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*Exempt from Filing Fees –
Gov. Code § 6103*

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ORANGE
12 CENTRAL JUSTICE CENTER
13

14 **HNHPC, Inc.,**

Petitioner,

15
16 v.

17
18 **THE DEPARTMENT OF CANNABIS
CONTROL, AN ADMINISTRATIVE
19 DEPARTMENT OF THE STATE OF
CALIFORNIA; NICOLE ELLIOTT, in her
20 capacity as Director of the Department of
Cannabis Control, and DOES 1-50,
21 inclusive,**

22 Respondents.
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Case No. 30-2021-01221014-CU-WM-CJC

**NOTICE OF MOTION TO QUASH
DEPOSITION SUBPOENA AND
REQUEST FOR PRODUCTION OF
DOCUMENTS, MOTION,
MEMORANDUM OF POINTS AND
AUTHORITIES**

Reservation No. 73651438

Hearing Date: February 14, 2022

Time: 10:30 a.m.

Dept: C26

Judge: The Honorable Gregory H. Lewis

Trial Date: TBD

Action Filed: September 15, 2021

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1 **PLEASE TAKE NOTICE** that at 10:30 a.m., on February 14, 2021, or as soon thereafter
2 as the matter can be heard, in Department C26 of the above-entitled court, at the Central Justice
3 Center at 700 Civic Center Drive, Santa Ana 92701, Defendants and Respondents Department of
4 Cannabis Control and Nicole Elliott, in her capacity as Director of the Department of Cannabis
5 Control, will move the Court for an order quashing the deposition subpoena served by Petitioner
6 and Petitioner, and staying the deposition pending determination of the motion. The deposition is
7 scheduled to be held on November 30, 2021, at 10:00 a.m., via “ZOOM teleconference” at the
8 Law Office of Jeff Augustini, 9160 Irvine Center Drive, Suite 200, Irvine, CA 92618.

9 The motion will be based on this Notice of Motion, Motion, the attached Memorandum of
10 Points and Authorities, a Separate Statement of Issues, the concurrently filed Declaration of
11 Ethan Turner, the Declaration of Stephanie Dorminey, the record and files of this case, and any
12 further oral or documentary evidence introduced at the hearing of this motion.

13
14 Dated: November 23, 2021

Respectfully submitted,

15 ROB BONTA
16 Attorney General of California
17 HARINDER K. KAPUR
18 Senior Assistant Attorney General

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21 ETHAN A. TURNER
22 Deputy Attorney General
23 *Attorneys for Respondent and Defendant*
24 *Department of Cannabis Control*

1 **INTRODUCTION**

2 Defendants and Respondents Department of Cannabis Control (“Department”) and Nicole
3 Elliott, in her official capacity as Director of the Department (collectively “Respondents”) ask
4 this Court to issue an order quashing the Amended Notice of Deposition and Request for
5 Production of Documents (“Amended Notice”) for the Department’s person most qualified
6 (“PMQ”) and to issue a protective order preventing, or limiting, discovery in this case at this time.
7 The Department moves to quash and seeks a protective order because the Amended Notice is
8 overly broad, unduly vague, and fails to necessarily set forth a “general description sufficient to
9 identify the person” or “describe with reasonable particularity the matters on which” the
10 deposition is being taken that the Department is unable to ascertain whether there is one PMQ, or
11 multiple PMQs, and which documents are responsive. Moreover, the Department has yet to have
12 even the opportunity to respond to the First Amended Petition for Writ of Mandate and Complaint
13 for Injunctive Relief, which was served on November 12, 2021.¹

14 **PROCEDURAL HISTORY**

15 On September 20, 2021, five days after this case was filed, Elliott Lewis, the Chief
16 Executive Officer and Chief Financial Officer of HNHPC, Inc., posted a video on the social
17 media platform, Instagram in which he openly admits that it is his intention to misuse the
18 discovery method of deposition to cause “unwarranted annoyance, embarrassment . . . oppression,
19 undue burden [and] expense.” (Code Civ. Proc. §2023.010, subd. (c).) Mr. Lewis’s post has a
20 caption that includes the statement “Can’t wait to get the leadership of the CA Cannabis program
21 and CDFTA [sic] under oath and illuminate their incompetence.” (Declaration of Ethan Turner
22 (Turner Dec) ¶ 2, Exh. A.) At the time signature 0:29 in the video, Mr. Lewis yells “I can’t wait
23 to depose Lori Ajax! Nicole Elliott! Nicholas Maduro! Y’all gonna go under oath for eight hours
24 and be exposed for what you really are!”²

