AlaFile E-Notice

03-CV-2023-000231.00

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC V. STATE OF ALABAMA MEDICAL CANNABIS COMMISSION
03-CV-2023-000231.00

The following CASE STATUS REPORT was FILED on 1/31/2024 5:06:42 PM

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GINA J. ISHMAN
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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, et al.	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.: CV-2023-000231.00
	)	
ALABAMA MEDICAL CANNABIS COMMISSION,	)	
	)	
	)	
Defendant.	)	

NOTICE OF FILING

COMES NOW the Defendant, Alabama Medical Cannabis Commission, by and through its attorneys of record and hereby gives notice to this Honorable Court that it has caused to be filed on the 31st day of January 2024, in the Alabama Court of Civil Appeals, a Petition for Writ of Mandamus. A copy of said Petition is attached hereto as Exhibit A.

RESPECTFULLY SUBMITTED on this the 31st day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2024, this Notice has been served electronically on all parties and/or their counsel of record via this Court's electronic filing system.

/s/ Mark D. Wilkerson
Mark D. Wilkerson
OF COUNSEL

No. _____

IN THE ALABAMA COURT OF CIVIL APPEALS

Ex parte State of Alabama Medical Commission., *Petitioner*

In re: Alabama Always, LLC, et al.

v.

State of Alabama Medical Commission, et al.

On Petition for Writ of Mandamus to the
Trial court of Montgomery County (03-CV-2023-000231.00)
(The Honorable James H. Anderson, Circuit Judge, Presiding)

PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

The legislature subjected the Commission to the Alabama Administrative Procedure Act ("AAPA"). Ala. Code §§ 41-22-1 (1975). But, with limited exemptions, the legislature required the exhaustion of administrative remedies before a medical cannabis license applicant could appeal to the circuit court. At the very least, the exhaustion doctrine was a prudential limitation the court should have applied to deny the claims of dissatisfied applicants and, thus, deny discovery.

Similarly, the Alabama Open Meetings Act ("AOMA") properly strikes a balance between the public's interest in government transparency and commissioners' interest in avoiding harassment under the guise of discovery. Ala Code §§ 36-25A-1 (1975). It permits discovery upon commissioners only if a plaintiff can meet a threshold showing of a prima facie case with particularized pleadings and substantial evidence at a required preliminary hearing.

This matter involves two movant-Respondents and many joinder-respondents who, despite not having satisfied any of these requirements, were not only allowed to survive dismissal, and granted not only discovery, but *expedited* discovery on all claims, all the way to the point that the trial court will allow them to depose the Commission members and

ask them what they were thinking when they voted to award medical cannabis licenses *before reaching a final decision*. This Court should vacate the trial court's expedited discovery orders now and dismiss the claims.

STATEMENT OF THE CASE

This Petition for Writ of Mandamus arises from litigation in the Montgomery County Circuit Court ("trial court") concerning the award of medical cannabis licenses by the Alabama Medical Cannabis Commission ("Commission"). But this Petition does not ask this Court to engage with an appeal by dissatisfied applicants of a final agency decision or an actual finding of an AOMA violation. Rather, this Petition is about whether the pleading and procedural gatekeeping mechanisms of the AOMA and AAPA have any teeth.

I. General Procedural Background

Although this dispute is relatively simple, the procedural history of this case is complex. The Legislature charged the Commission to issue licenses for several categories of facilities.[1] Before the Commission initially awarded business licenses, dissatisfied applicants for various licenses filed multiple actions against the Commission in the trial court.[2]

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[1] "[L]icenses shall be granted to integrated facilities, as well as to independent entities in the following categories: cultivator, processor, dispensary, secure transporter, and testing laboratory." Ala. Code § 20-2A-50(a) (1975).

[2] *Redbud Remedies, LLC v. State of Alabama Medical Cannabis Commission*, Case No: CV-2023-000110 (Doc. 1 (filed March 21, 2023)); *Med Shop Dispensary, LLC v. Alabama Medical Cannabis Commission*, Case No:

After the initial award of licenses, additional dissatisfied applicants filed suit.[3] After the Commission rescinded the initial license awards and voted to award licenses in all categories a second time, several more dissatisfied applicants filed suit.[4] Most of these cases were consolidated into the *Alabama Always* case (hereinafter "Master Case"). *See supra* note 3. Additional parties were also permitted to intervene. Most of the claims of Alabama Always and several other intervenors in the consolidated case were dismissed as part of a settlement reached in court-ordered mediation. (Exhibit A).

Following the settlement, Alabama Always filed a separate action against the Commission in an attempt to enjoin the Commission from re-

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CV-2023-900361 (Doc. 2 (filed March 22, 2023)); *Theratrue Alabama, LLC v. Alabama Medical Cannabis Commission, et al.*, Case No: CV-2023-900364 (Doc. 2 (filed March 23, 2023)) (hereinafter "Threatrue").

[3] *Alabama Always v. State of Alabama Medical Cannabis Commission*, Case No. CV-2023-000231 (Doc. 1 (filed June 22, 2023)) (hereinafter "Alabama Always"); *Hornet Medicinals, LLC v. Alabama Medical Cannabis Commission*, Case No. CV-2023-000232 (Doc. 1 (filed June 22, 2023)).

[4] *Bragg Canna of Alabama, LLC v. Alabama Medical Cannabis Commission*, Case No. CV-2023-901282 (Doc. 2 (filed Aug. 8, 2023)) (hereinafter "Bragg"); *Verano Alabama, LLC v. Alabama Medical Cannabis Commission*, Case No. CV-2023-901165 (Doc. 2 (filed Aug. 21, 2023)) (hereinafter "Verano").

awarding integrated facility licenses.[5] This new complaint alleged violations of the AAPA but not the AOMA. (Exhibit B). Predictably, after the Commission awarded licenses for a third time, dissatisfied applicants filed additional actions.[6] Those additional actions were consolidated into the Master Case as well.

