "created an unsupported finding that Respondents' owners *directed* a looping operation," (emphasis added) and that "no such evidence was presented at the Hearing." Objections, p. 3. Contrary to Sweet Leaf's objections, the Hearing Officer did not improperly rely on the City's theory of complicity to impose liability on Sweet Leaf. Objections, p. 7. The Hearing Officer relied on local laws governing the suspension or revocation of a license.

It is irrelevant whether Sweet Leaf's owners directed the looping operation; all that is necessary is that Sweet Leaf, or any of its *agents, servants or employees, have violated or permitted* a violation on the licensed premises. D.R.M.C. § 32-22(8). Moreover, the acts of Sweet Leaf's employees are imputed to the licensee pursuant to D.R.M.C. § 32-30(b). That provision states that "*any act* or omission committed by any employee, agent, or independent contractor that occurs in the course of his or her employment,

agency, or contract with the licensee *shall be imputed to the licensee* or permittee for purposes of imposing any suspension, revocation or other sanction on the licensee or permittee" (emphasis added).

Sweet Leaf employees violated MED Rules M 403(D) and R 402(C)(3) when they made twenty-six sales exceeding the one-ounce limit for retail marijuana and six sales exceeding the two-ounce limit for medical marijuana. These actions violate 32-22(8), and are therefore grounds for revocation. Sweet Leaf employees violated C.R.S. § 18-18-406(2)(b)(I) when they knowingly sold marijuana in amounts not otherwise permitted under state law. These actions also violate 32-22(8), and are therefore grounds for revocation. Sweet Leaf was complicit in its customer's unlawful possession of marijuana in violation of 18-18-406(4) and (5)(a). These actions also violate 32-22(8), and are therefore grounds for revocation.

Sweet Leaf employees also permitted customers to possess amounts of marijuana in violation of C.R.S. § 18-18-406(2)(b)(I). D.R.M.C. § 32-30(a) provides that a "licensee . . . shall be deemed to have permitted an act or condition if a reasonable licensee . . . would have been aware of the act or condition and taken action to stop the act or eliminate the condition." As stated above, Sweet Leaf employees recognized repeat customers and advised them that they could continue purchasing marijuana if they left the premises, placed the marijuana in their car, and then returned. Possession of marijuana is not limited to possession on the person, but also to places that are at least partially under the person's dominion or control, including their house or car. *People v. Vigil*, 489 P.2d 593, 595-96 (Colo. 1971). Sweet Leaf employees failed to take action to stop illegal possession. Instead, as stated above, Sweet Leaf affirmatively aided customers in possessing unlawful amounts of marijuana. The City submitted evidence showing that on various dates several Sweet Leaf customers were found to be in possession of more than one ounce of marijuana, and in several cases numerous pounds of marijuana. In the most extreme case, a Sweet Leaf customer was found to be in possession of 2.16 pounds of marijuana in his vehicle and 7.46 pounds of marijuana in his residence. Recommended Decision, ¶ 151. Sweet Leaf's actions have resulted in numerous customers possessing unlawful amounts of marijuana and these same customers illegally reselling said marijuana. These actions are not the actions of a "reasonable licensee." Therefore, these actions violate 32-22(8), and are therefore grounds for revocation.

The Director finds that the record supports the Hearing Officer's conclusion that Sweet Leaf's owners directed the looping scheme and, therefore, that the owners are liable for the violations above. Internal communications sent by Sweet Leaf's Retail Operations Manager, Ashley Goldstein, directed employees to encourage looping. Recommended Decision, ¶ 84. Ms. Goldstein instructed employees not to say anything when they recognized loopers, and only provide customers a notice stating that it is illegal for a person to possess more than one ounce of marijuana. Recommended Decision, ¶ 87. The Hearing Officer heard testimony from Mr. Stephen Bratten, a Special Agent with the Colorado Department of Revenue who interviewed Sweet Leaf's District Manager, Rachel Martinez. Recommended Decision, ¶ 88. In her interview, Ms. Martinez stated that the practice of looping was instituted by a Sweet Leaf vice president in 2016. Recommended Decision, ¶ 89. Prior to July 2016, Sweet Leaf restricted sales of retail marijuana to one ounce per day per customer. Id. Ms. Martinez stated that she took direction from the three owners of Sweet Leaf, that she and the owners participated in weekly meetings in which looping was discussed, and that the three owners encouraged and directed the practice of looping at all dispensaries. Recommended Decision, ¶ 89. This testimony was corroborated by interviews of twenty-two Sweet Leaf employees, four security guards and a confidential informant. Recommended Decision, ¶¶ 92-97; 107-108. One of the employees, Leanne Henley, stated that "Sweet Leaf owners, Christian Johnson and Anthony Sauro, have come into the Walnut Street dispensary and told her that looping was

