

DISTRICT COURT, CITY AND COUNTY OF DENVER,
COLORADO
1437 Bannock St.
Denver, CO 80202

Plaintiffs:

AJS EVANS, LLC, a Colorado limited liability company;
AJS FEDERAL, LLC, a Colorado limited liability
company; FEDERAL CORRIDOR, LLC, a Colorado
limited liability company; HERBAL WELLNESS, a
Colorado limited liability company; SWEET LEAF, LLC,
a Colorado limited liability company; DGP WALNUT,
LLC, a Colorado limited liability company; DGP 38TH,
LLC, a Colorado limited liability company; DGP SMITH,
LLC, a Colorado limited liability company; DGP ELATI,
LLC, a Colorado limited liability company,

v.

Defendants:

CITY AND COUNTY OF DENVER through its
Department of Excise & Licenses.

Attorneys for Plaintiffs:

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Case Number:

Div.:

**PETITION FOR STAY OF AGENCY ACTION
PURSUANT TO C.R.S. §§ 12-43.3-602 & 12-43.4-602**

Plaintiffs AJS Evans, LLC, a Colorado limited liability company, AJS Federal, LLC, a
Colorado limited liability company, Federal Corridor, LLC, a Colorado limited liability company,
Herbal Wellness, a Colorado limited liability company, Sweet Leaf, LLC, a Colorado limited

liability company, DGP Walnut, LLC, a Colorado limited liability company, DGP 38TH, LLC, a Colorado limited liability company, DGP Smith, LLC, a Colorado limited liability company, and DGP Elati, LLC, a Colorado limited liability company, (collectively "*Sweet Leaf*" or "*Plaintiffs*"), through undersigned counsel, hereby submit this Petition for Stay of Agency Action Pursuant to C.R.S. §§ 12-43.3-602 & 12-43.4-602 ("*Petition for Stay*" or "*Petition*") stating as follows:

Plaintiffs' undersigned counsel conferred with the Denver Department of Excise and Licenses' ("*Excise and Licenses*") counsel regarding this Petition. C.R.S. §§ 12-43.3-602(5) and 12-43.4-602(5) affords marijuana business licensees only fifteen days to file a petition for stay of agency action after issuance of a final agency order by a licensing authority. However, under C.R.C.P. 106(b), Sweet Leaf has twenty-eight days to file its appeal of the Director of Excise and Licenses Final Decision (respectively the "*Director*" and the "*Final Decision*"). The dissonance between the fifteen-day deadline and twenty-eight day deadline is apparent in the fact that Sweet Leaf is forced to file this Petition for Stay today, when it will file its Rule 106 Appeal in less than two weeks, along with a Motion to Stay under C.R.C.P. 106(a)(4)(V), which essentially will be a duplication of the Denver District Court's efforts. In an attempt to consolidate motions before the court, Sweet Leaf conferred with Excise and Licenses and requested a thirteen-day extension for the deadline of the destruction of its marijuana product, or Petition for Stay, to avoid this conflict between C.R.S. §§ 12-43.3-602 & 12-43.4-602, and C.R.C.P. 106(b), but Excise and Licenses refused to agree to such an extension. Accordingly, Sweet Leaf timely files the instant Petition for Stay.

BACKGROUND

On July 5, 2018, the Director issued her Final Decision in the Matter of the Marijuana Business Licenses Issued to Sweet Leaf. In the Final Decision, the Director declared that the

destruction of Plaintiffs' marijuana and marijuana product shall occur within fifteen days from the date of the Final Decision pursuant to C.R.S. §§ 12-43.3-602 & 12-43.4-602. Pursuant to C.R.S. §§ 12-43.3-602 & 12-43.4-602, Plaintiffs respectfully file this Petition for Stay of Agency Action pursuant to C.R.S. §§ 12-43.3-602(5) & 12-43.4-602(5).

Where a marijuana licensing authority issues a final order requiring the destruction of marijuana product of a marijuana business licensee, the licensee may petition the district court for a stay of that order. C.R.S. § 12-43.3-602(5). Pursuant to statute, "[t]he district court shall promptly rule upon the petition and shall determine whether the licensee has a substantial likelihood of success on judicial review so as to warrant delay of the destruction . . . or whether other circumstances . . . warrant delay of such destruction." C.R.S. § 12-43.3-202(5). Sweet Leaf will be filing its appeal of the Final Decision pursuant to C.R.C.P. 106(a)(4) in less than two weeks, there is a substantial likelihood Sweet Leaf will succeed on its appeal, and the other pertinent factors weigh heavily in Sweet Leaf's favor, as set forth below. *See Romero v. City of Fountain*, 307 P.3d 120 (Colo. App. 2011). Accordingly, Plaintiffs' Petition for Stay should be granted.

