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CASE NUMBER:
RG21098348

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA, UNLIMITED JURISDICTION

EMERALD ACRES CORPORATION, a
California corporation, and JOSEPH
NIEVES, an individual

Petitioners,

vs.

CALIFORNIA DEPARTMENT OF FOOD
AND AGRICULTURE (CDFA);
TABATHA CHAVEZ, in her official capacity
as Chief, Compliance and Enforcement
Branch of the CDFA, KAREN ROSS, in her
capacity as Secretary of the CDFA, and Does
1-10,

Respondents.

Case No. _____

**PETITIONERS' UNVERIFIED
PETITION FOR WRIT OF MANDATE
(CCP §1085)**

Date: _____
Time: _____
Judge: _____
Dept: _____

COME NOW PETITIONERS WHO ASSERT AND ARGUE AS FOLLOWS:

1. Petitioners, EMERALD ACRES CORPORATION, a California corporation
("Emerald Acres"), and JOSEPH NIEVES, an individual ("Nieves"), petition this Court for a writ of
mandate under Code of Civil Procedure §1085, directed to Respondents, and by this unverified
petition allege as follows:

2. Petitioners, as lawful cannabis operators in Hayfork, Trinity County, California, are
beneficially interested in the outcome of the questions of law presented in this petition. Respondents
have a ministerial duty to follow the law and provide constitutionally mandated due process and give
Petitioners an appeal hearing on the matters stated herein. Petitioners allege that there is no plain,
speedy, and adequate remedy at law for the matters alleged herein. Petitioners reserve the right to
brief more fully the facts and law germane to this petition pursuant to the briefing schedule ordered
by the court and/or stipulated by the parties.

I. INTRODUCTION & SUMMARY

3. Petitioners have legally operated a cannabis cultivation business with a license from
Respondent California Department of Food and Agriculture (“CDFA”) for almost nine months.
They have invested over \$2,000,000 in the business venture and employ/employed 4 full time
workers. Respondents summarily revoked that license on March 4, 2021 and claim that Petitioners
are entitled to no due process whatsoever including no prior notice, no hearing, and no appeal
pursuant to California Business and Professions Code. Over 9,720 such licenses have been issued
since January 1, 2018. 6,258 of those licenses are for cultivation (issued by CalCannabis Cultivation
Licensing, a division of the CDFa). As of March 2021, 83% of the cultivation licenses are
provisional. These businesses have operated under the licenses for years and have collectively
invested billions of dollars in reliance on them. Those licenses are constitutionally protected property
rights entitled to procedural due process. To the extent that the Business and Professions Code says
otherwise, the Code is unconstitutional generally, and as applied to Petitioners specifically.

II. PARTIES

4. Petitioner EMERALD ACRES CORPORATION (“Petitioner Emerald Acres”) is a
California corporation operating a commercial cannabis business in Hayfork, Trinity County, CA.
Petitioner held Provisional Cannabis Cultivation License #CCL20-0000142, which is the subject of
this Petition.

1 5. Petitioner JOSEPH NIEVES (“Petitioner Nieves”) is an individual and the CEO of
2 EMERALD ACRES CORPORATION.

3 6. Respondent CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE
4 (“CDFA”) is a cabinet-level agency located within the Government of the State of California. CDF
5 has sole authority to license cannabis cultivation businesses in the state of California through
6 CalCannabis Cultivation Licensing.
7

8 7. Respondent TABATHA CHAVEZ is the Chief of the Compliance and Enforcement
9 Branch of the CDFA.

10 8. Respondent Does 1-10 are persons or entities whose true identities are unknown as
11 of the time of the filing of this Petition.

12 9. At all times mentioned in this petition, the above Respondents have been the agencies
13 and officials in charge of administering Petitioners’ provisional license to operate as a commercial
14 cannabis cultivation site in the state of California. Such agencies and officials also have the authority
15 to grant or deny Petitioners’ underlying request for a hearing on Respondents’ putative revocation of
16 Petitioners’ provisional license.
17

18 **III. FACTS**

19 10. On March 30, 2021 Petitioner Nieves received a letter from the Trinity County
20 Planning Department informing him that his Trinity County Cannabis License had been withdrawn
21 due to the revocation of his CDF A license on March 4, 2021. The letter informed Petitioner that the
22 license was revoked due to certain alleged violations during a surprise inspection on December 22,
23 2020. During the time of the inspection, Petitioner Nieves was in the custody of the Trinity County
24 Sheriff’s Department under suspicion of the commission of a crime. Petitioner Nieves, in fact, was
25 found to have not committed any crime by the order of The Honorable Judge Eric L. Heryford
26 (“Judge”) on February 9, 2021.
27
28

11. On April 1, 2021, Petitioner communicated with CDFA by telephone and spoke with an associate about the March 4, 2021, CDFA revocation letter. Petitioner explained the events of the previous December, and the associate advised him to send a detailed letter requesting the restoration of his license due to the extraordinary circumstances surrounding his situation. Petitioner sent a letter and documentation via email in an attempt to appeal the revocation of CalCannabis License CCL-20-0000142. Petitioner explained the circumstances for which he was initially taken into custody and that he was released by judicial order as having not committed a crime.