25 ¹ The Department filed a demurrer to the Petition for Writ of Mandate and Complaint for Injunctive Relief.
26 Following receipt of the First Amended Petition for Writ of Mandate and Complaint for Injunctive Relief, the
Department requested that the hearing on the demurrer be taken off calendar.

27 ² The full video can be viewed at the following URL :
28 https://urldefense.proofpoint.com/v2/url?u=https-3A__www.instagram.com_tv_CUD-5Fwx1pNL-5F_-3Futm-5Fmedium-3Dshare-

1 In service of this express goal, Petitioner, through counsel, served a Notice of Deposition
2 and Request for Production of Documents (“Notice”) on November 5, 2021. The Notice was
3 served on a Friday, after close of business and it unilaterally set a deposition for the Department’s
4 person most qualified (PMQ) for November 22, 2021, at the Law Office of Jeff Augustini.
5 (Turner Dec. ¶ 3, Exh. B.) The Notice called for the PMQ’s deposition to take place in-person,
6 440 miles away from the Respondents’ home office, just nine business days after the Notice was
7 served, and during the week of the Thanksgiving Holiday. The Notice identified 31 categories of
8 testimony and demanded the production of 20 different categories of documents. (Turner Dec. ¶
9 3, Exh. B.) On Monday, November 8, 2021, Respondents’ counsel emailed Petitioner’s counsel
10 asking to meet and confer regarding the Notice. (Turner Dec. ¶ 4, Exh. C) On the morning of
11 Veterans Day, November 11, 2021, Petitioner’s counsel called Respondents’ counsel in response
12 to the request to meet and confer. Solely because of the Notice, Respondents’ counsel was
13 working on the holiday and answered his office phone. During this telephonic conversation,
14 Respondents’ counsel asked Petitioner’s counsel to take the deposition off calendar, given that the
15 Notice was demonstrably defective. Additionally, on October 29, 2021, the Department had
16 already filed its Demurrer response to the Verified Petition for Writ of Mandate and Complaint
17 for Injunctive Relief, with a hearing on the demurrer calendared for November 29, 2021.
18 Accordingly, Respondents’ counsel reasonably requested that Petitioner’s counsel schedule a
19 deposition for a mutually agreed upon date and time, if the Court denied the demurrer. (Turner
20 Dec. ¶ 5.) On November 12, 2021, Respondents’ Counsel sent a follow-up email and letter
21 regarding the conversation and continued meet and confer. (Turner Dec. ¶ 6, Exh. D.)

22 Petitioner’s counsel indicated his disagreement with Respondents’ position, indicated that
23 he would consider moving the deposition date, and demanded that Respondents’ counsel provide
24 a date within the following two weeks for the continued deposition. (Turner Dec. ¶ 7, Exh. E.)
25 However, Petitioner’s counsel did not re-schedule the deposition to a mutually agreed-upon date,

26 _____
27 [5Fsheets&d=DwIFAw&c=uASjV29gZuJt5_5J5CPRuQ&r=8uc5zdYblUtsvizpTGILPwFCH9QvMA-
28 jQ4UnfSEQ6MQ&m=3Xj2WL8B_vKAvwcrXQnHZwJIDOJtUOfN0u09VrzDjt0&s=qgL-
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1 or to follow a ruling on the demurrer, nor did Petitioner’s counsel file an opposition to the
2 demurrer. Instead, on November 12, 2021, Petitioner’s counsel filed a First Amended Petition,
3 and served an Amended Notice of Deposition (“Amended Notice”), before counsel for
4 Respondents provided any available dates, *again* unilaterally setting the deposition for November
5 30, 2021. The Amended Notice added only that the deposition would be held via “ZOOM
6 teleconference.” (Turner Dec. ¶ 8, Exh. F.)