Alabama Always' Second Amended Complaint in the Separate Action added a claim that unspecified members of the Commission violated the AOMA. (Exhibit C). Alabama Always' Third Amended Complaint in the Master Case—filed *after* discovery was granted—contains, in Count III, the same unspecified claim. (Exhibit D). Alabama Always further alleges that the Commission failed to comply with the Darren Wesley 'Ato' Hall Compassion Act, Ala. Code §§ 20-2A-1 (1975) ("Compassion

[5] *Alabama Always, LLC v. Alabama Medical Cannabis Commission*, Case No. CV-2023-901727 (Doc. 2 (filed Dec. 8, 2023)) (hereinafter "Separate Action").

[6] *Yellowhammer Medical Dispensaries, LLC v. State of Alabama Medical Cannabis Commission*, Case No. CV-2023-901798 (Doc. 2 (filed Dec. 26, 2023)) (hereinafter "Yellowhammer"); *Jemmstone Alabama, LLC v. State of Alabama Medical Cannabis Commission*, Case No. CV-2023-901800 (Doc. 2 (filed Dec. 27, 2023)) (hereinafter "Jemmstone"); *3 Notch Roots, LLC v. State of Alabama Medical Cannabis Commission*, Case No. CV-2023-901801 (Doc. 2 (filed Dec. 27, 2023)) (hereinafter "3 Notch"); *Pure by Sirmon Farms v. State of Alabama Medical Cannabis Commission*, Case No. CV-2023-901802 (Doc. 2 (filed Dec. 27, 2023)).

Act"), the AAPA, and its own rules and that its actions were arbitrary, capricious, and an abuse of discretion. *Id.* at ¶ 56. It also claims the Commission has adopted rules that exceed its statutory authority. *Id.* at ¶ 86.

On January 22, 2023, Insa Alabama, LLC ("Insa")—another integrated facility applicant—filed a complaint in the Master Case also alleging violations of the AAPA and AOMA. (Exhibit E).[7]

Simultaneously, the dissatisfied applicants have pursued, but not exhausted, their administrative remedies with the Commission, filing requests for statutorily mandated investigative hearings. *See* Ala. Code § 20-2A-57(f); Ala. Admin. Code r. § 538-x-.18.

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[7] Insa's belated complaint in intervention violated Rule 24(c). Ala. R. Civ. P. 24(c) ("A person desiring to intervene shall serve a motion to intervene upon the parties . . . and **shall be accompanied by a pleading setting** forth the claim or defense for which intervention is sought.") (emphasis added). "The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the claimant's position, the nature and basis of the claim asserted, and the relief sought by the intervenor." *Dillard v. City of Foley*, 166 F.R.D. 503, 506 (M.D. Ala. 1996) (internal citation omitted). When Insa moved for expedited discovery, it had failed to commence any action against the Commission. Therefore, even if Insa's Motion asked for discovery, the trial court was without jurisdiction to grant that motion.

II. The Discovery Orders

On December 27, 2023, Alabama Always filed in the trial court a motion for expedited discovery related to its AAPA and AOMA claims in the Separate Action. (Exhibit F). On the same day, Insa filed an almost identical motion in the Master Case also seeking expedited discovery but did so without alleging a claim. (Exhibit G). The trial court held a Temporary Restraining Order ("TRO") hearing on December 28, 2023, and entered a TRO as to dispensaries that same day. (Exhibit H). On January 3, 2024, Insa filed an amended discovery motion in the Master Case, but still without alleging a claim. (Exhibit I). That same day, the trial court granted a TRO as to Integrated facilities. (Exhibit J).

The Commission filed a response on January 3, 2024, opposing both motions. (Exhibit K). The Commission argued that Alabama Always and Insa (collectively "Plaintiffs") were barred from discovery because: 1) the Plaintiffs failed to meet the procedural and evidentiary requirements required by the AOMA to invoke the court's jurisdiction; 2) the trial court had failed to hold a preliminary hearing required by the AOMA; and 3) Plaintiffs failed to first exhaust all administrative remedies as required

by the AAPA. *See* Ala. Code § 36-25-9(a) (1975); Ala. Code § 41-22-20(a) (1975).

On January 3, 2024, the trial court entered an order granting expedited discovery as to the Plaintiffs. (Exhibit L). The order offered no parameters by which to guide the discovery (other than number limitations) and no limitations on the scope of the discovery. On January 5, 2024, the Commission filed a Motion for Reconsideration or a protective order in the alternative. (Exhibit M).

Notably, even though Alabama Always filed its expedited discovery motion in the Separate Case, the trial court did not enter the Expedited Discovery Order in the Separate Case. Instead, the trial court entered the Expedited Discovery Order in the Master Case only—a case in which Insa belatedly filed a pleading and in which Alabama Always filed an AOMA claim *after* discovery was granted. *See* Exhibits C–E.

Following the order granting discovery, other plaintiffs and intervenors in the Master Case filed motions to join in the "already granted" expedited discovery motions filed by Insa and Alabama Always. Some of these intervenors are applicants for licenses other than integrated facilities. At a hearing on January 11, 2024, the trial court heard arguments

from the Plaintiffs and intervenors regarding their discovery requests. On January 13, 2024, the trial court entered an Order granting the intervenors' requests to join in the expedited discovery. (Exhibit N). The Commission filed a Supplement to its Motion for Reconsideration on January 23, 2024. (Exhibit O).

On January 24, 2024, the trial court held a hearing on the pending motions in the Master Case. On January 30, 2024, the trial court entered an Order denying the Commission's request for a protective order and request for reconsideration. (Exhibit P). The Commission seeks a writ of mandamus directing the trial court to vacate both discovery Orders and enter an order denying Plaintiffs' request for expedited discovery.