LEGAL STANDARD

Whether to grant a stay depends on the circumstances of each case. *Id.*, at 122. A court considers four factors when deciding whether a stay should be granted: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.* The party requesting the stay bears the burden of showing that the circumstances justify granting a stay.

When considering these four factors, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent a stay. *Id.*, at 123. As long as there is more than a mere possibility of success on the merits, significant irreparable harm will be given more weight than the probability of success. *Id.*

ARGUMENT

I. SWEET LEAF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Sweet Leaf has a substantial likelihood of prevailing on the merits of its Rule 106 Appeal pursuant to C.R.C.P. 106(a)(4). A reviewing court is required to set aside a final agency order where an administrative agency applied "an erroneous legal standard" or "misconstrued the law" in reaching a quasi-judicial decision. *See Elec. Power Research Inst., Inc. v. City & Cnty. of Denver*, 737 P.2d 822, 825-26 (Colo. 1987). A court reviews an agency's interpretation of the applicable statutes and regulations *de novo*. *See Stell v. Boulder Cty. Dep't of Soc. Servs.*, 92 P.3d 910, 915 (Colo. 2004). The court will reverse an administrative agency's legal determination if the agency erroneously interpreted the law. *See McClellan v. Meyer*, 900 P.2d 24, 29 (Colo. 1995).

The sole legal issue before the Director in the licensing proceeding was the interpretation of one state statute and one state regulation: C.R.S. § 18-18-406 and 1 CCR 212-1, Rule 402(C) ("**Rule 402**"). Section 18-18-406 is a generally applicable criminal statute regarding unlawful possession various controlled substances, including marijuana. Rule 402(C) is a regulation governing sales of marijuana by licensed Medical Marijuana Centers and Retail Marijuana Stores, promulgated by the Colorado Department of Revenue, Marijuana Enforcement Division (the "**MED**"). The Director, relying upon a written recommendation of an Excise and Licenses hearing officer, erroneously interpreted these laws and arbitrarily and capriciously revoked Sweet Leaf's licenses.

By revoking Sweet Leaf's licenses based on C.R.S. § 18-18-406 and Rule 402(C), the Director misinterpreted the law. In reaching her Final Decision, the Director found that Sweet Leaf's practice of "looping" (a colloquial phrase in Colorado's licensed marijuana industry referring to purchases from Medical Centers or Retail Stores) violated these two laws. The Director ruled that Excises and Licenses proved that customers of Sweet Leaf were able to purchase more than the legally allowable amount of marijuana during the course of the same day, in violation of the state criminal statute for personal possession and MED Rule 402.

Section 18-18-406 and MED Rule 402(C), however, at the time the alleged conduct occurred, did not bar the sale of more than one ounce of Retail marijuana **per day**—they only barred any single sale of more than one ounce of Retail marijuana. The possession statute makes it a crime to "knowingly dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute marijuana or marijuana concentrate" except as authorized by statute. C.R.S. § 18-18-406(2)(b)(I). MED Rule 402, as it existed at the time of the conduct at issue in the Sweet Leaf matter, provided that a Retail marijuana store and its employees "are prohibited from selling more than one ounce of [marijuana] . . . **during a sales transaction to a consumer**" (emphasis added). MED regulations do not define the terms "sales," "sales transaction" or "transaction."

Subsequent changes to MED Rule 402 demonstrate the fatal legal flaw in the Director's reliance upon the rule to revoke Sweet Leaf's licenses. Amended Rule 402(C), effective January 1, 2018, now provides:

A Retail Marijuana Store and its employees are prohibited from Transferring more than one ounce of Retail Marijuana flower or its equivalent in Retail Marijuana Concentrate or Retail Marijuana Product **in a single transaction** to a consumer. A single transaction includes multiple Transfers to the same consumer **during the same business day where the Retail Marijuana Store employee knows or reasonably should know that such Transfer would result in that consumer possessing more than one ounce of marijuana.**

Excise and Licenses seeks to penalize Sweet Leaf in an *ex post facto* application of the law that went into effect January 1, 2018, even though the conduct at issue occurred in 2017.

Excise and Licenses did not prove at the hearing that Sweet Leaf or any of its employees sold more than one ounce of Retail marijuana to a customer at any one time. Instead, Excise and Licenses' theory of the case rested on a "complicity theory" that implicated Sweet Leaf in the unlawful conduct of the individual customers who later were found in possession of more than their personal, legally allowed limit under CRS § 18-18-406. Excise and Licenses relied upon a MED Statement of Position, a non-binding agency guidance document, as its primary source of authority for interpretation of Rule 402. The Statement of Position, however, offers no definitive interpretation and no practical guidance for marijuana business licensees.