7 In subsequent communication Petitioner’s counsel was reminded that the Department was
8 reviewing the Amended Notice and attempting to determine whether there exists one single PMQ
9 to Petitioner’s vast deposition and document request, or whether several depositions of multiple
10 PMQs would be required to respond to the wide-ranging request. The Department must also
11 determine which responsive documents are within its custody and control, or potentially within
12 the custody and control of other state agencies. (Turner Dec. ¶ 9, Exh. G.) Accordingly,
13 Respondents counsel, again, reasonably requested Petitioner’s counsel to delay any deposition(s)
14 until January or February, 2022, in order for the Department to have a fair and adequate amount
15 of time to search for, and pragmatically produce responsive documents, as well as identify the
16 necessary PMQ or PMQs. (*Ibid.*) In addition, Respondents counsel repeated the request to
17 Petitioner’s counsel to wait to schedule any deposition(s) until the Department could reasonably
18 file a responsive pleading to the First Amended Petition. (*Ibid.*) Petitioner’s counsel accused
19 Respondents’ of employing stall tactics, would not agree to change the unilaterally set date for
20 deposition, and made accusations against Respondents’ counsel. (Turner Dec. 10, Exh. H.)
21 Respondents’ counsel attempted to clarify the Department’s willingness to produce records and
22 witnesses. (Turner Dec ¶ 11, Exh. I.) However, Petitioner’s counsel again accused the
23 Department of “blatant stonewalling” and terminated the meet and confer. (Turner Dec. ¶ 12,
24 Exh. J.)

25 The parties were thus unable to come to an agreement regarding the defective notice, the
26 need for a description sufficient to identify the person or persons to be deposed, the need to
27 provide the Department with fair and adequate time to locate and identify the responsive
28 documents, as well as to identify the person or persons most knowledgeable to answer the broad

1 categories of testimony delineated in the Amended Notice. Further, the Department has already
2 produced documents that *are* responsive to the request, and it will continue to do so as they are
3 sufficiently identified. However, a review of potentially *six* (6) years of documents and data
4 simply cannot be completed within the unreasonable timeframe unilaterally “set” by Petitioner – a
5 mere twelve (12) business days. On November 22, 2021, Petitioner was served with
6 Respondents’ Objections to Notice of Taking Deposition of Person(s) Most Qualified at
7 Department of Cannabis Control and Request for Production of Documents. (Turner Dec. ¶ 13,
8 Exh. K.)

9 Therefore, Respondents respectfully request that the Court quash the deposition notice,
10 and issue a protective order delaying the deposition to allow the Department a reasonable amount
11 of time to identify the necessary PMQ, or PMQs. Additionally, Respondents further request that
12 the Court include within the protective order a provision necessarily limiting the request for
13 production to relevant documents that are actually within the custody and control of the
14 Department. Finally, Respondents respectfully request that the protective order stay discovery in
15 this matter, until the Department has had a fair opportunity to file its responsive pleading to the
16 First Amended Petition and any dispositive hearing that may be reasonably held as a result.

17 **FACTUAL BACKGROUND**

18 In 2015, the Medical Marijuana Regulation and Safety Act (MMRSA) was enacted by the
19 passage of Chapter 688, Statutes of 2015 (Assembly Bill (AB) 243), Chapter 689, Statutes of
20 2015 (AB 266), and Chapter 719, Statutes of 2015, (Senate Bill (SB) 643). MMRSA established
21 a regulatory program for the cultivation, manufacturing, and retail sale of medicinal cannabis.
22 The MMRSA mandated the California Department of Food and Agriculture (CDFA) to establish
23 a track and trace program that uniquely identified medicinal cannabis plants from “seed to sale.”
24 (See Former Bus. & Prof. Code, § 19335, repealed by stats. Sen. Bill No. 94 2017-2018 Reg.
25 Sess. § 1.) In order to implement the track and trace program, many departments collaborated
26 and participated in determining how the track and trace program would be set-up. These included
27 the departments with licensing responsibility (CDFA, the Department of Consumer Affairs, and
28 the California Department of Public Health) as well as other departments affected and given