STATEMENT OF FACTS

I. The State's authorization of Medical Cannabis licensure and the Commission's award of licenses

The challengers have resorted to litigation because they ultimately want the Commission to award them a cannabis license. The Legislature passed the Compassion Act to make "medical cannabis . . . grown in Alabama available to registered qualified patients . . . by licensing facilities that process, transport, test, or dispense medical cannabis." Ala. Code § 20-2A-22(a) (1975). Through the Compassion Act, the Legislature created the Commission and gave it—and it alone—the power to award and issue licenses.

The Compassion Act authorizes the issuance of several types of licenses, each of which permits the holder to conduct specified activities. *See supra* note 1. Alabama Always, Insa and the other challengers unsuccessfully sought an award of Integrated Facility licenses.[8] An Integrated Facility License permits its holder to cultivate, process, dispense, transport, and sell medical cannabis. Ala. Code § 20-2A-67(a), (c) (1975). Other challengers unsuccessfully sought either a Cultivator license or

[8] Other challengers seeking an Integrated Facility license include Bragg, Jemmstone, and 3 Notch. *See supra* note 6.

Dispensary license.[9] But the Compassion Act caps the number of available licenses in certain categories. Ala. Code § 20-2A-67(b) (1975).

To obtain a license, a putative licensee must apply to the Commission. Ala. Code § 20-2A-55(a) (1975); Ala. Admin. Code r. 538-X-3-.03 (2022). The Commission, in turn, must select suitable applicants from a field of applicants who meet the criteria.[10] Ala. Code § 20-2A-67(b) (1975).

After rescinding prior non-final license awards from June 12 and August 10, 2023, the Commission held two open, properly noticed meetings on December 1 and 12, 2023, to award medical cannabis licenses. At its December 1, 2023 meeting, the Commission awarded licenses for the cultivator, processor, dispensary, secure transporter, and testing laboratory categories.

During its December 12 meeting, the Commission voted to award Integrated Facility licenses. The unsuccessful applicants, having not been awarded licenses, promptly filed suits. *See supra* note 6. The licenses for dispensaries and integrated facilities have not been issued,

[9] Pure unsuccessfully sought a Cultivator license and Yellowhammer unsuccessfully sought a Dispensary license. *See supra* note 5.

[10] Applicants may be disqualified from consideration based on deficiencies in their applications. *See* Ala. Code 20-2A-55(g), 56(b) (1975); Ala. Admin. Code r. 538-X-3-.08, -.14 (2022).

however, because on December 28, 2023, and January 3, 2024, the trial court entered TROs prohibiting the Commission from issuing them. (Exhibits H, J).

The Compassion Act provides an administrative remedy for those who are denied a license. An unsuccessful applicant may request an "investigative hearing," where it has "the opportunity to present testimony and evidence to establish its suitability for a license. Other testimony and evidence may be presented at the investigative hearing, and Compassion Act provides that the Commission's decision must be based on the "whole record before the commission and is not limited to testimony and evidence submitted at the public investigative hearing." Ala. Code § 20-2A-56(e) (1975); *see* Ala. Admin. Code r. 538-X-3-.18 (2022). The Commission is empowered to "issue subpoenas for the attendance of witnesses; issue subpoenas duces tecum for the production of [evidence] and administer oaths and affirmations to witnesses as appropriate." Ala. Code § 20-2A-57(e) (1975).

An unsuccessful applicant can appeal the Commission's final decision after the investigative hearing to the Montgomery County Circuit Court. Ala. Code § 20-2A-57(f) (1975); Ala. Admin. Code r. § 538-x-.18

(2022). All but one of the consolidated plaintiffs and intervenors in the Master Case have requested an investigative hearing with the Commission.[11] These hearings have yet to be scheduled due to the flurry of litigation and because of the trial court's injunction of any actions in furtherance of the awarded licenses.

After hearing arguments on January 24, 2024, the trial court entered an Order on January 30, 2024, where it denied the Commission's Motion for Reconsideration (as it applied to the TRO), its Motion for a Protective Order, and granted other plaintiff and intervenors' requests to participate in discovery. (Exhibit M).

II. Allegations of the Relevant Plaintiffs

Although this Petition arises from the grant of expedited discovery to applicants for integrated facility licenses Alabama Always and Insa based on their respective Motions, the Master Case involves a multitude of plaintiffs in other license categories as well, some of which have been

[11] Integrated Facility applicants that have requested and investigative hearing are: Insa; Jemmstone; 3 Notch; Bragg; Alabama Always; Verano; Samson Growth, LLC; Southeast Cannabis Co., LLC; Natural Relief Cultivation, LLC; Medella, LLC; Aspire Medical Partners; and TheraTrue Ala., LLC. *See supra* notes 2–6.

subsequently permitted to join in the expedited discovery.[12] The claims by the Plaintiffs, additional plaintiffs, and intervenors (collectively "Challengers") allege various violations of the AAPA and the AOMA.

A. Alleged violation of the AAPA.

The Challengers seek injunctive relief in this case pursuant to § 41-22-10 of the AAPA, which permits plaintiffs to challenge the "validity or applicability of [an administrative] rule." Ala. Code § 41-22-10 (1975). The Challengers variously allege that the Commission: 1) failed to follow its own rules; 2) invalidly created new rules; 3) lacked authority to re-scind license awards; and 4) lacks a meaningful administrative remedy. For reasons more thoroughly described below, all these claims are either not properly before the trial court or purely questions of law, for which discovery is inappropriate and unnecessary.

B. Alleged violation of the AOMA.

Alabama Always' operative complaint in the Separate Action and its Third Amended Complaint in the Master Case contain one count of an AOMA violation. It alleges "[o]n information and belief, at least some of

[12] Challengers granted joinder in discovery are Jemmstone, Bragg, Canna, and Verano. *See* Exhibit N, *see also supra* notes 4 and 6.

the Commissioners held serial or private meetings prior to the scheduled [December 12] meeting to discuss how they would rank the [integrated license] applicants, in violation of the AOMA." (Exhibit D at ¶ 19). Contrary to the requirements of Section 36-25A-9, the complaint does not state upon which of the four enumerated grounds the AOMA count is based.