Further, at the multi-day hearing on Sweet Leaf's licenses, Excises and Licenses abused its discretion by allowing a plethora of inadmissible evidence, and then afforded that inadmissible evidence great weight in reaching a Final Decision. Sweet Leaf objected throughout the hearing, including but not limited to, the grounds of hearsay under CRE 802, hearsay within hearsay under CRE 802, the prejudicial effect outweighs the probative value under CRE 403, irrelevance under CRE 402, and cumulative evidence under CRE 403. Despite the general maxim that the rules of evidence are relaxed in administrative proceedings, the volume and materiality of the inadmissible evidence allowed by Excise and Licenses, over objections by Sweet Leaf, caused significant harm to Sweet Leaf when the Director revoked all of its licenses.

In its appeal of the Final Decision, Sweet Leaf has a substantial likelihood of success in overturning the Director's erroneous legal conclusions and arbitrary revocation of its licenses. The legal issues are relatively narrow: only one statute and one agency rule are at issue. Excise and Licenses will not be demonstrating to this Court why, for example, the revocation of Sweet Leaf's

Medical and Retail Marijuana Cultivation Facility (Grow) Licenses and a Marijuana Infused Products Manufacturing Facility Licenses is warranted for alleged violations of laws regarding personal marijuana possession and/or sales by Medical Centers and Retail Stores to customers.

For the reasons set forth above, and for the grounds to be fully set forth in Sweet Leaf's appeal under C.R.C.P. 106(a)(4), the Final Decision erroneously interpreted the law, misconstrued the evidence, incorporated inadmissible evidence, and is arbitrary and capricious.

II. SWEET LEAF WILL BE IMMEDIATELY AND IRREPARABLY HARMED IF THIS COURT DOES NOT GRANT THIS PETITION FOR STAY.

Excise and Licenses is attempting to order the destruction of all of Sweet Leaf's marijuana and marijuana product (the "*Entirety of the Product*") related to the licenses at issue. The value of the Entirety of the Product totals at least \$7.5 Million. If this Court does not grant this Petition for Stay and Sweet Leaf is forced to destroy the Entirety of the Product, and then Sweet Leaf is ultimately successful on its appeal, Sweet Leaf will be immediately and irreparably harmed.

A moving party seeking a stay satisfies the irreparable harm requirement by demonstrating a danger of real, immediate, and irreparable injury that may be prevented by the requested relief. *Romero*, 307 P.3d at 123. After determining the harm that would be suffered by the moving party if the stay is not granted, the court must then weigh that harm against the harm to the other party if the stay or injunction pending is granted. *Id.*

If the Entirety of the Product were to be destroyed, it would take years for Sweet Leaf to cultivate that amount of product to place it at the status quo of where it is now. Therefore, although the current value of the product is at least \$7.5 Million, this is not a damage that is quantifiable and ascertainable due to the nature of marijuana product and crop and the intense processes and procedures associated with getting the product from initial plant stages to monetizable stages.

Additionally, because the Entirety of the Product includes product from Medical Marijuana Centers, Retail (recreational) Marijuana Stores, Medical and Retail Cultivation Facilities (Grows), and a Marijuana Infused Products Manufacturing Facility, the product is in all different stages of the profitability life cycle such that the true value cannot be determined. Profit margins are additionally uncertain and change constantly and therefore make potential damages unascertainable.

Conversely, Excise and Licenses will not suffer any harm if the stay is granted. Sweet Leaf is already under an Administrative Hold pursuant to 1 CCR 212-1, 1 CCR 212-2, Rules M 1202(B) and R 1202(B), and it has been since December 14, 2017, while the Excise and Licenses hearing process was underway. This Court's grant of the Petition for Stay would only maintain this administrative hold—and therefore maintain the status quo—which would cause absolutely no harm to the city and no harm to the public, but it would cause immediate, immense, and irreparable harm to Plaintiffs.

III. A STAY WILL CAUSE NO INJURY TO ANY PARTIES INTERESTED IN THE PROCEEDING.

Granting this Petition for Stay, and therefore maintaining the status quo under the Administrative Hold currently in effect against Sweet Leaf, will cause no injury to any other party interested in this proceeding. Trial courts have considered this *Romero* factor where a stay would have a clear effect on parties interested, but not involved in, the proceedings. For instance, where a stay of a subpoena order involved alleged violations of the Colorado Consumer Protection Act ("*CCPA*"), the court considered the effect of a stay on all consumers in Colorado. *State v. Vaden Law Firm, LLC*, 2013 WL 8506023 (Denver Dist. Ct. July 29, 2013). The court held that the consumers of Colorado had an interest in the speedy resolution of alleged CCPA violations and declined to stay its subpoena order. *Id.*

Here, there is no party interested in this proceeding that would be injured by a stay. Parties that might be interested in this proceeding include other marijuana businesses and Colorado consumers. Granting this Petition will maintain the status quo under the Administrative Hold, which already prevents Sweet Leaf from selling or distributing its marijuana products. For Colorado consumers and other marijuana businesses, destroying the Entirety of the Product will not change the status quo as it currently exists, nor will it accelerate the resolution of this case on appeal. Granting this Petition will not have any negative effect on any party interested in this proceeding, and it will eliminate the irreparable harm that Sweet Leaf will suffer if the Petition is not granted.