1 responsibility by statute, as a result of cannabis legalization (Department of Justice [DOJ], the
2 California Department of Fish and Wildlife, the State Water Resources Control Board, and the
3 Board of Equalization). (See Turner Dec, ¶ 14, Exh. L: CA Information Technology Annual
4 Report 2016, pg. 16.) In addition, the California Department of Technology was tasked with
5 coordinating the various stakeholders to develop a statewide framework for the information and
6 technology needs of medicinal cannabis businesses. (*Ibid.*)

7 In 2017, following the passage of Proposition 64 and the legalization of adult-use
8 cannabis, CDFA was mandated to establish a track and trace program which uniquely identifies
9 cannabis plants, and enables licensing authorities to track all cannabis throughout the distribution
10 chain. (Bus. & Prof. Code, § 26067.) CDFA again worked with the other state agencies to
11 expand the track and trace program to include reporting the movement of both medicinal and
12 adult use cannabis products throughout the distribution chain. The track and trace system
13 continued to be overseen and maintained by CDFA until July 12, 2021.

14 On July 12, 2021, the Governor signed Assembly Bill 141, creating the Department of
15 Cannabis Control (referenced herein as the “Department”). With the enactment of AB 141,
16 responsibility for the track and trace system was shifted to the newly constituted Department.

17 ARGUMENT

18 A. Petitioner’s Amended Notice of Deposition is Defective

19 The Amended Notice is defective because it fails to set forth a “general description
20 sufficient to identify the person” or “describe with reasonable particularity the matters on which”
21 the deposition is being taken, as required by statute. A deposition notice *must* “set forth” a
22 “description sufficient to identify the person or particular class to which the person belongs.”
23 (Code Civ. Proc., § 2025.220, subd. (a)(3).) In addition, Code of Civil Procedure section
24 2025.230 requires that a deposition notice for an entity describe with “reasonable particularity”
25 the matters on which examination is requested. Here, even as amended, Petitioner’s deposition
26 notice of the Department’s Person Most Qualified (PMQ), plainly does not satisfy these
27 requirements.

28 //

1 Rather than cure these defects, Petitioner has refused to engage in a reasonable meet and
2 confer. Respondents counsel spoke with Petitioner’s counsel telephonically, sent a meet and
3 confer letter, and exchanged multiple emails describing the specific defects plainly evident within
4 the notice. (Turner Dec., ¶¶ 4 -12, Exhs. D - G.) Respondents’ counsel also specifically and
5 immediately articulated to Petitioner’s counsel, the Department’s objections to both the Notice
6 and Amended Notice on the reasonable grounds: that, it is overly broad, unduly vague; that, the
7 time-frame unilaterally set-forth by Petitioner’s counsel was not sufficiently focused or limited in
8 time; that, the matters were not within the scope of knowledge of any one individual; that, the
9 listed matters sought testimony regarding information maintained by another state agency; and,
10 that some of the matters involved probing the mental processes of decision makers performing a
11 statutorily mandated duty. (Turner Dec., ¶¶ 5 - 6, Exh. D.) Petitioner responded by making a
12 number of accusations against Respondents’ counsel and Respondents, including making
13 representations that were not made and employing “blatant stonewalling tactics.” (Turner Dec.,
14 10 & 12 Exhs. H & J.)

15 Discovery tools such as depositions should be used to facilitate litigation rather than as
16 “weapons to wage litigation; these tools should be well-calibrated: the lancet is to be preferred
17 over the sledge hammer.” (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th
18 216, 221.) Deposition notices of entities must specify with reasonable particularity the matters to
19 be examined; just like inspections, the term “reasonably” in the statute requires that the matters be
20 reasonably particularized from the standpoint of the party who is subjected to the burden of
21 production. (*Id.* at p. 222.) Any other interpretation places too great a burden on the party to
22 whom the demand is made. (*Ibid.*) In addition, the categories of testimony must be sufficient to
23 identify the individual to be deposed.