Insa intervened by Motion in the Master Case as a Plaintiff against the Commission on December 27, 2023, moving for expedited discovery by also asserting that "[u]pon information and belief, at least some of the Commissioners held serial or private meetings prior to the scheduled [December 12] meeting to discuss how they would rank the applicants, in violation of the [AOMA]." (Exhibit G).

At no point has the trial court—either in the Master Case or the Separate Case—received evidence establishing a prima facie case of an AOMA violation, or even making a credible claim of one. *See* Ala. Code § 36-25A-9(a)-(c) (1975). Nor has the trial court made a finding that either Plaintiff has shown, by a preponderance of the evidence, that a prohibited meeting of the governmental body occurred, and that each defendant attended the meeting, or that the very specific requirements for a finding

of a "serial" meeting have been met. *See* Ala. Code § 36-25A-2(15), -9(b) (1975).

STATEMENT OF ISSUES

Before a plaintiff can obtain AOMA discovery, it must first satisfy initial procedural requirements. Specifically, the trial court is required to determine the propriety of the AOMA claims in a preliminary hearing, during which the plaintiff carries the burden of proof. Did the trial court exceed its discretion by permitting expedited AOMA discovery without following the AOMA's preliminary procedures and thereby violate the Commission's clear legal right to its privileges against discovery?

Before a plaintiff can obtain discovery in a judicial review of a non-final agency decision under the AAPA, it must first either exhaust all administrative remedies or prove that such remedies are inadequate. Did the trial court exceed its discretion by permitting expedited discovery without first either remanding the matter back to the agency or determining that the existing administrative remedy is inadequate?

STATEMENT WHY WRIT SHOULD ISSUE

This Court will issue a writ of mandamus "when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court." *Ex parte Ala. Dept. of Revenue*, 325 So. 3d 1260, 1263–64 (Ala. 2020) (internal quotations omitted). Each condition is present here. Discovery disputes, such as forms the basis for this petition, are among those categories of controversy that the Alabama Supreme Court has identified as appropriate for mandamus review. *See Ex parte Guar. Pest Control, Inc.*, 21 So. 3d 1222, 1226 (Ala. 2009) (citing *Ex parte Ocwen Fed. Bank, FSB*, 872 So. 2d 810, 813 (Ala. 2003)).

I. The Commission has a clear legal right not to be subjected to discovery, and the trial court had an imperative duty not to issue its Expedited Discovery Orders.

The January 3, 2024 Expedited Discovery Order, as affirmed and modified by the trial court's January 30, 2024 Order, inappropriately subjects the Commission to expedited discovery. The trial court exceeded its discretion by issuing it because the Challengers have not satisfied the prerequisites for obtaining discovery on either AAPA or AOMA claims.

Under the AAPA, before a plaintiff can obtain discovery, it must either exhaust all administrative remedies or obtain a determination from the trial court that such remedies are inadequate. Neither has happened. Likewise, before a plaintiff can obtain AOMA discovery, it must fulfill several requirements, and the court must hold a preliminary hearing to weigh such evidence. Neither has happened, although the Court entertained arguments from counsel at its January 24, 2024 hearing. Both Alabama Rule of Civil Procedure 26(b)(1), the AAPA, and the AOMA imposed an imperative duty on the trial court to deny Plaintiffs' motions for expedited discovery and grant the Commission's motion for a protective order.

A. The Expedited Discovery Orders disregarded the AAPA's exhaustion requirement.

Under the AAPA, the legislature can require "the exhaustion of administrative remedies [as a] jurisdictional prerequisite to filing an action." *Stowe v. Ala. Bd. of Pardons & Paroles*, 245 So. 3d 610, 614 (Ala. Civ. App. 2017) (internal quotation marks omitted) (quoting *Ex parte Crestwood Hosp. & Nursing Home, Inc.*, 670 So. 2d 45 (Ala. 1995)); *see also W.A.A. v. Bd. of Dental Examiners of Ala.*, 156 So. 3d 973, 977 (Ala.

Civ. App. 2014) (holding the circuit court was without subject-matter jurisdiction to rule on discovery orders where the legislature vested that decision in the discretion of the administrative hearing officers). "[E]ven in the absence of such an express [jurisdictional] condition" from the legislature, "administrative exhaustion is generally mandatory as a "'judicially imposed prudential limitation.'"" *Johnson v. Ala. Sec'y of Lab. Fitzgerald Washington*, No. SC-2022-0897, 2023 WL 4281620 (Ala. June 30, 2023), cert. granted sub nom. *Williams v. Washington, Ala. Sec. of Lab.*, No. 23-191, 2024 WL 133549 (U.S. Jan. 12, 2024) (Sellers, J., concurring specially) ("I agree that the trial court properly dismissed the plaintiffs' complaint on the basis that the circuit court lacked subject-matter jurisdiction.").

"Generally, judicial review of administrative determinations is limited to final orders or actions." *Dawson v. Cole*, 485 So. 2d 1164, 1167 (Ala. Civ. App. 1986) (internal citation omitted) (affirming the trial court's finding in part because whether the agency gave the plaintiff sufficient notice of the hearing while the decision was pending was not yet ripe for adjudication "because of [its] dependency, at least in part, upon the resolution of disputed facts"). Thus, even when the agency's enabling

Act allows for "[a]ny party aggrieved by any final judgment or decision" of the agency to appeal to the circuit court, "[a] plaintiff is required to exhaust [its] administrative remedy before seeking a trial de novo" in the circuit court unless an exception applies. *Ex parte Lake Forest Prop. Owners' Ass'n*, 603 So. 2d 1045, 1046 (Ala. 1992) (citing without quoting the board of adjustment statute, Ala. Code § 11-52-81 (1975)).

