

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

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CASE NUMBER: 2018CV32885

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; and ASHLEY KILROY,
as Director of Department of Excise & Licenses, in her
official capacity.

Attorneys for Plaintiffs:

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▲ COURT USE ONLY ▲

Case Number:

Div.: Ctrm.:

COMPLAINT FOR JUDICIAL REVIEW PURSUANT TO C.R.C.P. 106(a)(4)

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 its undersigned attorneys, hereby submits its Complaint for judicial review pursuant to Colorado Rule of Civil Procedure 106(a)(4), as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiffs are Colorado limited liability companies doing business in Denver, Colorado.

2. Upon information and belief, the City and County of Denver through its Department of Excise and Licenses ("EXL") is the local governmental body commissioned with the responsibility to administer all powers granted, pursuant to Articles 43.3 and 43.4 of Title 12, Colorado Revised Statutes ("C.R.S.") (as amended), the Colorado Medical Marijuana Code and Colorado Retail Marijuana Code, Article V of Chapter 6, Denver Revised Municipal Code, and the Regulations adopted pursuant thereto, to a local licensing authority.

3. Ms. Ashley Kilroy is the Director of EXL (the "Director").

4. This Court has subject matter jurisdiction over this Complaint pursuant to C.R.S. § 24-4-106(4), C.R.S. § 13-6-104, Colorado Constitution Article VI, Section 9, and Rules 57 and 106 of the Colorado Rules of Civil Procedure ("C.R.C.P."), or otherwise.

5. Venue is proper herein pursuant to C.R.C.P. 98(c) because the administrative proceedings giving rise to this action took place in Denver County, Colorado.

GENERAL ALLEGATIONS

6. Sweet Leaf operated licensed medical and recreational marijuana retail stores located within the City and County of Denver.

7. Sweet Leaf operated licensed marijuana cultivation facilities, marijuana-infused products manufacturing facilities, and other medical and recreational marijuana retail stores throughout Colorado.

8. Sweet Leaf held seven Retail Marijuana Store Licenses, five Retail Marijuana Cultivation Facility Licenses, six Medical Marijuana Center Licenses, seven Medical Marijuana Optional Premises Cultivation Licenses, and one Medical Marijuana-Infused Products Manufacturing License in the City and County of Denver (the "Licenses").

9. Amendment 64 legalized the sale of marijuana and marijuana products to consumers in Colorado if, among other things, the seller has a valid license to operate a retail

marijuana store or is acting in his or her capacity as an owner, employee or agent of a licensed retail marijuana store. Colo. Const. art. XVIII, § 16 (4)(b).

10. The Colorado General Assembly enacted Article 43.4 of Title 12 of the Colorado Statutes (the "Retail Marijuana Code"), governing the retail sale of marijuana in Colorado.

11. C.R.S. § 12-43.4-402(3)(a)(I) provides: "A retail marijuana store may not sell more than one ounce of retail marijuana or its equivalent in retail marijuana products . . . during a single transaction to a person."

12. The Retail Marijuana Code does not define the phrases or terms "during a single transaction," "single transaction," or "transaction." *See* C.R.S. § 12-43.4-103; C.R.S. § 12-43.4-402.

13. The Colorado Department of Revenue, Marijuana Enforcement Division ("MED") promulgated regulations pursuant to the Retail Marijuana Code to regulate the sale of marijuana.

14. Prior to January 1, 2018, MED Rule 402 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."

15. Prior to January 1, 2018, the MED's marijuana regulations did not define the terms "sales," "sales transaction" or "transaction."

16. Prior to December 14, 2017 (the "Applicable Period"), the Director alleges that Sweet Leaf sold marijuana or marijuana product to the same customer multiple times in a single day.

17. At no point during the Applicable Period did the Retail Marijuana Code or MED Rule 402 bar the sale of more than one ounce of marijuana to a single consumer per day.

18. At no point during the Applicable Period did Sweet Leaf sell more than one ounce of retail marijuana or marijuana product, or more than the allowable medical marijuana patient limit, to any customer during any individual sale.

19. At no point during the Applicable Period did Sweet Leaf sell marijuana or marijuana product to any customer who had in their possession, at the time of the sale, any other marijuana or marijuana product.

20. The MED amended Rule 402, effective January 1, 2018, to read: "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."

21. On December 14, 2017, before amended MED Rule 402 became effective, EXL issued an Order of Summary Suspension for the Licenses. The Order of Summary Suspension summarily suspended all twenty-six (26) of Sweet Leaf's Licenses, shutting down its business in the City and County of Denver before the commencement of any administrative proceedings.

22. On January 2, 2018, EXL issued an Order to Show Cause requiring Sweet Leaf to appear at a hearing and show cause why the Licenses should not be permanently suspended or revoked, alleging violation of MED Rule 402 and C.R.S. § 18-18-406.