12. Petitioner is a retired veteran and a former detective, who retired from the New York Police Department. Petitioner abides by the law and was following all of the regulations correctly prior to the date of the CDFA inspection. The circular and conclusory statements of alleged facts in the CDFA revocation letter primarily pertain to violations stemming from Petitioner Nieves' inability to be physically present at the property at the time of the December 22, 2020, inspection for reasons out of Petitioner Nieves' control.

13. Petitioner bought the property at 1478 Hyampom Road, Hayfork CA in January 2019. Following the professional advice of Rachel Wood of Buildaberg Consultants, the required permits and licenses were issued in May 2020, in accordance with the procedures of the Trinity County Cannabis Office. Petitioner's Trinity County Cannabis Cultivation Provisional License number is CCL-2020-356.

14. The construction of certain greenhouses on the licensed premises took place from May to July 2020. At that time, Petitioner was living on both coasts. Petitioner planned to move permanently to California to oversee operations more closely. The outbreak of the COVID-19 pandemic delayed this relocation. Petitioner hired Ricardo Ortiz ("Ortiz") in the month of May 2020, to supervise the farm and cultivation operations, and hired Rachel Wood as the compliance officer. Ortiz appeared to have the necessary experience and ability to advance the purposes of the licensed

1 cultivation operation. Prior to Ortiz' involvement, Petitioner Emerald Acres had a clean record and
2 was in full compliance with regulations.

3 15. On December 10, 2020 at 1:30 p.m. Petitioner Nieves visited the property to meet
4 with Ortiz. When Petitioner Nieves and his associate arrived on the property, they noted several
5 issues with the condition of the property. They also noticed that construction work that Ortiz had
6 reported as finished was incomplete. It became clear that Ortiz was significantly failing to adequately
7 perform the duties of his position with Petitioner Emerald Acres. Petitioner Nieves terminated Ortiz'
8 position on or around December 10, 2021. Petitioner communicated with his compliance officer,
9 Rachel Wood, to explain what happened and obtain her advice. She informed Petitioner that Ortiz
10 called her and told her he was going to burn down the property since he had been terminated. He
11 also told her he would destroy Petitioner's business and make sure that Petitioner would lose his
12 California cannabis license. Ortiz said he would, and did, file false complaints against Petitioner and
13 his business. Additionally, Ortiz said he would ask neighbors to file false complaints against Petitioner
14 Emerald Acres.
15
16

17 16. On or around December 10, 2020, and December 11, 2020, Rachel Wood informed
18 Petitioner that she would send an email to the Trinity County Cannabis Board to explain the extent
19 to which Ortiz had threatened Petitioner Nieves with destroying records, disrupting METRC records
20 and tags, and doing everything in his power to get Petitioner Nieves' licenses revoked. Petitioner
21 Nieves had no idea how much damage Ortiz had done and was planning to do. Petitioner Emerald
22 Acres had been in compliance with applicable regulations throughout this time period. There had
23 never been any issues with an inspection or the corporate documents or records regarding Petitioner
24 Emerald Acres. Rachel Wood also recommended that Petitioner Nieves call the Trinity County
25 Sheriff's Department to report the threats to his life and the threats to burn down his business. On
26 December 11, 2020, Rachael Wood emailed Jeff Dickey of the Trinity County Planning Department.
27 The purpose of the email was to self-report a potential problem and request an inspection to show
28

1 that the property had addressed any issues of non-compliance. While Rachel Wood dealt with the
2 Planning Department, Petitioner Nieves called the Trinity County Sheriff's Department.

3 17. At 2:20 p.m. on December 10, 2020 Deputy Benjamin Spencer arrived to find Ortiz
4 trespassing on Petitioners' property. Ortiz was pounding on Petitioner's truck windshield and
5 threatening to shoot him. Deputy Spencer did not arrest Ortiz but referred him to civil court for a
6 restraining order.
7

8 18. For the next two days, circumstances continued to escalate with an increasingly
9 unstable and violent Ortiz. The circumstances ultimately resulted in a physical confrontation with
10 Petitioner Nieves during which Petitioner Nieves had to use force against Ortiz to protect his own
11 life. That series of events led to Petitioner Nieves' ultimately improper arrest.