"The [exhaustion] doctrine does not apply when (1) the question raised is one of interpretation of a statute, (2) the action raises only questions of law and not matters requiring administrative discretion or an administrative finding of fact, (3) the exhaustion of administrative remedies would be futile and/or the available remedy is inadequate, or (4) where there is the threat of irreparable injury." *Ex parte Lake Forest*, 603 So. 2d at 1046-47. But while the Alabama Supreme Court "ha[s] recognized exceptions to the exhaustion-of-administrative-remedies doctrine, an action for declaratory judgment was never intended to be used as a substitute for appeal." *City of Graysville v. Glenn*, 46 So. 3d 925, 930 (Ala. 2010) (internal cite and quote omitted).

Even where the agency's jurisdiction is not exclusive, attempting to challenge the sufficiency of the evidence before an administrative agency

is not an exception to the exhaustion-of-administrative-remedies requirement, and "'[t]he question [whether the official acted upon no evidence or improper evidence] should be determined by the usual method of direct review'" by the agency, not a declaratory judgment in the trial court. *Graysville*, 46 So. 3d at 930 (quoting *Mitchell v. Hammond*, 39 So. 2d 582, 584 (Ala. 1949)) (affirming the trial court's dismissal for failure to exhaust administrative remedies, agreeing with the agency defendant that the plaintiff was seeking a "review" of the decision to issue the permit, not an interpretation of the statute as they claimed, and even though the agency's jurisdiction was not expressly exclusive, that was a matter for the agency).

Just like the plaintiffs in *Graysville*, the Challengers allege that the Commission failed to follow its enabling act and rules. And much like the defendant in *Graysville*, the Alabama Legislature has authorized the Commission to address those questions specifically in the investigative hearing process.

Where an administrative body has the authority to review its previous decisions, and the enabling legislation provides such a remedy, the remedy is not futile; thus, invoking and exhausting that remedy is "the

necessary predicate for judicial review." *Ex parte Cincinnati Ins. Co.,* 51 So. 3d 298, 310 (Ala. 2010) (finding that only after the administrative remedy has been exhausted is a party "entitled to access to the courts").

The Challengers' ploy to depose Commission members regarding their mental processes while the administrative process is still ongoing (i.e., before the Commission's final decision following the investigative hearings), is both improper and disingenuous. By their own admission, requiring the Commissioners to say what they were thinking in ranking the applicants is the whole point of their discovery.[13] *See* Exhibit Q at 18:11-19, 22:21-24. Such a demand for such discovery is plainly not a matter for the trial court's review, because the Commission has not made any final decision and will not do so until after the investigative hearings—an administrative remedy all but one of the Challengers is pursuing. *See supra* note 10.

Moreover, the Challengers cannot properly demonstrate that the investigative hearing process is truly futile. The investigative hearing

[13] Pursuant to Commission rules, qualified applicants were rank ordered in order to determine the order in which they were to be considered for a motion. Special Procedures Relating to Certain Applications, XLII Ala. Admin. Monthly 48 (Oct. 31, 2023) (codified as 538-X-3-.20ER) (adopted Oct. 12, 2023).

procedure is specified in the Compassion Act and has yet to play out. *See* Exhibit D at ¶¶ 74-76. The Challengers cannot simply assume without evidence or precedent that an investigative hearing would be futile, or that reasonable and necessary discovery as a precursor to such a hearing would be denied, when they have not yet undertaken the investigative hearing process.

While the Challengers contend the investigative hearing is futile because the commission has already awarded five applicants, the Commission has express revocation authority and implied and inherent rescission authority, giving it the power to reconsider and reverse previous licensing decisions and authority to consider the Challengers' complaints.

In a properly filed appeal *after administrative remedies are exhausted*, the trial court has the power to remand the case back to the Commission should it find that there was unlawful procedure or an inadequate record. Ala. Code § 41-22-20(k) (1975). Until then, however, Plaintiffs are in the wrong forum making the wrong arguments at the wrong time.

B. The Expedited Discovery Order was not related to then-pending AOMA claims.

Rule 26(b) requires that all discovery be "relate[d] to . . . the claim or defense of any . . . party." Ala R. Civ. P. 26(b)(1). Both Alabama Always and Insa asserted their AOMA claims in the case from which this Petition arises *after* the court entered its first Expedited Discovery Order. Hence, the discovery ordered by the court could not have been related to the claim or defense of any party and, therefore, was improperly entered.

To be sure, Alabama Always had a pending AOMA claim—but in a *different* case. Indeed, its AOMA claim stems from the same case in which it filed its motion for expedited discovery. But the trial court did not enter its first Expedited Discovery Order in that case. It entered it in *this* one (the Master Case), the one lacking any AOMA claim at the time it entered its Order.

It does not matter that the trial court consolidated Alabama Always' separate cases. Consolidated cases "retain their separate identity and the parties and pleadings in one action do not automatically become parties and pleading in another action." *Ex parte Autauga Cnty. Dept. of Human Res.*, 348 So. 3d 403, 409 (Ala. Civ. App. 2021) (quoting *R.J.G. v. S.S.W.*, 42 So. 2d 3d 747, 752-53 (Ala. Civ. App. 2009)). Although the

trial court could have entered an order applying to *all* consolidated cases—as it has already done on several occasions (*See* Exhibit H)—it entered the first Expedited Discovery Order *in this case, the Master Case, only*. The discovery it contemplates must therefore be relevant to the claims in *this* "pending action." Ala. R. Civ. P. 26(b)(1). Any AOMA discovery is thus outside the scope of and impermissible under Rule 26.

C. The Expedited Discovery Orders violate the AOMA.

Even if the trial court could retroactively merge Alabama Always' AOMA claim into this case, the AOMA still bars discovery. Before obtaining discovery on an AOMA claim, a plaintiff must fulfill several statutory requirements, and the court must hold a preliminary hearing to validate those requirements. Plaintiffs have not satisfied those requirements.