okay." Recommended Decision, ¶ 95. For the reasons above, the Director adopts the Hearing Officer's conclusion that Sweet Leaf's three owners had knowledge of, and directed, its looping scheme.

**b. The Hearing Officer's conclusion that Sweet Leaf's licenses should be revoked pursuant to D.R.M.C. § 32-22(5) is valid and supported by the record.**

D.R.M.C. § 32-22(5) provides additional grounds to revoke Sweet Leaf's licenses. That provision authorizes the Department to revoke a license on the same grounds that would justify the denial of the license at the time that the application was originally submitted to the Department. Recommended Decision, ¶ 169-170. Therefore, the Director rejects Sweet Leaf's argument that the Hearing Officer "improperly considered health, safety, and welfare." Objections, p. 7. The standards for denial of an application for a retail marijuana store or medical marijuana center authorize the Director to deny an application if a medical marijuana center at the same location "has been previously operated in a manner that adversely affects the public health, welfare, or safety of the immediate neighborhood" or if the issuance of the license "will adversely impact the health, welfare, or public safety in the neighborhood." *See* D.R.M.C. §§ 6-212(c)(2)c. and d., and 24-508.5(c)(2)c. and d.

The Hearing Officer found that the criminal activity occurring at Sweet Leaf dispensaries "has an obvious negative impact on the health, safety, and welfare of the surrounding neighborhood." Recommended Decision, ¶ 173. In addition, Sweet Leaf's residential and business neighbors testified that they observed looping being practiced by various out-of-state customers. Recommended Decision, ¶ 126-129. They observed public consumption of marijuana by Sweet Leaf customers, employees and security guards. Recommended Decision, ¶ 175. They testified that they felt threatened by the confrontational and disrespectful behavior exhibited by Sweet Leaf customers and employees. Id. Residents testified that it was not safe for their children and grandchildren to play outside, and one resident stated that she did not feel safe in her own home. Id. Both residential neighbors also testified that they were so adversely affected that they considered moving. Recommended Decision, ¶ 126-127. However, all these problems stopped when Sweet Leaf's licenses were summarily suspended in December 2017. Recommended Decision, ¶ 175-176. The Director adopts the Hearing Officer's conclusion that all of the issues described by Sweet Leaf's neighbors demonstrate an obvious negative impact on the health, safety, and welfare of the neighborhood which was caused by Sweet Leaf. Recommended Decision, ¶ 177. Such adverse impact on the health, safety, and welfare of the neighborhood would have been grounds for denial of all the medical marijuana center and retail marijuana store licenses if these facts and conditions had been known at the time of original licensure, pursuant to D.R.M.C. §§ 6-212(c)(2)c. and d., and 24-508.5(c)(2)c. and d. Accordingly, the Hearing Officer properly found that Sweet Leaf's licenses should be revoked pursuant to D.R.M.C. § 32-22(5).