24 Here, the categories of testimony are impermissibly vague and so uncertain as to render
25 the Department unable to identify who the PMQ might be, or whether it is more than one
26 individual; as well as whether such a person, or persons, is/are an employee/s of the Department,
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1 the California Department of Food and Agriculture³, or the California Department of Tax and Fee
2 Administration⁴, a former state employee, or perhaps an employee or subcontractor of Farnwell,
3 Inc. The Department should not be placed in the position of guessing what matters a PMQ might
4 be deposed about. Without sufficient particularity in the subject matter of the proposed
5 deposition, it is not possible for the Department to ascertain what individual(s) to send for a
6 deposition, or even if such a person is an employee of the Department. Therefore, in this matter
7 the “categories of testimony” that have been propounded are wholly inadequate to identify the
8 deponent, or the particular class to which the deponent belongs, as specifically required Code of
9 Civil Procedure section 2025.220, subdivision (a)(3).

10 Accordingly, the Department respectfully requests that the Court quash the PMQ
11 deposition Notice that was served on November 12, 2021, for failing to comply with the explicit
12 statutory requirements that the Notice identify with reasonable particularity the matters upon
13 which the deponent would be examined.

14 **B. The Court Should Preclude Discovery of Confidential and Privileged**
15 **Matters and Documents**

16 The Request for Production of Documents asks for the production of confidential and
17 privileged Department records. A party is not entitled to confidential documents protected by
18 privilege or statutory exemption from discovery. Additionally, a party may object to the request
19 by raising objections and asserting any applicable privileges against disclosure of the information,
20 to be adjudicated by the Court at an in camera hearing. The Department’s track and trace records
21 are protected from disclosure under the Medicinal and Adult-Use Cannabis Regulation and Safety
22 Act, and many of the public policy reasons that support exemptions found in the Public Records

23 ³ The California Department of Food Agriculture’s CalCannabis division was the agency tasked with implementing
24 and maintaining the track and trace system until July 12, 2021, when Assembly Bill 141 was passed and became
25 operative, and created the Department of Cannabis Control. Prior to that time, the regulation of commercial
26 medicinal and adult use cannabis was the responsibility of the Bureau of Cannabis Control, the California
27 Department of Food and Agriculture’s CalCannabis division, and the California Department of Public Health’s
28 Manufactured Cannabis Safety Branch (see former Bus. & Prof. Code, § 26012, subd. (a)(2) repealed by Stats AB
141 reg sess. 2021-2022 § 11). The Department of Cannabis Control is the legal successor of these agencies in
relevant respects. (Bus. & Prof. Code, § 26010.7.)

⁴ The California Department of Tax and Fee Administration is charged with the collection of cannabis cultivation and
excise taxes. (Rev. & Tax Code, §§ 34011, subd. (b)(1) & 34012, subd. (h)(2)(A).)

1 Act, and the Official Information Privilege.

2 Department has an overriding interest in maintaining confidentiality over its records to
3 preserve the integrity of the information it receives and its investigations. For this reason, the
4 challenges in responding to the Amended Notice are not just the over-breadth and uncertainty of
5 the scope of information and materials, but also in the significant legal analysis which must attend
6 the response. The Department, in its review of its own documents, and ultimately the Court, will
7 have to consider numerous potential privileges and the public policies that these privileges serve.

8 **1. The Exemption of MAUCRSA**

9 The Request for Production of Documents calls for the production of records regarding
10 and related to the Department’s track and trace system. The Medicinal and Adult-Use Cannabis
11 Regulation and Safety Act mandates the confidentiality of these records and exempts them from
12 disclosure. (Bus. & Prof. Code, § 26067, subd. (b)(6).) Business and Professions Code section
13 26067, subdivision (b)(6), which specifically addresses records maintained by the track and trace
14 system, states:

15 “Information received and contained in records kept by the department or licensing
16 authorities for the purposes of administering this chapter are confidential and shall not be
17 disclosed pursuant to the California Public Records Act (Chapter 3.5 (commencing with
18 Section 6250) of Division 7 of Title 1 of the Government Code), except as necessary for
authorized employees of the State of California or any city, county, or city and county to
perform official duties pursuant to this division or a local ordinance.”