The AOMA establishes guardrails against opportunistic plaintiffs who might otherwise treat this statutory right of action as a free ticket to court-ordered discovery on state bodies. Unlike typical civil actions, the AOMA requires several things to happen *before* a court is permitted to open the gates to discovery. Those requirements were not met here.

First, an appropriate plaintiff must file a verified complaint that "state[s] specifically" at least one of four "applicable . . . grounds for the complaint" and personally serve the complaint on each named defendant. Ala. Code § 36-25A-9(a) (1975). Neither Plaintiff has done this. The Plaintiffs' complaints generally allege that, "upon information and belief, at least some of the Commissioners held serial or private meetings . . . ." (Exhibits C, E). They do not "state specifically" on which of the four applicable grounds its claim is based. Ala. Code § 36-25A-9(b)(1)-(4) (1975). Furthermore, the record in the Separate Action indicates that personal service of the verified complaint was affected on only one named defendant.

Second, the trial court must hold a "preliminary hearing on the complaint" where "the plaintiff shall establish by a preponderance of the evidence that a meeting of the governmental body occurred and that each defendant attended the meeting." Ala. Code § 36-25A-9(a)-(b) (1975). This has not happened.

Third, at the preliminary hearing which has yet to occur, the plaintiff must "establish a prima facie case" by "present[ing] substantial evidence" to support at least one of the four applicable grounds for their

complaint. *Id.* Not a shred of evidence was presented of an AOMA violation.

AOMA discovery may begin only after the plaintiff satisfies all these requirements and the court sets the case for a hearing on the merits. Ala. Code § 36-25A-9(c) (1975). Therefore, even if Alabama Always or Insa properly had an AOMA claim at issue in this case prior to the entry of the discovery orders, discovery would be improper because: 1) they have not identified with specificity the grounds for an AOMA claim; 2) they have not personally served all defendants; 3) the trial court has not held a preliminary hearing; 4) they have not established an improper meeting by a preponderance of the evidence; and 5) they have not presented substantial evidence needed to establish a prima facie case.

II. The Commission has properly invoked this Court's jurisdiction, and an appeal after final judgment would not be an adequate remedy.

The Commission's Petition satisfies the remaining two requirements for a writ of mandamus.

First, the Commission has properly invoked this Court's jurisdiction under Ala. Code § 12-3-11 (1975). This Court has appellate juris-

diction over this case because it is a civil case in which the amount involved does not exceed $50,000. Ala. Code § 12-3-10 (1975). Furthermore, the trial court issued the Order on January 3, 2024, which it affirmed and modified by order on January 30, 2024, when it rejected the Commission's request for Reconsideration, a Protective Order and a Stay.

Second, this discovery dispute is the type for which an appeal is not an adequate remedy. When, as here, a discovery order disregards a privilege or "compels the production of patently irrelevant or duplicative documents, such as to clearly constitute harassment or impose a burden on the producing party far out of proportion to any benefit that may obtain to the requesting party," the appeal of a discovery order after a final judgment is not an adequate remedy. *Ex parte Guar. Pest Control, Inc.*, 21 So. 3d 1222, 1226 (Ala. 2009) (citing *Ex parte Ocwen Fed. Bank, FSB*, 872 So. 2d 810, 813 (Ala. 2003)). The Expedited Discovery Orders qualify for mandamus review because they disregard two privileges, and because they compel inappropriate and irrelevant discovery such as to cause harassment and undue burden.

A. The Orders disregard commissioners' AOMA privilege against frivolous discovery demands.

In crafting the AOMA, the Legislature recognized that, if a plaintiff need only file a complaint to obtain discovery from an administrative board or commission, such boards and commissions would soon be inundated with subpoenas based on little more than generalized allegations and speculation. To protect against such vexatious discovery requests, the Legislature shielded administrative bodies from being subjected to discovery based simply on a plaintiff filing a complaint.

When a court disregards these statutory discovery protections, it "disregard[s] a privilege" for purposes of mandamus review. *See Ex parte Mobile Infirmary Ass'n*, 279 So. 3d 1129, 1133 (Ala. 2018) (quoting *Ex parte Gentiva Health Servs., Inc.*, 8 So. 3d 943, 947 (Ala. 2008)). Both *Mobile Infirmary* and *Gentiva* considered petitions claiming that a trial court's discovery orders violated the safeguards established by the Medical Liability Act of 1987, Ala. Code § 6-5-551 (1975) ("MLA"). The MLA provides in part that a plaintiff may only conduct discovery concerning specific acts or omissions by a healthcare provider in a case for breach of the standard of care and, even then, only if the plaintiff pleads a "detailed

specification and factual description" of those particular acts or omissions. The Supreme Court held that this statutory limitation and prohibition are "treated as a privilege for purposes of determining whether in issuing the discovery order the trial court has disregarded a privilege, thus warranting review of the discovery order by way of a petition for a writ of mandamus." *Mobile Infirmary*, 279 So. 3d at 1133 (citing *Gentiva*, 8 So. 3d at 946–47).

The same principles apply here. By allowing AOMA discovery before Plaintiffs have satisfied the AOMA requirements for obtaining it, the trial court disregarded a privilege that the Legislature granted to the Commission. Indeed, the very purpose of the AOMA's procedures is defeated if a commission or board must wait until an appeal after a final judgment to correct improperly granted discovery.

B. The Orders improperly intrude upon the Commissioners' ongoing deliberative processes.

The Expedited Discovery Orders also unreasonably intrude on the Commissioners' ongoing deliberative processes. The Courts have long recognized the interest in preserving the confidentiality of thought processes and certain discrete categories of materials and information, similar to when a legislator confers with an aide, or a judge deliberates

with a law clerk. *See Soucie v. David*, 448 F. 2d 1067, 1081 (D.C. Cir. 1971) (Wilkey, J., concurring).