**c. The Hearing Officer's conclusion that all of Sweet Leaf's licenses should be revoked pursuant to D.R.M.C. § 32-22(4) is valid and supported by the record.**

Finally, the Director finds that D.R.M.C. § 32-22(4) authorizes revocation of all twenty-six of Sweet Leaf's Denver licenses, not just revocation of the medical marijuana center and retail marijuana store licenses. Sweet Leaf contends that the Recommended Decision "erroneously recommends revocation of all of [Sweet Leaf's] business licenses—including cultivation facilities and products manufacturing facilities" based on statutes that only apply to marijuana centers and stores." Objections, p. 6. The Director adopts the Hearing Officer's finding that D.R.M.C. § 32-22(4) authorizes the revocation

of a license where the same licensee has violated any regulation related to the license on or off the licensed premises. Recommended Decision, ¶ 196. Evidence and testimony at the hearing make clear that marijuana sold by Sweet Leaf was grown and produced in cultivation and product manufacturing facilities commonly owned by Sweet Leaf's three owners. There were 5,554.98 pounds of medical marijuana sold in looping transactions, and the gross sales revenue totaled $6,779,795.06, between June 1, 2016 and December 13, 2017. Retail marijuana sales ranged from $5,000,000 to $10,000,000 and 30-50% of Sweet Leaf's revenue was from looping. Sweet Leaf's cultivation and product manufacturing facilities have benefitted directly from Sweet Leaf's illegal looping scheme in violation of state law. Therefore, D.R.M.C. § 32-22(4) provides grounds for the revocation of all Sweet Leaf's licenses.

**3. The Hearing was not a trial by ambush, and the Hearing Officer did not admit inadmissible evidence.**

Sweet Leaf makes two primary objections to the method in which the Hearing was conducted. First, without citing any case law to support its claim, Sweet Leaf contends that the Hearing "was a trial by ambush." Objections, p. 4. Further, Sweet Leaf argues that the Hearing Officer admitted and considered "a plethora of inadmissible evidence" and failed to note its contemporaneous objections in the Recommended Decision. Id.

Sweet Leaf's "trial by ambush" claim is properly characterized as a claim that its right to procedural due process was violated. The Department preserved Sweet Leaf's due process rights by providing notice of the Hearing and affording Sweet Leaf an opportunity to be heard. *Tepley v. Pub. Employees Ret. Ass'n*, 955 P.2d 573, 578 (Colo. App. 1997); *Douglas Cty. Bd. of Comm'rs v. Pub. Utilities Comm'n of State of Colo.*, 829 P.2d 1303 (Colo.1992); *Feeney v. Colorado Ltd. Gaming Control Comm'n*, 890 P.2d 173 (Colo. App.1994). Administrative hearings are not subject to strict compliance with the rules of civil procedure and Sweet Leaf fails to provide any law requiring parties to turn over evidence prior to an administrative disciplinary proceeding. *Sclavenitis v. City of Cherry Hills Vill. Bd.*, 751 P.2d 661, 663 (Colo. App. 1988) (stating that administrative proceedings need not be conducted according to strict rules of procedure and evidence). The Order to Show Cause issued by the Department on January 2, 2018 provided notice to Sweet Leaf of the charges that were being brought against it, and the D.R.M.C. provisions under which the Department sought disciplinary action against Sweet Leaf's license. Also, Sweet Leaf had adequate opportunity to cross-examine each of the City's witnesses, object to the introduction of evidence and testimony, present contradictory evidence, and subpoena witnesses. *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122, 125 (Colo. App. 1992).

Sweet Leaf claims that the City had no requirement to turn over evidence in advance and that the City turned over evidence "on the eve of the hearing." Sweet Leaf does not allege any bad faith on the part of the City's counsel. In fact, Sweet Leaf recognizes "that the City's counsel made their best efforts to turn over the evidence as quickly as they could." Objections, p. 4. *See People v. Robias*, 193 Colo. 496, 501 (1977) (The exclusionary rule should not to be magnified to bring about injustice. However, a different result could occur in cases where there is bad faith). While the Order issued by the Department on March 6, 2018 did not provide deadlines, it encouraged the parties to exchange discovery, exhibit lists, and witness lists at their earliest convenience. Upon review of the record, the Director finds that the City provided Sweet Leaf with discovery by March 7, 2018, a week before the Hearing. Response to Objections, p. 3. If Sweet Leaf needed more time to prepare its case and review the City's evidence, the available remedy was to seek a continuance of the Hearing. In fact, the Department had already granted

one continuance to Sweet Leaf on January 10, 2018 due to the anticipated length and magnitude of the proceeding, and there was no indication that a second continuance would have been denied. Accordingly, the Director is not persuaded by Sweet Leaf's argument that the hearing was a trial by ambush or that its procedural due process rights were violated. Rather, Sweet Leaf failed to pursue an available remedy that could have provided it with more time to prepare for the Hearing.