23. The Show Cause Hearing (the "Hearing") was held on March 14, 15, 20, 22, and April 3, 4, and 10, 2018 by a Hearing Officer for EXL, acting as the appointed representative of the Director.

24. On April 30, 2018, the Hearing Officer issued a Recommended Decision recommending that all twenty-six (26) of Sweet Leaf's Licenses should be revoked.

25. Under the Charter of the City and County of Denver, the Director has the exclusive duty to determine whether a duly issued business license should be revoked. *See* D.R.M.C. § 2.7.1.

26. Under the Denver Retail Marijuana Code and Denver Medical Marijuana Code, the Director has the exclusive authority to issue or revoke local marijuana business licenses. *See* D.R.M.C. §§ 6-204(a) and 24-505.

27. The Director may personally conduct hearings on the issuance or revocation of a marijuana license, or may appoint a hearing officer to conduct the hearing and thereafter "consult with" the Director with respect to such hearings. *See* D.R.M.C. §§ 6-204(b) and 24-505.

28. Because the Director did not personally conduct or attend the multi-day Hearing on the revocation of Sweet Leaf's licenses, she had to rely upon the Recommended Decision to accurately summarize the facts and legal arguments presented.

29. During the Hearing, the Hearing Officer admitted hearsay statements from almost every one of the City's witnesses, which are inadmissible under Colorado Rule of Evidence 802. Sweet Leaf timely objected to those statements at the time they were admitted. The Hearing Officer then relied upon those statements in issuing her written Recommended Decision. *See* Recommended Decision, ¶ 18 (discussing Mr. Scott's hearsay statements for which the prejudicial effect outweighed the probative value), ¶ 29 (discussing Mr. Njie's hearsay statements for which the prejudicial effect outweighed the probative value), ¶ 51 (discussing Mr. Montez's hearsay statements for which the prejudicial effect outweighed the probative value).

30. During the Hearing, the Hearing Officer admitted multiple statements of SASS Security Guards, which are employees of a security guard company completely unaffiliated with

Sweet Leaf. These statements were hearsay under C.R.E. 802 and Sweet Leaf timely objected to those statements at the time they were admitted. The Hearing Officer then relied upon those statements in issuing the Recommended Decision. Further, the Hearing Officer erroneously attributed those statements to Sweet Leaf, when the guards were in fact not Sweet Leaf employees or party opponents, and therefore the statements were inadmissible hearsay statements. *See* Recommended Decision, ¶¶ 9, 23, 28, 56, 59, 74, 83, 98, 100, 101, 105, 127, 174.

31. During the Hearing, the Hearing Officer admitted voluminous evidence of taped interviews between the police and Sweet Leaf employees, SASS Security Guards, neighbors, and other persons. These statements were hearsay under C.R.E. 802 and timely Sweet Leaf objected to those statements at the time they were admitted. No attempt was made by the City of Denver (the "City") to call interviewees as in-person witnesses at the hearing. The interviewees did not appear under oath at the Hearing. Sweet Leaf was unable to cross-examine the interviewees to determine their credibility, potential biases, trustworthiness, or competence to testify regarding relevant facts.

32. Throughout the Hearing, the Hearing Officer admitted other evidence over Sweet Leaf's objections, including but not limited to, evidence inadmissible on 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.

33. Throughout the forty-five (45) page Recommended Decision, the Hearing Officer failed to note Respondents' contemporaneous objections, which were made throughout the Hearing.

34. The Recommended Decision misstates the evidence in material ways that adversely affect Sweet Leaf (for example, inaccurately stating that the City's witnesses were unavailable and stating that the SASS security guards were Sweet Leaf security guards or employees).

35. The Recommended Decision 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, Sweet Leaf's witness testimony or its relevant evidence. The Recommended Decision utilizes this imbalanced summary of the Hearing to then make conclusory findings regarding the material legal issues in the case.

36. On July 5, 2018, the Director issued her Final Decision, relying upon and adopting the Hearing Officer's Recommended Decision.

37. 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).

38. 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).

39. 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).

40. In the Final Decision, the Director misinterpreted the law in determining that "a single sales transaction" actually means multiple different sales transactions by a customer during the same business day, despite the plain language of both the Retail Marijuana Code and MED Rule 402 prior to January 1, 2018. Instead, the Director relied upon a MED Statement of Position, a non-binding agency guidance document, as her primary source of authority for her interpretation of MED Rule 402.