12 19. On December 22, 2020 at 9:00 a.m., while Petitioner Nieves was in custody for
13 suspicion of commission of a crime, representatives of CalCannabis, Trinity County Planning
14 Department, Cannabis Division, and Trinity County Deputy Sheriffs caravanned to the premises for
15 an unnoticed inspection and allegedly found violations. The inspectors did not inform Petitioner of
16 the inspection directly, nor would Petitioner have been able to attend the inspection at that time.
17 However, Petitioner's compliance officer could have attended had she been informed in advance.
18 Additionally, some of the purported violations identified in the March 4, 2021, CDFA letter could
19 have been timely, properly addressed.
20

21 20. On February 9, 2021 the preliminary hearing in Petitioner's criminal case was
22 concluded. This hearing resulted in the charges being dismissed. Judge Heryford, the presiding judge,
23 found there was not sufficient cause to believe Joseph Nieves guilty of the alleged offenses in the
24 criminal Complaint.
25

26 21. After the preliminary hearing, the Trinity County Sheriff's Department recognized
27 Petitioner as the true victim of the crimes and conducted an investigation. Petitioner was released
28 from custody and immediately sought to remedy the issues that occurred during the two months he

1 was unable to tend to his business and property. On March 4, 2021 Petitioner's cannabis license was
2 revoked without notification to Petitioner or his compliance officer. No notice was sent requesting
3 remedial actions or asking for any explanation of the events that led to the alleged violations.
4 Petitioner's efforts to comply with all regulations were clearly thwarted by circumstances beyond his
5 control and the supposed factual findings of non-compliance were actually the result of there being
6 no knowledgeable person present during the inspection to respond to the questions of the inspectors
7 and identify the location of records and the like. As a former detective, Petitioner has a strong desire
8 to follow the law and all regulations in both his personal and business dealings.
9

10 IV. LEGAL QUESTIONS AND STANDARD OF REVIEW

11 22. Petitioners allege and argue in the underlying writ petition that Petitioners possess a
12 constitutionally protected property right which Respondents seek to revoke without affording
13 constitutionally mandated due process of law. These arguments are meritorious and present
14 important and undecided issues of law and fact.
15

16 23. Petitioners, therefore, are entitled to a prohibitory injunction that prevents
17 Respondents from taking action and preserves the *status quo ante* until the underlying controversy is
18 resolved. This Court has subject matter jurisdiction over the controversy and personal jurisdiction
19 over Respondents. Petitioners have standing to bring the underlying action.
20

21 V. LEGAL ARGUMENT

22 **A. Petitioners are entitled to ordinary mandamus relief to compel**
23 **Respondents to provide a fair and impartial hearing before an independent**
24 **hearing officer BEFORE revoking their license authorizing them to**
25 **cultivate cannabis issued to them by the CDFA almost a year ago—and to**
26 **undo the CDFA's purported revocation of March, 4, 2021, with which they**
27 **have complied only under protest and duress.**

28 24. Petitioners allege and argue that Petitioners possess a constitutionally protected
property right which Respondents seek to revoke without affording constitutionally mandated due
process of law.

B. The Court has subject matter jurisdiction over the writ petition.

2 25. California Code of Civil Procedure § 1085 states in pertinent part:

3 “A writ of mandate may be issued by any court to any inferior tribunal, corporation, board,
4 or person, to compel the performance of an act which the law specially enjoins, as a duty
5 resulting from an office, trust, or station, or to compel the admission of a party to the use and
6 enjoyment of a right or office to which the party is entitled, and from which the party is
unlawfully precluded by that inferior tribunal, corporation, board, or person.”

7 26. Petitioners request in the underlying writ petition that this Court issue a writ
8 compelling CDFA to take an act required by law *vis* the affording of constitutional procedural due
9 process to Petitioners as relates to their constitutionally protected property right. The Superior Court
10 of Alameda County has authority over the CDFA in this context. Given the parameters of the relief
11 that Petitioners seek herein, that is, that the CDFA provide it due process of law, this Court has
12 subject matter jurisdiction over Respondents.

13 **C. Under the Fourteenth Amendment to the U.S. Constitution, and under**
14 **Article I, § 7(a) of the California Constitution, CDFA is barred from**
15 **depriving Petitioners Emerald Acres and Nieves of their property interest**
in the license, “without due process of law.”

16 27. Once the state government authorizes (or, “licenses”) a person to engage in a
17 business or profession, it has created an entitlement property interest protected from arbitrary
18 deprivation by both the Fourteenth Amendment to the U.S. Constitution and Article I, §7(a) of the
19 California Constitution (collectively, “the Constitutions”). Such property interests are entitled to
20 procedural due process before deprivation: specifically, detailed notice of the grounds for the
21 deprivation and an opportunity to be heard. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v.*
22 *Sinderman* (1972) 408 U.S. 593, 601; *Goldberg v. Kelly*, 397 U.S. 254, 263 n.8; 264 (1970); *Saleeby v. State*
23 *Bar* (1985) 39 Cal.3d 547, 564-65.

24 28. The threshold issue before this Court is whether Petitioners have a property interest
25 in their “provisional” cannabis cultivation license that CDFA issued almost a year ago authorizing
26 them to engage in commercial cannabis activity. This issue is also dispositive because if there is a
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28

property interest, then such property interest is entitled to due process before deprivation. CDFA claims that the license can be revoked without due process implying that Petitioners do not have a property interest. CDFA's justification for this position is that Cal. Bus. & Prof. Code §26050.2(h) states that no due process is required for the revocation of a provisional license. There can be no question that §26050.2(h) cannot preempt the Federal or State constitutions and that the State Legislature does not have the authority to legislate away the constitutional protections of a property interest.