Sweet Leaf also argues that the Hearing Officer admitted inadmissible evidence. Objections, p. 4. Sweet Leaf objects to the admission of hearsay statements made by Sweet Leaf customers who were arrested for having unlawful amounts of marijuana in their possession. Objections, p. 4-5. Sweet Leaf also objects to the admission of hearsay statements made by security guards that provided security services to Sweet Leaf. Objections, p. 4-5. Finally, Sweet Leaf contends that it was deprived of any opportunity to cross-examine persons whose interviews were entered into evidence. Objections, p. 5-6.

The hearing before the Department is primarily a fact-finding proceeding, and therefore, there is flexibility in the admission of evidence. *See Colo. Dept. of Rev, Motor Veh. Div. v. Kirke*, 743 P.2d 16, 21 (Colo. 1987). Hearsay evidence does not violate due process and is admissible in administrative hearings if the hearsay is sufficiently reliable and trustworthy and if the "evidence possesses probative value commonly accepted by reasonable and prudent persons in conduct of their affairs." *Indus. Claims Appeals Office v. Flower Stop Mktg. Corp.*, 782 P.2d 13, 18 (Colo. 1989). The Colorado Supreme Court has enumerated several factors that provide helpful guidance, but not a mandatory checklist, for determining whether evidence is reliable, trustworthy, and probative. Id. These factors include: (1) whether the statement was written and signed; (2) whether the statement was sworn to by the declarant; (3) whether the declarant was a disinterested witness or had a potential bias; (4) whether the hearsay statement is denied or contradicted by other evidence; (5) whether the declarant is credible; (6) whether there is corroboration for the hearsay statement; (7) whether the case turns on the credibility of witnesses; (8) whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; and, finally, (9) whether the party against whom the hearsay is used had access to the statements prior to the hearing or the opportunity to subpoena the declarant. Id. If the hearsay evidence is reliable, trustworthy, and probative, then the evidence can constitute substantial evidence to support an administrative agency's decision. Id.

Sweet Leaf objects to the Hearing Officer's admission of statements made by Sweet Leaf customers, including: Joseph Scott, Adama Njie, and Juan Montez. Sweet Leaf argues that the Hearing Officer admitted these hearsay statements under the exception for statements against penal interest in CRE 804(b)(3) without any discussion or evidence of whether these individuals were in fact unavailable. Objections, p. 4. The Director concludes that regardless of whether these individuals were unavailable, the Hearing Officer properly determined that their statements were sufficiently reliable, trustworthy, and probative under the standard identified in *Flower Stop* to be admitted. All of the statements were made by Sweet Leaf customers after they were advised of and waived their Miranda rights. Recommended Decision, ¶¶ 18, 28, 51. Each of the customers stated that Sweet Leaf advised them that if they left the dispensary after each purchase and put their marijuana in their car, then they could return for additional purchases. The statements were corroborated by substantial evidence introduced at the Hearing including: testimony of undercover police officers who conducted surveillance operations at Sweet Leaf stores, footage from High Activity Location Observation ("HALO") cameras installed outside Sweet Leaf locations, photographs of marijuana containers seized from the customers' vehicles pursuant to search warrants, receipts of marijuana purchases, the customers' guilty pleas to class four felonies for possession

of marijuana, and testimony from neighbors, Sweet Leaf employees, and security guard witnesses. Recommended Decision, ¶¶ 15-20, 26-30, 49-52. Sweet Leaf had access to these statements prior to the hearing, and at least a month prior to their case in chief (which did not start until April 10, 2018) and could have subpoenaed each of these witnesses. Upon review of the factors identified in *Flower Stop*, the Director finds that the Hearing Officer properly admitted each of these statements.