"Some aspects of the privilege, for example the protection accorded the mental processes of agency officials, have roots in the constitutional separation of powers." *In re Sealed Case*, 121 F. 3d 729, 737 n. 4 (D.C. Cir. 1997) (citing U.*S. v. Morgain*, 313 U.S. 409, 421-22 (1941) (noting that in a judicial proceeding, it is "not the function of the court to probe the mental processes of [an officer of the Executive branch]"); *see also Wolfe v. Dept. of Health and Human Servs.*, 839 F. 2d 768, 773 (D.C. Cir. 1988). In *Chicago, B & Q Ry. Co. v. Babcock*, 204 U.S. 585, 593 (1907) the Supreme Court found it was improper for members of a state board to be cross-examined "with regard to the operation of their minds".

"[A] governmental privilege arising from federal case law or statute, and which as a matter of federal constitutional law must be enforced by the courts of Alabama, may be claimed in the state courts in the manner provided by federal law." Ala. R. Evid. 508 advisory committee's notes. "The deliberative process privilege is a subcategory of the executive privilege." Alabama Evidence 3d § 5:21; *see also Ex parte Ala. Dep't of Envtl.*

Mgmt., 627 So. 2d 927, 929-30 (Ala. 1993) (recognizing the existence of the deliberative process privilege but reversing on other grounds).

The deliberative process privilege does not conflict with the AOMA's requirement that "the deliberative process of governmental bodies . . . be open to the public . . . ." Ala. Code § 36-25A-1(a) (1975). The AOMA defines "deliberation" as "[a]n exchange of information or ideas *among a quorum of members* . . . ." Ala. Code § 36-25A-2(1) (1975) (emphasis added). Hence, the AOMA does not apply to the thoughts or mental processes of individual commissioners.

Nor does it conflict with the Compassion Act or AAPA. In this regard, the Challengers assert that the cannabis licensing process is a "contested case" under the AAPA, from the filing of the application to final disposition. The AAPA defines a "contested case" as a matter "in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency *after an opportunity for hearing*." Ala. Code § 41-22-3(3) (1975) (emphasis added). Notably, the Compassion Act does not require a hearing prior to an initial license award, thus placing that process outside of the "contested case" definition. If deemed a contested case, the AAPA only requires a party be given the right to an evidentiary

hearing at one stage in a multi-tiered administrative process. Ala. Code § 41-22-17(a) (1975). The "investigative hearing" process provides such an evidentiary hearing, and upon its conclusion will result in issuance of written order. The Challengers should not be allowed to depose the decision makers in the midst of this ongoing process.

CONCLUSION

This Court should issue a writ of mandamus directing the trial court to vacate the Expedited Discovery Orders and enter an Order granting the Commission's motion for a protective order in full.

RESPECTFULLY SUBMITTED on this the 31st day of January 2024.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitation set forth in Alabama Rule of Appellate Procedure 21(d) and 32(b)(3). According to the word-count function of Microsoft Word, the brief contains 5,990 words. I further certify that this brief complies with the font requirements set forth in Alabama Rule of Appellate Procedure 32(a)(7). The brief was prepared in the Century Schoolbook font using 14-point type. *See* Ala. R. App. P. 32(d).

/s/ *Mark D. Wilkerson*
Mark D. Wilkerson
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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2024, I filed the foregoing with the Clerk of the Court using the electronic filing system and served a copy by electronic filing and/or U.S. Mail and email to Respondents:

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/s/ *Mark D. Wilkerson*
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OF COUNSEL

APPENDIX

Exhibit A: Order; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 491 (filed Nov. 29, 2023))

Exhibit B: Complaint; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-901727 (Doc. 2 (filed Dec. 08, 2023))

Exhibit C: Second Amended Complaint; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-901727 (Doc. 37 (filed Dec. 27, 2023))

Exhibit D: Third Amended Complaint; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 721 (filed Dec. 09, 2023))

Exhibit E: Complaint; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 800 (filed Jan. 22, 2024))

Exhibit F: Motion for Expedited Discovery; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-901727 (Doc. 44 (filed Dec. 27, 2023))

Exhibit G: Motion for Expedited Discovery; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 564 (filed Dec. 27, 2023))

Exhibit H: Temporary Restraining Order; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 590 (filed Dec. 28, 2023))

Exhibit I: Amended Motion for Expedited Discovery; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 636 (filed Jan. 03, 2024))

Exhibit J: Temporary Restraining Order; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 642 (filed Jan. 03, 2024))

Exhibit K: Response in Opposition to the Motions for Expedited Discovery; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 640 (filed Jan. 03, 2024))

Exhibit L: Discovery Order; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 646 (filed Jan. 03, 2024))

Exhibit M: Motion for Reconsideration; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 682 (filed Jan. 05, 2024))

Exhibit N: Order; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 766 (filed Jan. 13, 2024))

Exhibit O: Supplement to Motion to Reconsider; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 824 (filed Jan. 23, 2024))

Exhibit P: Order; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 860 (filed Jan. Jan. 30, 2024))

Exhibit Q: Hearing Transcript; *Alabama Always, LLC, et al. v. AMCC*, 03-CV-2023-000231 (Doc. 828, Ex. B (filed Jan. 23, 3034))

EXHIBIT A

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11/29/2023 9:23 PM
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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, Plaintiff, v. ALABAMA MEDICAL CANNABIS COMMISSION, Defendant.	)	Case Number: CV-2023-000231 LEAD CASE[1]

ORDER

These consolidated matters were ordered by the Court to a mediation, which convened in the courtroom before Mediator Phil Adams on November 20, 2023. At the conclusion of mediation, certain (but not all) litigants reached a pro tanto settlement and resolution of claims. Following the conclusion of mediation, the parties to the agreement memorialized the same in a record discussion with the Court. Certain non-settling parties also noted for the record their non-joinder in the agreement reached on the record and in their positions regarding issues pending in these and at least one other case.