29. Authorization to operate, and to continue operating while meeting evolving regulatory requirements, is no different from the entitlement in any other professional or business license that might be nominally "renewable," but belongs perpetually to the individual or business absent some egregious incurable violation. Vested property rights have value because there is confidence among the people that such rights will be protected by the government, not taken by the government without due process.

D. U.S. (and California) Supreme Court Case Law Recognizes Property Interests in "Entitlements" that "are Created and... Defined by Existing Rules or Understandings that Stem from an Independent Source such as State Law."

30. U.S. Supreme Court case law recognizes property interests in "entitlements" that "are created and... defined by existing rules or understandings that stem from an independent source such as state law." (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577 (emphasis added.) Here, such an "understanding" stems from Cal. Bus. & Prof. Code § 26050.2(a), which creates entitlements by issuing "provisional" licenses identical in every way to permanent (annual) licenses, save for their purported lack of due process protections asserted in subsections (c), (d), (e), and (h). It is subsection (l) that explicitly states that in all other respects the license types are identical.

31. Effective, January 1, 2019, the state legislature created, through Cal. Bus. & Prof. Code § 26050.2, its "provisional" licensing system. Originally intended to last for only a year, it was

then extended through 2021, and the legislature is now considering a bill to extend it through 2027,
which would make for a full decade of temporary and provisional licensing. Cannabis legalization
created a difficult regulatory conundrum: shut down an existing multi-billion-dollar legacy medical-
use industry of thousands of operators and take years to license and re-open it or allow it to continue
operating while simultaneously licensing it. The §26050.2 system is the solution the legislature
devised to that problem.

32. SB 1459, the senate bill that created §26050.2 justified its “urgency” status as follows:

SEC. 4. This act is an urgency statute necessary **for the immediate preservation of the public peace, health, or safety** within the meaning of Article IV of the California Constitution and **shall go into immediate effect**. The facts constituting the necessity are: **The significant number of cultivation license applications pending** with local authorities that do not have adequate resources to process these applications before the applicants’ temporary licenses expire on January 1, 2019, **threatens to create a major disruption in the commercial cannabis marketplace**.

(Stats. 2018, Chapter 857, Section 4, emphases added.)

33. Expiration of the previous “temporary” licenses (issued starting at the beginning of regulation January 1, 2018), would have rendered almost the entire industry illegal and collapsed the whole regulatory scheme.

34. A year later, AB 97 extended the provisional licensing workaround for two more years through the end of 2021. Its urgency clause put the matter even more bluntly:

“In order to have a thriving and legal cannabis market in California, it is necessary that this act take effect immediately.”

(Stats. 2019, Chapter 40, Section 20, emphasis added.)

35. § 26050.2(a) grants “the licensing authority” (in this case, CDFA) discretion to issue provisional licenses (or not). That was clearly necessary: without authorized licensed operators the entire \$3.5 billion legal cannabis market would have instead operated underground, as many unlicensed operators did at that time, and still do today. Current estimates are that the legal

aboveground California cannabis industry has annual gross receipts of around \$3.5 billion. The underground market is almost triple that at an estimated \$8.7 billion as of 2019.

36. There can be no legal marketplace of thousands of businesses without authorizing them to legally engage in “commercial cannabis activity,” as the code defines it at Cal. Bus. & Prof. Code § 26001(k). They must be authorized, legal, and entitled to continue operating—otherwise “the immediate preservation of the public peace, health, or safety” is threatened (SB 1459 (Stats. 2018, Chapter 857, Section 4), *supra*), and California is in danger of having no “legal cannabis market” (AB 97 (Stats. 2019, Chapter 40, Section 20, *emphasis added.*), *supra*).

37. That is the only logical way of understanding the provisional system created by SB 1459 and extended by AB 97: it must be swift and sustainable, and it must authorize and license businesses to operate legally and in compliance with all applicable regulations, or face enforcement measures coupled with due process protections, like any other licensed business. Otherwise the system cannot work as intended, and as empowered by Cal. Bus. & Prof. Code § 26050.2(a).

38. The very nature of entitlement property interests is that “they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Board of Regents v. Roth* (1972) 408 U.S. 564, 577 (*emphases added.*) Provisional licensees, including Petitioners, have property entitlements that constitutionally require procedural due process.

39. Further, under California constitutional law, even an “expectancy is entitled to some modicum of due process protection” with required “findings” to ensure that the government acts in a nondiscriminatory and nonarbitrary manner.” *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 564, 566-68. Here, the CDFA’s position is that not a shred of process is due before the deprivation of this valuable license, which has been substantially relied on, and into which significant capital investment has been made. That position is an unconstitutional attempt to evade judicial review, including the

current petition for writ of mandamus before this Court. *Marbury v. Madison*, 5 U.S. 137 (1803), 147-48.