41. In the Final Decision, the Director erroneously applied the law when she found that Sweet Leaf violated C.R.S. § 18-18-406, a provision of Colorado criminal law that applies to controlled substances generally. However, C.R.S. § 18-18-433 states that "[t]he provisions of this part 4 [relating to criminal offenses and penalties] do not apply to a person twenty-one years of age or older acting in conformance with section 16 of article XVIII of the state constitution [constitutional provisions relating to lawful Retail Marijuana sales and possession] and do not apply to a person acting in conformance with section 14 of article XVII of the state constitution [constitutional provisions relating to lawful Medical Marijuana sales and possession]." C.R.S. § 18-18-433. Accordingly, under the plain language of C.R.S. § 18-18-433, C.R.S. § 18-18-406 does not apply because Sweet Leaf was acting in conformance with the applicable provisions of the state constitution.

42. In the Final Decision, the Director erroneously applied MED Rule 402 to Sweet Leaf's Licenses for marijuana *cultivation facilities* and marijuana-infused *products manufacturing facilities*. By its plain language, the Rule has no applicability to marijuana licenses other than Retail Marijuana Stores or Medical Marijuana Centers. The Director's decision to revoke Sweet Leaf's cultivation facility and products manufacturing facility licenses, when such facilities have no ability to sell retail or medical marijuana to consumers and where the City made no such allegation, was arbitrary, capricious and an abuse of discretion.

43. Further, the Director erroneously applied D.R.M.C. § 32-22, a Denver ordinance which generally applies to all local business licenses issued by EXL. D.R.M.C. § 32-22 sets forth eight (8) specific grounds for revoking a business license in the City and County of Denver. The Director relied upon a standard of "health, safety and welfare" in revoking the Licenses under D.R.M.C. § 32-22. However, none of the criteria in the ordinance in fact include "health, safety and welfare" considerations. The Director's revocation of the Licenses is therefore unsupported by the applicable law.

44. In the Final Decision, the Director erroneously found Sweet Leaf was complicit in its customers' possession of more than one ounce of marijuana. In order to charge a party with the complicity, the State must charge that party with the same criminal act with which the committing defendant is charged. The Show Cause order does not charge Sweet Leaf with possession of more

than one ounce of marijuana, and therefore the Director could not find Sweet Leaf complicit and exceeded her authority and abused her discretion in finding Sweet Leaf complicit.

45. Plaintiffs' counsel notified Defendants' counsel prior to the Hearing that they had improperly charged a "complicity theory" in the Order to Show Cause and Complaint. Plaintiffs' counsel suggested that Defendants amend their Complaint with the proper charge, but Defendants declined to do so. Plaintiffs' counsel raised the issue again in their Pre-Hearing Brief prior to the Hearing. Plaintiffs' counsel raised the issue again during the Hearing, and provided evidence that the Denver District Attorney amended its separate criminal complaints against Sweet Leaf employees to properly charge under the complicity theory, as proposed by Plaintiffs' counsel.

46. Finally, at the Hearing, Plaintiffs offered Professor Sam Kamin of the University of Denver Law School as an expert witness, in part to explain how the complicity theory works, and to show that it was improperly charged in the Order to Show Cause and Complaint. The Hearing Officer failed to allow Professor Kamin to testify as an expert, and even failed to allow his lay testimony about the Complicity Theory. The Director adopted this erroneous ruling in reaching her Final Decision, which misconstrued the law regarding the complicity theory.

CLAIM FOR RELIEF
(Review Pursuant to C.R.C.P. 106(a)(4))

47. Sweet Leaf realleges and incorporates herein the allegations of the preceding paragraphs as fully set forth therein.

48. At all times relevant hereto, the City and EXL were exercising quasi-judicial functions within the meaning of C.R.C.P. 106 with respect to their actions which are the subject of this Complaint.

49. The City and EXL exceeded their jurisdiction in revoking Sweet Leaf's Licenses.

50. The City and EXL's foregoing actions are contrary to law, unsupported by competent evidence in the administrative record, and arbitrary and capricious. Therefore, the City and EXL abused their discretion in revoking Sweet Leaf's Licenses.

51. Sweet Leaf has no other plain, speedy, and adequate remedy at law. Sweet Leaf has no other legal remedy, nor other ability to appeal the City and EXL's revocation of its Licenses.

WHEREFORE, Sweet Leaf respectfully requests that judgment enter in its favor, and against Defendants, as follows:

- a. Determining that the City and EXL exceeded their jurisdiction and abused their discretion in attempting to revoke Sweet Leaf's Licenses;
- b. Vacating and/or otherwise overturning the Director's Final Decision;

- c. Order that revocation proceedings on the Licenses cease and that the Licenses be reinstated to good standing;
- d. For all recoverable damages, including but not limited to attorney fees for having to file this action, and all other recoverable fees and costs; and
- e. For all such further relief the Court deems appropriate.

DATED: August 2, 2018

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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