19 **2. Many of the Public Interest Concerns Supporting Exemptions in 20 the Public Records Act Also Favor Nondisclosure In this Case.**

21 Nondisclosure of information is authorized by the Public Records Act. (Gov. Code, §
22 6250, et seq.) The exemption from disclosure is found in Government Code section 6254, which
23 provides for non-disclosure of “[p]reliminary drafts, notes, or interagency or intra-agency
24 memoranda that are not retained in the ordinary course of business,” (Gov Code § 6254, subd.
25 (a)), “[r]ecords pertaining to pending litigation to which the public agency is a party” (Gov Code
26 § 6254, subd. (b)), and “[r]ecords of complaints to, or investigations conducted by, or records of
27 intelligence information or security procedures of . . .any other state or local agency for
28 correctional, law enforcement, or licensing purposes.” (Gov. Code, § 6254, subd. (f)).
Information within each of these categories is encompassed by the expansive descriptions

1 information in the categories of testimony and categories documents listed in the Notice and some
2 potentially responsive documents need to be withheld from disclosure for public policy reasons
3 set for the below.

4 While discovery in litigation is not limited by the exemptions set forth in the Public
5 Records Act, these exemptions serve important public policy goals that must be considered in
6 determining what information should be disclosed through witness testimony, what documents
7 are responsive to HNHPC’s requests that should be released in full, partially redacted, or
8 withheld. In this case, a determination as to whether “[d]isclosure of the information is against
9 the public interest because there is a necessity of preserving the confidentiality of the information
10 outweighs the necessity for disclosure in the interest of justice” need to be made. (Evid Code §
11 1040, subd. (b)(2).)

12 **3. The Official Information Privilege**

13 The Department’s track and trace records are also privileged under the Official
14 Information Privilege. A public entity may invoke the Official Information Privilege to protect
15 official information from discovery where its disclosure is forbidden by law, or where competing
16 interests favor nondisclosure. The official information privilege, found in Evidence Code section
17 1040, provides:

18 “(a) As used in this section, ‘official information’ means information acquired in
19 confidence by a public employee in the course of his or her duty and not open, or
officially disclosed, to the public prior to the time the claim of privilege is made.

20 “(b) A public entity has a privilege to refuse to disclose official information, and to
21 prevent another from disclosing official information, if the privilege is claimed by a
person authorized by the public entity to do so and:

22 ¶. . . ¶

23 “(2) Disclosure of the information is against the public interest because there is a necessity
24 for preserving the confidentiality of the information that outweighs the necessity for
disclosure in the interest of justice”

25 Evidence Code section 1040 “‘establishes two different privileges [for “official
26 information”]—an absolute privilege if disclosure is forbidden by a federal or state statute (subd.
27 (b)(1)), and a conditional privilege in all other cases pursuant to which privilege attaches when
28 the court determines ... that disclosure is against the public interest (subd. (b)(2)).’ [Citations.]”

1 (*County of San Diego v. Superior Court* (1986) 176 Cal.App.3d 1009, 1018-1019.) Application
2 of the privilege involves weighing competing interests. (*County of Orange v. Superior Court of*
3 *Orange County* (2000) 79 Cal.App.4th 759, 763.) A court should preclude disclosure as against
4 the public interest where ““there is a necessity for preserving the confidentiality of the
5 information that outweighs the necessity for disclosure in the interest of justice’ (Evid. Code
6 § 1040, subd. (b)(2).)” (*Ibid.*) This conditional privilege requires the trial court to “weigh the
7 interests and to sustain the privilege only if ““there is a necessity for preserving the confidentiality
8 of the information that outweighs the necessity for disclosure in the interest of justice.” ’
9 [Citations.]” (*Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1126.) Although “[a]
10 statute that makes information confidential expresses a strong public policy against disclosure, ...
11 it is still necessary to weigh the need for confidentiality against a particular party’s interest in
12 obtaining the information.” (*White v. Superior Court* (2002) 102 Cal.App.4th Supp. 1 at p. 7.)