40. Business & Professions Code § 26050.2 is unconstitutional on its face, and as applied to Petitioners, because it purports to grant to the cannabis licensing authorities two irreconcilable powers: 1) the power of the agencies to exercise their discretion to issue “provisional” licenses that authorize licensees to engage in commercial cannabis activity; and 2) the power subsequently to revoke or suspend those entitlements in their “sole discretion” without notice and hearing.

41. In the March 4, 2021 CDFA letter, the agency claims that its revocation is effective immediately, and that “[u]nder section 26050.2, the decision to revoke a provisional license does not entitle the licensee to a hearing or an appeal of the decision...” and “[b]ecause the above-listed license is a provisional license, Emerald Acres is not entitled to a hearing or an appeal of the decision to revoke the license.”

42. As explained above, BPC §26050.2(a) creates the only possible system that can work in the circumstances recognized by the legislature in its stated findings of urgency and necessity. But the rest of Cal. Bus. & Prof. Code § 26050.2 purports to deny legally operating licensees the same procedural due process afforded other similar business license entitlements: notice and an opportunity to be heard before revocation. (*Goldberg v. Kelly*, 397 U.S. 254, 263 n.8, 264 (1970)). Under §26050.2, the government authorizes, licenses, entitles, and encourages businesses to operate in the legal aboveground industry to save it from “major disruption”—but it would prefer not to give them any due process rights. (Stats. 2018, Chapter 857, Section 4), *supra*.) That preference is impermissible under the Due Process Clauses of the Constitutions.

43. Both subsections (c) and (d) use the phrase “in its sole discretion” in authorizing a licensing agency to suspend or revoke the “provisional” licenses (subsection (d)), and to renew them until they issue or deny the licensee’s “annual” license (subsection (c)). That annual license is really a

permanent license that the Bus. & Prof. Code, and the agencies in their regulations, concede is a property interest entitled to notice and hearing before deprivation.

44. The only difference between a provisional license and an annual license is the purported denial of due process found throughout §26050.2. BPC §26050.2(l) bluntly specifies this equivalence and reads in its entirety: "Except as specified in this section, the provisions of this division shall apply to a provisional license in the same manner as to an annual license." A provisional licensee is fully authorized to engage in commercial cannabis activity and is required to follow the hundreds of pages of applicable statute and regulations. (Cal. Bus. & Prof. § 26050.2(l)). Of the approximately 6,258 licenses issued by CalCannabis since January 2018, approximately \$5,190 licenses (or 83% of the licenses) are "provisional". These "provisionally" licensed businesses currently make up the bulk of the multi-billion dollar California cannabis industry, representing that much in investment and in annual gross receipts, and employing many thousands of Californians. They cultivate, manufacture, test, distribute, and sell cannabis—strictly subject to hundreds of pages of administrative regulation.

45. Statutory authorization to act "in its sole discretion" does not authorize an agency to deprive any person of their property without due process of law. (U.S. Const., XIV Am.; Cal. Const. Art. I, §7(a)). In *Board of Regents v. Roth*, the U.S. Supreme Court cited one of its earlier cases, *Goldsmith v. Bd. of Tax Appeals*, 270 U.S. 117 (1926), in which the U.S. Board of Tax Appeals' rules allowed it to deny applicants admission to practice before it "in its discretion" and to likewise subsequently suspend or disbar admittees. In the context of the "discretionary" denial of an admission application, the *Goldsmith* decision says that the board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the applicant as would constitute due process." (*Board of Regents, supra*, 408 U.S at 577, n15).

2 46. Given that due process is required in the context of an application for a
3 “discretionary” reimbursement award, logically, due process is certainly required for the revocation of
4 a license issued and relied on for almost a year with a multi-million investment, and with several
5 employees’ families’ livelihoods dependent upon it. *Saleeby, supra*, 562-68.

6 47. The CDFA’s practice as to the renewal process has been to make it a simple and
7 straightforward “rubberstamping,” exactly as one would expect of a recognized entitlement.
8 Typically, the annual renewal process takes about an hour online filling in the same basic information
9 and affirming that there have been no changes in operations. CDFA then approves promptly and
10 issues an invoice for the annual licensing fee (which is substantial). Once paid, the license is renewed,
11 as would be expected. The whole process takes a week or so, most of which is waiting time.

12 48. Inserting the word “sole” into the phrase “in its discretion” does not alter the
13 protections forever codified into the Constitutions. The licensing authorities have issued over 8,000
14 provisional licenses (out of over 9,000 total licenses, the rest of which are “annual” licenses), as of
15 March 4, 2021. The government issued these licenses with the clear understanding that the licensees
16 would actually operate licensed businesses thereunder to further the government’s purpose of
17 bringing cannabis into control and regulation, and that they would rely on them by investing
18 significant sums of money, and by employing workers.