IV. THE GRANTING OF THE STAY WILL NOT DISSERVICE THE PUBLIC INTEREST.

Courts consider whether there are policy considerations that bear on whether a stay should be issued. *Romero*, 307 P.3d at 123. Here, the public interest lies in allowing Plaintiffs the benefit of their full right to appeal without rendering their appeal moot: if a stay is not issued and Plaintiffs are forced to destroy the Entirety of the Product, and Plaintiffs ultimately prevail on appeal, it will be a pyrrhic victory in light of the unquantifiable loss they were forced to suffer with the destruction of the Entirety of the Product.

Furthermore, destroying the Entirety of the Product before appeal will deter licensed marijuana businesses from operating in Colorado, contrary to the expressed desire of the people of Colorado as expressed in Amendment 20 and Amendment 64. The people of Colorado voted to legalize both recreational and medical marijuana, and the laws and regulations pertaining to marijuana were created to facilitate its sale and allow marijuana businesses to effectively operate within the state. Denying a stay here would allow the destruction of at least \$7.5 Million of product after only a local jurisdiction hearing, without any appeal. This would deter marijuana businesses

from operating in Colorado, which would go against the public interest of facilitating the cultivation and sale of marijuana. Granting a stay will not disservice the public interest.

V. EXCISE AND LICENSES DOES NOT HAVE THE AUTHORITY TO ORDER THE DESTRUCTION OF THE RETAIL MARIJUANA PRODUCT.

Excise and Licenses, as a local marijuana licensing authority, only has the authority to order the destruction of **Medical** Marijuana product, not **Retail** Marijuana product. *Compare* C.R.S. § 12-43.3-602 *with* C.R.S. § 12-43.4-602.

C.R.S. § 12-43.3-602, part of the Colorado Medical Marijuana Code, allows "the state or local licensing authority" to order the destruction of marijuana product after a disciplinary action against a business licensee by either licensing authority. In contrast, C.R.S. § 12-43.4-602, part of the Colorado Retail Marijuana Code, only allows "the state licensing authority" to order destruction after the state authority's disciplinary action. The State Licensing Authority is the Colorado Marijuana Enforcement Division (the "**MED**"). MED regulations implementing both the Medical Marijuana Code and the Retail Marijuana Code only allow the **state** licensing authority to order destruction of product (MED). *See* MED Rule M 1203, MED Rule R 1203. In light of the clear differences between these two statutes, Excise and Licenses can only lawfully order the destruction of Sweet Leaf's Medical Marijuana product. It has no authority to order the destruction of Sweet Leaf's Retail Marijuana product. However, this Court should grant a stay of both the Medical and Retail Marijuana product for the above reasons.

CONDITIONS OF STAY

If a stay is granted, "the court shall issue an order setting forth the terms and conditions pursuant to which the licensee may maintain the retail marijuana and retail marijuana product pending judicial review and prohibiting the licensee from using or distributing the retail marijuana or retail marijuana product pending the review." C.R.S. § 12-43.4-602(5). As noted above, all of

Sweet Leaf's Medical and Retail Marijuana in the City and County of Denver is already under an MED Administrative Hold pursuant to 1 CCR 212-1, 1 CCR 212-2, Rules M 1202(B) and R 1202(B), and it has been since December 14, 2017. The Administrative Hold tags all affected product in the state-monitored inventory tracking system, requires Sweet Leaf to physically segregate the product, prohibits Sweet Leaf from selling, transferring, transporting or destroying the product, and requires Sweet Leaf to safeguard the product in full compliance with all MED security requirements.

If the Court grants a stay for the purpose of preventing the destruction of the product before judicial review of Excise and Licenses' agency action revoking the licenses, the Court need not impose any additional conditions, and may direct Sweet Leaf to comply with any and all MED regulations regarding the existing Administrative Hold.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court enter an order staying the Excise and Licenses' agency action, including but not limited to the order therein for the destruction of Plaintiff's Retail and Medical Marijuana and Marijuana Product, pending the outcome of Plaintiff's appeal of the Final Decision pursuant to Colorado Rule of Civil Procedure 106.

DATED: July 20, 2018

Respectfully submitted,

IRELAND STAPLETON PRYOR & PASCOE, PC

*SIGNED ORIGINAL ON FILE AT THE OFFICE OF
IRELAND STAPLETON PRYOR & PASCOE, PC*

/s/ Tom Downey

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