Sweet Leaf also objects to the Hearing Officer's admission of statements made by security guards that provided security services to Sweet Leaf. Objections, p. 5. Sweet Leaf contends that the security guards are not employees of Sweet Leaf and are "in fact employees of SASS Security—a company entirely separate from [Sweet Leaf]" and that "the SASS Security Guards worked for SASS, reported to SASS, and did not take direction from [Sweet Leaf]." Id. The record supports a finding to establish that the security guards are, at the very least, agents of Sweet Leaf. Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *City of Aurora ex rel. Util. Enter. v. Colorado State Eng'r,* 105 P.3d 595, 622 (Colo. 2005), *as modified on denial of reh'g* (Feb. 14, 2005). In one written statement, Victor Olea-Bentancour, a SASS security officer, brought his concerns regarding looping to his SASS supervisor. His supervisor told him to follow the directions from Sweet Leaf's managers and "[w]e need to keep [Sweet Leaf] happy." Exhibit C-160. At times, Sweet Leaf managers would get upset and even move security guards who argued with them over the rules. Id. Security guards also complied with directions from Sweet Leaf employees and managers to instruct customers to move their vehicles outside of camera view before returning to purchase more marijuana. Recommended Decision, ¶¶ 51, 56, 59, 98-105. Sweet Leaf's internal meeting notes discuss the termination of a SASS security guard and the establishing of security protocols. Exhibit C-158. In any event, the Director concludes that the Hearing Officer properly admitted the statements under *Flower Stop* as the statements are corroborated by the evidence above, and the Hearing Officer found that the statements are reliable, trustworthy, and probative. Recommended Decision, ¶ 106.

Lastly, Sweet Leaf argues that it was deprived of any opportunity to cross-examine persons who made taped statements "in order to determine their credibility, potential bias, trustworthiness or competence to testify regarding relevant facts." Objections, p. 5. The primary purpose of an administrative hearing before the Department is to determine the facts. Contrary to Sweet Leaf's arguments, the City is not required to call interviewees as in-person witnesses at the hearing and hearsay statements may still be reliable, trustworthy and probative even if they are not given under oath. Id. In *Flower Stop*, the Colorado Supreme Court found that hearsay evidence is admissible in administrative hearings, and one of the factors is whether the party against whom the hearsay is used has access to the statements prior to the hearing or the opportunity to subpoena the declarant. Sweet Leaf first received discovery on March 7, 2018, a week before the hearing, and presented its case in chief on April 10, 2018, almost a month after the first hearing date. Sweet Leaf had ample time between receipt of discovery and beginning of their case in chief to review all of the City's evidence and subpoena any of the witnesses interviewed by the City. As described above, the Director finds that Sweet Leaf had the opportunity to seek another continuance if it needed more time to prepare, and Sweet Leaf's failure to pursue this available remedy does not require the Director to reject the Hearing Officer's evidentiary rulings. Upon review of the entire record, including the Recommended Decision, objections, responses, and subsequent filings, the Director finds that the Hearing Officer properly admitted evidence at the hearing and conducted the hearing fairly.

**4. The fact that the Hearing Officer did not summarize Respondent's witness testimony and relevant evidence is harmless.**

Sweet Leaf claims that the "Director cannot rely on the Recommended Decision" because the Hearing Officer "meticulously summarizes the City's witness testimony and evidence in a light most favorable to the City, without discussing material points that [Sweet Leaf] elicited on cross-examination, Respondent's witness testimony or its relevant evidence." Objections, p. 7. Sweet Leaf argues that the Recommended Decision "erroneously gives no weight to Respondents' witnesses, resulting in an arbitrary and capricious recommendation," because the Hearing Officer "merely states the identity of Sweet Leaf's witnesses, but fails to summarize any of their testimony or analyze their testimony with respect to the material issues in the case (sic)." Objections, p 8.

D.R.M.C. §§ 6-204(b) and 24-505 authorize the Director to appoint a Hearing Officer to conduct hearings and "to consult with the director with respect thereto, and to certify the record or a summary thereof as required by the director along with the Hearing Officer's recommended findings, conclusions and decision." Although it is not applicable to local proceedings, the Colorado Administrative Procedure Act provides guidance. The Act states that any findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by a Hearing Officer shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence. C.R.S. § 24-4-105(15)(b). Nonetheless, a fair hearing in accordance with due process requires that the administrative officer who decides, but does not personally hear the evidence, must read and consider the evidence adduced in her absence. *Tepley v. Pub. Employees Ret. Ass'n*, 955 P.2d 573, 579 (Colo.App 1997). In response to Sweet Leaf's objections, the Director has reviewed the recorded proceedings, and provides the following summary, findings, and conclusions.