19 49. Petitioners, and all other provisional licensees, have a legitimate right to assume that
20 barring any glaring unresolvable issues, their applications for “annual” (really permanent) licenses will
21 be granted in due course, and that in the meantime, while waiting for the licensing authorities to
22 process the 8,000 plus pending license applications,¹ their provisional licenses will be renewed
23 regularly in due course—as they were and have been.
24
25

26
27 ¹ Under the terms of §26050.2(a), to obtain a provisional license the licensee must have a
28 complete application for an annual license pending.

2 50. If Respondents take issue with any provisional licensee’s compliance with the statutes
3 and regulations, they are free to take disciplinary action against them provided that they first provide
4 notice and a hearing.

5 51. To assert that a governmental agency can issue a license identical to a slightly
6 differently named license, for exactly the same activity under exactly the same regulations, for years
7 on end, and yet one license has procedural due process protection and the other does not, has no
8 precedent in California history. Again, the plain language of the statute makes the case for due
9 process, save for the initial phrase, “Except as specified in this section.” That phrase purports to
10 deny due process through other sub-sections and, on that basis, must be stricken from, or
11 disregarded in, the statute as unconstitutional for the reasons given. §26050.2(i).

12 52. §26050.2(h) is the crux of the matter. And it is at least partially invalid, including
13 under the facts presented here, as to the purported revocation of a license to operate a business
14 granted and relied on. § 26050.2(h) is two sentences long. The first states that revocation or
15 suspension of a provisional license “shall not entitle the applicant or licensee to a hearing or an
16 appeal of the decision.” The second sentence specifies four BPC sections that shall not apply to
17 provisional licenses—all related to due process, and thus the denial thereof.

18 53. Again, under the constitutional analysis given *supra* to the extent that this sub-section
19 (h) purports to allow deprivation of the property interest in the provisional license through
20 revocation without prior notice and hearing, it offends the due process clauses of the Constitutions
21 and is impermissible.

22 54. The government cannot arbitrarily set rules for one industry that apply to no other
23 industry. These licensed businesses and individuals who have staked time (literally, liberty) and
24 treasure (property) in carrying out the state’s mandate to rescue the “the commercial cannabis
25 marketplace” from “major disruption,” must have the entitlement that comes with that authorization
26 and the appropriate due process rights. No businesses will invest capital in a system that gives them
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1 authorization and a license, lures them into detrimental reliance at grand scale, and then pulls the plug
2 at its “discretion.” That cannot be the logical “understanding...that stem[s]” from the provisional
3 licensing system. Rather, the logical understanding that stem[s]” from the provisional licensing
4 system is that licensed legally operating cannabis businesses have the same measure of constitutional
5 due process protection as everyone else like situated. *Board of Regents v. Roth, supra* at 577; *Perry v.*
6 *Sinderman, supra* at 601; *Goldberg v. Kelly, supra* at 263 n.8; 264; *Saleeby v. State Bar, supra* at 564-65.
7

8 **E. Unlike the U.S. Constitution’s “entitlement” approach to determining the**
9 **existence of a property interest, the California Constitutional due process**
10 **protections are broader and more nuanced, recognizing property and**
11 **liberty interests even where the government has “discretionary” powers,**
12 **through a 4-part balancing test that also recognizes a dignitary interest,**
13 **under which Petitioners are clearly entitled to due process before**
14 **revocation of their authorization and license to engage in commercial**
15 **cannabis activity.**

16 55. In *Saleeby v. State Bar*, 39 Cal.3d 547 (Cal. 1985) the California Supreme Court applied
17 procedural due process requirements to the exercise of discretionary decision-making powers granted
18 to the State Bar by the legislature in statute, similarly to that discretion facially apparent in Cal. Bus. &
19 Prof. Code § 26050.2. The Court found that the California Constitution required that they:
20

21 “inquire whether the present procedures adequately assure that the bar, having elected to
22 exercise the discretion conferred upon it by the Legislature, will exercise that discretion in a
23 nonarbitrary, nondiscriminatory fashion. We conclude that in order to comport with due
24 process requirements applicants must be afforded an opportunity to be heard and respond to
25 the bar’s determinations and the bar must issue sufficient findings to afford review.”
26

27 *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565.
28

56. The Court even mentioned, in contrast to federal law, that even an “expectancy is
entitled to some modicum of due process protection.” *Id.* at 564. Under these standards, Petitioners
property interest and due process rights are even more clear. The CDFA on behalf of the state
employed its “discretion” in a manner so general and vague as to fail to give notice even of what
specific violations from what time period were the grounds for the revocation, let alone an

opportunity to be heard and respond in even the most informal and settlement-oriented manner.

Such slipshod practice does not pass muster under California law as detailed below.

57. The *Saleeby* Court also laid out the 4-part balancing test used not only to determine the type of due process required in each situation, but also before that, to determine if a property or liberty interest is implicated in the government action. *Id.* at 565. We examine each part, quoted from *Saleeby*, in turn below.