13 **4. The Department has a Legitimate Interest in Maintaining the** 14 **Confidentiality of the Sought After Documents**

15 Although the confidentiality provisions under MAUCRSA and the Public Records Act are
16 inapplicable to civil discovery proceedings (Gov. Code, § 6260), the express exemption of certain
17 records from disclosure under these Acts reinforces the view that such files are confidential in
18 nature. Moreover, there are significant legitimate interests which favor their non-disclosure. The
19 Department has a legitimate interest in maintaining the confidentiality of documents that are
20 “preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the
21 public agency in the ordinary course of business” (Gov. Code, § 6254, subd. (a)); “records
22 pertaining to pending litigation to which the public agency is a party, or to claims made pursuant
23 to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been
24 finally adjudicated or otherwise settled” (Gov. Code, § 6254, subd. (b)); and records that would
25 tend to reveal law enforcement investigative techniques or sources (Gov. Code, § 6254, subd. (f)).

26 Multiple agencies worked to establish and implement the track and trace system. During
27 that process notes, drafts of contracts, legal memoranda, and interagency memoranda were
28 created. The purpose of exempting these records is to provide a measure of agency privacy for

1 written discourse concerning matters pending agency action. To the extent the records sought are
2 documents produced in the course of a determinate process of evaluating compliance by the
3 CDFA with state criteria for establishing the track and trace system they are confidential.

4 (*Citizens for A Better Environment v. Department of Food* (1985) 171 Cal.App.3d 704.) This
5 determinate process resulted in implementation of the track and trace system. These preliminary
6 materials are customarily not preserved by the Department, thus, any preliminary materials that
7 have been inadvertently retained (see Declaration of Stephanie Dorminey ¶ 7 (“Dorminey Dec.”)
8 To the extent that these documents possibly contain recommendatory language, versus factual
9 notes, the Department has a legitimate interest in maintaining the confidentiality of these records.
10 (see *Citizens for A Better Environment v. Department of Food* (1985) 171 Cal.App.3d 704.)

11 Likewise, the Department has a legitimate interest in maintaining the confidentiality of
12 records related to pending litigation. This interest applies to documents which are attorney-client
13 privileged, attorney work product, or any other work product related to pending litigation. (*Board*
14 *of Trustees of California State University v. Superior Court* (2005) 132 Cal.App.4th 889, review
15 denied.) To the extent the Request for Production of Documents asks for documents related to
16 pending litigation, they are confidential and not be subject to disclosure.

17 In addition, given the broadly recognized confidentiality of investigatory files, the
18 contents of those files sought in civil discovery must remain confidential, so long as the need for
19 confidentiality outweighs the benefits of disclosure in any particular case. (Evid. Code, § 1040,
20 subd. (b)(2).) “[T]here is an obvious danger that [criminal defendants] may learn crucial
21 information that would enable them to avoid apprehension.” (*County of Orange v. Superior Court*
22 (2000) 79 Cal.App.4th, 759, 766.) The records of the track and trace system are, in part, an
23 investigatory tool and must be kept confidential for the for the integrity of the Department’s
24 investigations and operations. (Dorminey Dec ¶ 5.) The records maintained by the track and trace
25 system constitute confidential information about the movement of cannabis within the state, as
26 well as the Department’s operations and tactics. If the Department were compelled to produce
27 the requested records to petitioner or his counsel, information contained therein would negatively
28 impact the Department’s operations and investigations. Thus, the Official Information privilege

1 of Evidence Code section 1040, and this Court should grant Department’s motion on the ground
2 that the records sought are confidential and exempt from disclosure.

3 Finally, in regards to the Amended Notice and the 51 categories of testimony and
4 document requests, they seek information within the California Cannabis Track and Trace
5 (CCTT) system’s electronic database. As discussed above, such information is “official
6 information” within the meaning of Evidence Code section 1040, subdivision (a), because
7 licensees enter information into the database with a reasonable expectation that the information
8 will remain confidential pursuant Business and Professions Code section 26067, subdivision (b).
9 There are several significant public policy and public safety concerns that support keeping track
10 and trace information confidential. First, licensees do not have access to banks and make many
11 large cash transactions for product that has high value on the illegal market. Licensees are
12 required to enter information about transactions, including delivery manifests, time and location
13 of exchanges prior to actually conducting the transactions or moving the cannabis or cannabis
14 products. Further, distributors are required to collect cultivation tax as part of their transactions
15 which they must deliver to the California Department of Tax and Fee Administration. If the track
16 and trace information is made public, it could compromise the safety of these activities. Second,
17 unique identification numbers are entered by licensees into the CCTT system. If these numbers
18 are made public it creates opportunities for these numbers to be used to sell illegally cultivated or
19 illegally manufactured products to retailers who would reasonably believe that the products came
20 from legal sources and had been tested for contaminants and potency such that it is safe for
21 human consumption. Finally, engaging in commercial cannabis activity remains illegal under
22 federal law.