Sweet Leaf called three witnesses to provide testimony in support of their case: Ms. Marley Bordovsky, Mr. Jordan Wellington, and Mr. Sam Kamin. Ms. Bordovsky is the Director of the Prosecution and Code Enforcement (PACE) Section of the Denver City Attorney's Office (the "CAO"). Hearing Recording, April 10, 2018 9:23 AM. She testified that the MED has issued a position statement regarding the enforcement consequences of looping. Hearing Recording, April 10, 2018 9:25 AM. Ms. Bordovsky further indicated that the Denver Office of Marijuana Policy has not issued a bulletin stating that multiple transactions in one day constitute the sale of more than an ounce. Hearing Recording, April 10, 2018 9:26 AM. When asked whether the CAO had ever sent a notice to Sweet Leaf regarding the legality of looping, Ms. Bordovsky indicated that the CAO has not and would not have sent such a notice. Hearing Recording, April 10, 2018 9:27 AM. Ms. Bordovsky was unsure whether the City stated any position on the issue at its annual marijuana symposium, or whether the Department of Excise and Licenses had sent any kind of notice to Sweet Leaf regarding the legality of looping. Hearing Recording, April 10, 2018 9:27 AM.

Mr. Jordan Wellington is a professor of law at the University of Denver; the Vice President and Director of Compliance at Vincente Sederberg; and the Chief Compliance Officer of Simplifia, a regulatory compliance software for marijuana companies and ancillary businesses. Mr. Wellington first testified about his general knowledge of looping, stating that "looping is a colloquial term used to describe a situation where someone makes multiple purchases of cannabis over a period of time." Hearing Recording, April 10, 2018 9:40 AM. Mr. Wellington stated that while he has an understanding of looping as a concept, he has no specific knowledge of looping activities at any particular business. Recording at

9:41. Mr. Wellington also stated later that he was not aware of any other state or local law enforcement actions against a business for looping activities. Hearing Recording, April 10, 2018 10:07 AM.

Mr. Wellington testified that he previously worked for the MED, where he was responsible for developing marijuana policy and drafting rules and regulations, including Rule R 402. Hearing Recording, April 10, 2018 9:39 AM. Mr. Wellington testified about the history of Rule R 402, stating that the MED initially promulgated the rule in 2013, and that revisions commenced during the summer of 2017. Hearing Recording, April 10, 2018 9:41-42 AM. Mr. Wellington testified that he personally participated in the working group meetings where the revisions to rules, including Rule R 402, were discussed. Hearing Recording, April 10, 2018 9:43 AM. Specifically, Mr. Wellington testified about the redline edits of Rule R 402 and M 403, which were discussed at meetings that were recorded and open to the public. Hearing Recording, April 10, 2018 9:49-9:51 AM. He explained that the purpose of the redline edits was to clarify the meaning of Rule R 402 and what would be considered a single sales transaction. Hearing Recording, April 10, 2018 9:50-9:52 AM. Mr. Wellington testified about his belief that the MED wanted to end the practice of looping, and that the purpose of revising the rule was to clarify Rule R 402 as a means to that end. Hearing Recording, April 10, 2018 9:53 AM. He also testified about his personal belief that the policing of looping would be difficult. Hearing Recording, April 10, 2018 9:56 AM. Mr. Wellington stated that the working group members discussed whether there should be increased penalties for individuals in possession of more than one ounce and how any rule changes would be communicated to the public. Hearing Recording, April 10, 2018 9:57-58 AM.