"(1) the private interest that will be affected by the official action"

58. The private interest affected by the CDFA letter and forcible deprivation of the right to engage in cannabis economic activity has a monetary value of approximately \$5-10 million dollars, the estimated market value before revocation. Several full-time employees' livelihoods are at stake, as is Mr. Nieves' personal and professional reputation, standing, his position, and his business interests. The property interest at stake is highly significant in a number of dimensions. Petitioners meet this part of the *Saleeby* test and are entitled to due process under the California Constitution.

"(2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"

59. CDFA's procedures are opaque. A three-page letter of conclusory allegations was offered with a blunt assertion that no due process appertained per the untested language of BPC §26050.2. There being no due process "procedures used" whatsoever, any additional "safeguards" would be hugely valuable. As it is, the risk of erroneous deprivation has zero checks and balances on it. No specific factual findings and conclusions of law were offered. None whatsoever. The allegations might be entirely arbitrary and capricious and there would be no way to know, and even if known, there would be no way to challenge capricious or inadvertent error by government actors and agents.

60. CDFA has a robust disciplinary and appeal hearing process with clear notice and hearing requirements following the Administrative Procedures Act. If any modicum of that process

1 were available to Petitioners they would be vastly better off. If CDFA would even communicate with
2 them, they are eager to find common ground and understand the agency's concerns (or the concerns
3 of its investigators). Petitioners meet this part of the *Saleeby* test and are entitled to due process under
4 the California Constitution.

5 **“(3) the dignitary interest in informing individuals of the nature, grounds and
6 consequences of the action and in enabling them to present their side of the story
7 before a responsible governmental official”**

8 61. For both Petitioner Emerald Acres, and for Petitioner Nieves, this revocation has
9 deep wounding significance. They are mystified as to what they did to deserve the swift death
10 sentence without notice or warning. Petitioners have been subjected to an abrupt and egregious
11 violation of the norms of fairness. Their public reputation has been harmed and their treatment by
12 CDFA in this case has violated their dignitary interests in a substantial and demonstrable way. For
13 Mr. Nieves in particular, there are constitutional issues of double jeopardy. Even if arguably, there is
14 no “right” to a provisional license, the government cannot revoke it for impermissible reasons such
15 as interference with constitutional rights; due process must therefore be provided. *Perry v. Sinderman*
16 (1972) 408 U.S. 593, 596-98. CDFA humiliated Mr. Nieves before his peers and his employees by
17 stripping him of his license for his non-presence at the inspection of December 22, 2020, which was
18 out of his control and due to his wrongful arrest for a crime of which he was fully exonerated. This
19 adds even greater insult and injury to Petitioner Nieves who already bears the trauma and shame of
20 being arrested for a crime and embarrassed in the community. Petitioners meet this part of the *Saleeby*
21 test and are entitled to due process under the California Constitution.
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23 **(4) the governmental interest, including the function involved and the fiscal and
24 administrative burdens that the additional or substitute procedural requirement
25 would entail.**

26 62. The government has an interest in licensing and regulation—and enforcing
27 regulations—and in successfully implementing the legal cannabis system (on which the jury is still
28 out). The underground market is still three times larger than the aboveground market. The

government function is critical, and Petitioners support it and wish to contribute to its success. This relationship can be collaborative; it need not be adversarial. As for fiscal and administrative burdens, CDFA already has a whole division committed to enforcement, discipline, appeals, hearings, and due process, with many pages of specific regulation and of course the Administrative Procedures Act. Sec. Bus. & Prof. Code Chapter 2 (commencing with Section 480) of Division 1.5, Chapter 4 (commencing with Section 26040) of Division 10, and Sections 26031 and 26058. There is no additional burden on CDFA in affording Petitioners with reasonable notice and an appeal hearing. That is all that Petitioners ask: the basic level of respect and due process for a government-authorized-and-licensed professional organization for a Petitioner who has served the country in the military and served as a police officer. Petitioners meet this part of the *Saleeby* test and are entitled to due process under the California Constitution.

63. Looking at the 4-part balancing test, it is clear that Petitioner Emerald Acres and Petitioner Nieves have both property and liberty interests at stake here, and under California law must be extended the basic elements of due process: notice and hearing prior to deprivation.

64. In the present matter, Petitioners have made a strong factual showing that they have property and liberty rights that they have been deprived of with neither compensation nor a shred of procedural due process. Quite the opposite.

65. The question before the court is not whether such a property right might be revoked in the course of such due process, only whether due process is required. It is likely that Petitioners will prevail on this question due to the extensive and unambiguous weight of law that the taking of a property right by the government necessarily requires procedural due process under both the State and Federal constitutions.