23 **C. The Department Moves this Court for a Protective Order**
24 **Instructing That the Deposition Be Postponed Pending Determination on**
25 **the Operative Pleading**

26 Pursuant to Code of Civil Procedure section 2025.420, subdivision (a), “[b]efore during,
27 or after a deposition, any party . . . may promptly move for a protective order.” Further, the
28 Court, “for good cause shown, may make any order that justice requires to protect any party . . .
from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.”

1 (Code Civ. Proc., § 2025.420, subd. (b).) The protective order may include, but is not limited to,
2 directing that “the deposition not be taken at all” or that “the deposition be taken at a different
3 time.” (*Id.* at § 2025.420, subds.(b)(1) & (b)(2); also see *Westly v. Superior Court* (2004) 125
4 Cal.App.4th 907, 912; *San Joaquin Local Agency Formation Commission v. Superior Court*
5 (2008) 162 Cal.App.4th 159, 173.) In deciding whether good cause is shown, the court must
6 decide whether the burdens of the deposition outweigh the benefits sought. (Code Civ. Proc., §
7 2017.020(a).

8 Here, the deposition date was noticed unilaterally, without any prior agreement to
9 schedule a date that is suitable for all parties. Moreover, the Notice provided only nine business
10 days for the Department to locate a plethora of documents, review and interpret thirty-one
11 categories of testimony to determine the PMQ, or PMQs, and review twenty categories of
12 documents to identify and produce. The Amended Notice added only three business days to this
13 deadline. It is simply not possible, nor reasonable to expect, that the Department could comply
14 with the given deposition date of November 30, 2021. In addition to dealing with the sheer
15 volume of documents and information implicated in the categories testimony and categories of
16 documents listed in the Notice, the Respondents must also contend with the problem that the
17 descriptions of information and categories of documents will encompass information and
18 materials that is, or may be, subject to one or more of the privileges discussed above. The lack of
19 clarity in describing the categories of testimony and documents compounds this problem, and the
20 unreasonably short deadline for producing documents and deponents makes a meaningful and
21 useful response totally impossible.

22 Respondents reasonably offered to reschedule the deposition and production of documents
23 to either January, or February, 2022, but Petitioner’s counsel rejected the offer. Here the burdens
24 involved in complying with exceptionally short deadline proposed in the notice of deposition
25 significantly outweighs whatever benefits the Petitioner seeks to obtain. (Code Civ. Proc.
26 2019.030, subd. (a)). Upon the basis of the “good cause” shown, a protective order staying the
27 deposition should be issued and a motion to quash the Amended Notice should be granted.
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CONCLUSION

For all of these reasons, Respondents respectfully request that the Court quash the deposition notice and issue a protective order staying discovery.

Dated: November 23, 2021

Respectfully submitted,

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DECLARATION OF SERVICE BY ELECTRONIC MAIL

Case Name: **HNHPC, Inc. v. The Department of Cannabis Control**

Case No.: **30-2021-01221014-CU-WM-CJC**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On November 23, 2021, I served the attached:

NOTICE OF MOTION TO QUASH DEPOSITION SUBPOENA AND REQUEST FOR, PRODUCTION OF DOCUMENTS, MOTION, MEMORANDUM OF POINTS AND AUTHORITIES

by transmitting a true copy via electronic mail addressed as follows:

Jeff Augustini, Esq.
Law Office of Jeff Augustini
jeff@augustinilaw.com
Counsel for Plaintiff/Petitioner

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 23, 2021, at Sacramento, California.

N. Clark



Declarant

Signature