Mr. Wellington then testified regarding the MED position statement regarding the definition of a single sales transaction. Hearing Recording, April 10, 2018 9:59 AM. He stated that he was not aware of any other state or local laws or public statements addressing the definition of a single sales transaction, but he was familiar with the position statement released by the MED. Id. He testified that such position statements are issued after a request for guidance, rather than pursuant to rulemaking procedures. Hearing Recording, April 10, 2018 10:01 AM. These position statements, he testified, are considered final agency actions intended to clarify existing law and carry the force and effect of law. Id. Mr. Wellington testified that, in his opinion, the position statement does not provide a useful clarification about how he could advise a potential client regarding the definition of a single sales transaction. Hearing Recording, April 10, 2018 10:04 AM. However, Mr. Wellington later testified that if he were to advise a client on this issue, he would warn the client that there is a risk to enforcement. Hearing Recording, April 10, 2018 10:12 AM. Mr. Wellington further testified that he believed it was possible that the MED would view multiple sales transactions as a single transaction. Hearing Recording, April 10, 2018 10:09 AM. Finally, Mr. Wellington testified that multiple sales transactions in a short period of time could lead to a consumer possessing more than one ounce of marijuana at a given time, and that he does not believe the gifting of marijuana, for example, between such sales transactions, is a common activity. Hearing Recording, April 10, 2018 10:17 AM.

Sweet Leaf's final witness, Mr. Sam Kamin, is a professor of law at the University of Denver. Mr. Kamin first testified about the history of retail marijuana legalization in Colorado, beginning with the passage of Amendment 64 in the fall of 2012 and describing the legal effects of the amendment. Hearing Recording, April 10, 2018 1:31-35 PM. Mr. Kamin described the creation of a legal licensing scheme at the state level for the sale, cultivation, and manufacturing of marijuana and marijuana products. Id. Mr. Kamin also described the need for rulemaking by the MED after enabling legislation was passed. Hearing Recording, April 10, 2018 1:36 PM. Mr. Kamin stated that the revision of Rule R 402 was the first time

the MED limited, by rule, the number of sales transactions that were permitted on a single day. Hearing Recording, April 10, 2018 1:37 PM. Finally, Mr. Kamin testified that Sweet Leaf had contacted him for his legal opinion on looping, and that Sweet Leaf was compensating him for his presence, his testimony, and his representation of Sweet Leaf in this matter. Hearing Recording, April 10, 2018 1:45-47 PM.

Much of Sweet Leaf's witness testimony details the history of retail marijuana legalization and the rulemaking process, and provides little more. Ms. Bordovsky's testimony simply indicates that the City has not issued, and would not issue, a position statement on the legality of looping. Mr. Wellington's testimony provides insight into the rulemaking process for the revision of Rule R 402 and indicates that, despite the lack of a clear definition of "single sales transaction" in Rule R 402, he would still advise a client of potential enforcement consequences for looping activities. Finally, Mr. Kamin's testimony provides the background about retail marijuana legalization in Colorado and a disclosure that he is being compensated by Sweet Leaf. After considering Sweet Leaf's witnesses' testimony, the Director finds that the Hearing Officer's failure to summarize the testimony was harmless because the Hearing Officer's findings of fact in the Recommended Decision are not contrary to the weight of the evidence, even including the above-summarized testimony.

**Therefore, it is ordered that all twenty-six of Sweet Leaf's licenses shall be REVOKED, effective on the date of this Final Decision. All of the medical and retail marijuana and marijuana product at Sweet Leaf's licensed premises identified above is hereby declared to be an illegal controlled substance. Upon the effective date of this Final Decision, Sweet Leaf shall lose any interest in said retail and medical marijuana and marijuana product, and such marijuana and marijuana product shall be destroyed pursuant to C.R.S. §§ 12-43.3-602 and 12-43.4-602 and in compliance with all state laws and regulations. The destruction shall occur no later than fifteen days after the effective date of this Final Decision. This Final Decision constitutes final agency action subject to judicial review in Denver District Court.**

SO ORDERED this 5th day of July, 2018

Ashley Kilroy, Executive Director
Department of Excise and Licenses

## CERTIFICATE OF MAILING

The undersigned hereby states and certifies that one true copy of the foregoing Final Decision was sent via mail and email, on the 5 day of July, 2018 to the following:

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