F. Petitioners have no adequate remedy at law.

66. Injunctive relief is available when future pecuniary compensation would not provide adequate relief, or it would be difficult to ascertain such damages. (Cal. Code Civ. Proc. § 526(a)(4)-

(5); *Dodge, Warren & Peters Ins. Servs. V. Riley* (2003) 105 CA4th 1414). In the present case, it is unclear whether the legal remedy sought even provides Petitioners with an avenue to recover damages, and on this basis alone, injunctive relief is proper. Even if Petitioners were entitled to pecuniary relief, many of the elements of the harm they face, such as loss of long-term contracts and the loss of an entire growing season, are impossible to meaningfully quantify in advance. Even if the government ultimately had to pay the \$5-10 million market value of the business prior to the illegal revocation, Petitioners do not want to sell their business. Nor has the government followed the proper procedures to exercise eminent domain, condemn, appraise, and purchase the business at fair market value. On the basis that the harm faced is difficult or impossible to monetarily quantify, Petitioners are entitled to injunctive relief.

G. An analysis of the public interest and balance of the equities demonstrates that risk of public harm is low (having never been alleged) while the risk of irreparable harm to Petitioners is high.

67. Respondents have alleged no public harm at any point in the factual record. The CDFA letter generally alleges, without any specific facts as to details, dates, persons involved, number of occurrences, or any other circumstances, three general types of regulatory violations as grounds for revocation in a conclusory fashion. None of these include any allegation that Emerald Acres in any way threatens the public health and safety through alleged deficiencies in ongoing practices.

68. The alleged grounds for revocation include only the following three, from the second paragraph of the three-paragraph CDFA letter here numbered, listed, and quoted verbatim:

- [1. alleged] Interfering, obstructing or impeding the CDFA's inspection, investigation or audit, in violation of CCR section 8501, subdivision (c);
- [2. alleged] Failure to keep commercial cannabis activity records on the Premises in violation of Business and Professions Code section 26160, subdivision (d) and CCR section 8400, subdivision (b); (
- [3. alleged] Misrepresentation or falsification of information entered into the track- and-trace system in violation of CCR section 8404, subdivision (c);

- 2 [4. alleged] Failure to enter accurate and complete data and information into the track-
and-trace system in violation of CCR section 8402, subdivision (a);
- 3 [5. alleged] Failure to report in the CCTT system information related to the disposition of
4 cannabis and nonmanufactured cannabis products on the licensed premises
5 within three (3) calendar days of the applicable event, including but not
6 limited to, the harvesting of mature plants in violation of CCR section 8405,
7 subdivision (c)(4);
- 8 [6. alleged] The failure to assign a UID to cannabis and nonmanufactured cannabis
9 products corresponding to the unique harvest batch name from which the
10 cannabis and nonmanufactured cannabis products were derived in violation
11 of CCR section 8403 subdivision (d); and
- 12 [7. alleged] Failure to report either the disposal or transfer of cannabis or
13 nonmanufactured packages within three (3) calendar days of the applicable
14 event in violation of CCR section 8405, subdivision (c)(3) or (d).

15 69. None of these general allegations impugn the overall compliance and safety of
16 Emerald Acres' operations as a licensed and regulated cannabis cultivator or provide meaningful
17 examples of specific violations worthy of the summary execution of Petitioners' license.

18 70 Emerald Acres refutes each of these allegations as being either false, too vague to be
19 admitted or denied, previously cured, or easily cured if given specific details of violation actually
20 occurring. Regardless, this refutation is not relevant to the immediate issue of whether there is any
21 imminent harm to Respondents or the public in maintaining the *status quo ante* while the Court
22 determines if Respondent must allow Petitioners an opportunity to have these issues heard by an
23 impartial decision maker prior to revocation of their valuable license and the execution of the death
24 sentence on their corporate business entity and their individual professional reputation, standing,
25 position, salary, and employees' livelihoods.

26 71. There is no defensible argument that allowing Petitioners to continue their
27 operations, while their writ petition is properly heard and decided, poses any public harm as they
28 have operated with a license for almost a year with no such allegation.

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WHEREFORE, PETITIONERS PRAY FOR RELIEF AS FOLLOWS:

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1. A peremptory writ of mandate be issued ordering Respondents to provide Petitioners with an administrative hearing for the purposes of hearing Petitioners' appeal of Respondents' revocation letter;

2. And that such writ further order Respondent to return Petitioners' property improperly and unlawfully seized without due process of law;

3. An *ex parte* order (application filed, or to be filed, under separate cover) be issued providing a stay of enforcement against Petitioners to preserve the *status quo ante* on the basis of the arguments therein and that such stay be in effect until final disposition of this petition for writ of mandate and any timelines for appeal thereof have elapsed;

4. A renewal of Petitioners' Provisional Cannabis Cultivation License #CCL20-0000142, which is currently set to expire on May 29, 2021;

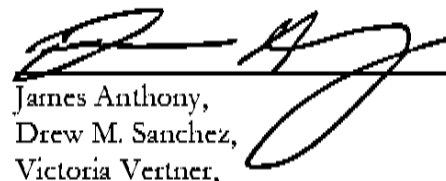
5. Petitioners recover their costs in this action, including attorney fees according to law;

6. Such other relief be granted that the Court considers proper.

Respectfully submitted,

Date: May 7, 2021

ANTHONY LAW GROUP, PC



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