As discussed on the record in the hearing, it is **ORDERED** as follows:

1. The Alabama Medical Cannabis Commission (hereinafter "the Commission") is **PERMANENTLY ENJOINED** from relying upon, using, or considering in any way the "Scores" (including without limitation scoring materials, scoring notes, scoring results, and any corresponding rankings of applicants derived from those scores) made the subject of this litigation. The intent of this Order is to fully and finally eliminate any use of the Scores by the Commission for any purpose whatsoever in the Commission's evaluations of applicants for medical cannabis licensing of any type or form, including application of those provisions of 538-

X-3-.20ER pertaining to the Scores. For clarity, the term "Scores" is intended to encompass those numerical scores derived during 2023 pursuant to and by application of the *Application Guide* published by the Commission, or in conjunction with the Commission's retention of the University of South Alabama as a coordinator of third-party scoring.

2. Because applicants for medical cannabis licenses other than integrated licenses (the "Non-Integrated Applicants") have already been required to submit supplemental materials to the Commission under Ala. Admin. Code § 538-x-3-.20ER paragraph 4, such Non-Integrated Applicants shall have until November 27, 2023 within which to make revised or supplemental submissions of materials under Ala. Admin. Code § 538-x-3-.20ER paragraph 4, as needed in order for their submissions to be tailored or revised due to the relief granted in this Order.

3. All other aspects of the Commission's implementation of Ala. Admin. Code § 538-x-3-.20ER shall remain on schedule, in accordance with the timelines previously published by the Commission to all applicants (both Non-Integrated Applicants and Integrated Applicants).

4. In light of the Court's grant of injunctive relief in paragraph 1 above, all claims in this action based upon the Scores, the Application Guide and related forms, and the "10MB" and "workaround" issue are **DISMISSED WITH PREJUDICE**. This includes specifically the claims raised in Alabama Always's Third Amended Complaint (Doc. 450) and prior iterations thereof, and Specialty Medical Products's Second Amended Complaint (Doc. 404) and prior iterations thereof. It also includes certain aspects of Medella's Second Amended Complaint (Doc. 406). Finally, it includes any claims, whether raised in Complaints in Intervention or not, which any Intervenor asserted or could have asserted concerning the Scores, the Application Guide and related forms, and the "10MB" and "workaround" issue described above and herein.

5. All claims in Alabama Always's Third Amended Complaint and Specialty Medical

Products's Second Amended Complaint not based on scoring, the Application Guide and related forms, or the 10MB and workaround issues are **DISMISSED WITHOUT PREJUDICE**.

6. The Court will retain jurisdiction to enforce the terms of the settlement and the terms of this Order.

DONE this 29th day of November, 2023.

/s/ JAMES H ANDERSON
CIRCUIT JUDGE

EXHIBIT B

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03-CV-2023-901727.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, Plaintiff, v. ALABAMA MEDICAL CANNABIS COMMISSION, Defendant.	))))))))))	Case No. CV-2023-_____

VERIFIED COMPLAINT

Alabama Always, LLC (Alabama Always) files this complaint pursuant to Alabama Code § 41-22-10 against the Alabama Medical Cannabis Commission (the Commission), to declare a Commission rule invalid in part, and to enjoin its enforcement. Specifically, Alabama Always seeks relief against that portion of Alabama Administrative Code r. 538-X-3-.20 and 538-X-3-.20ER (the Rule) that gives a minority of Commission members the ability to exercise what amounts to a veto over a majority of Commission members in selecting medical cannabis licensees. This veto power violates fundamental Alabama law that requires decisions by the Commission and other administrative agencies to be made by majority vote.

Parties

1. Alabama Always is an Alabama limited liability company and an applicant for an integrated medical license pursuant to the Darren Wesley "Ato" Hall Compassion Act (the Compassion Act).

2. The Commission is an agency of the State of Alabama subject to the Alabama Administrative Procedure Act. *See* Ala. Code § 20-2A-20(p).

Jurisdiction and Venue

3. Jurisdiction and venue are appropriate by virtue of Alabama Code § 41-22-10, which provides that civil actions such as this are to be prosecuted in the Circuit Court of

Montgomery County.

Facts

4. The Court will need no substantial introduction to the underlying facts of this case, the Court having presided over extensive litigation involving the Commission. The Court can certainly take judicial notice of prior and pending proceedings before it.

5. In addition, on information and belief, certain staff members have reportedly stated that Alabama Always will receive a license "over [their] dead body."

6. Based on a staff recommendation, the Commission has adopted a voting procedure that gives a minority of Commission members the ability to effectively veto the judgment of the majority. This procedure is contained in an identical pair of rules, Alabama Administrative Code r. 538-X-3-.20 and 538-X-3-.20ER, adopted by the Commission at its October 12, 2023 meeting.[1] The procedure requires each Commissioner to rank all 36 applicants for integrated licenses in descending order. The staff will then average the rankings to obtain a single composite ranking, and the average ranking thus generated will determine the order in which the applicants are considered for licenses.

> In order to determine the order in which Applicants should be considered, each Commissioner will be given an opportunity to submit, in an open meeting, *a written form providing an overall preliminary rank, in descending order, of each of the Applicants in the license category*, giving due consideration to all statutory and regulatory criteria. Such forms shall be tabulated and averaged by the Commission staff and used solely to determine the order in which individual Applicants are subsequently considered. In those instances where two or more applicants receive identical average rankings, the order shall be determined by a drawing. The Chair will call for a motion to approve or deny each application in the order established above. Following such motion, duly seconded, the Chair will provide an opportunity for further deliberations and a vote.

Ala. Admin. Code r. 538-X-3-.20 & -.20ER.

[1] The rules are identical because 538-X-3-.20ER was adopted as an emergency rule, effective for no more than 120 days, and 538-X-3-.20 is the permanent version, adopted after notice and comment as required by the AAPA.

7. There are 36 applicants for the five available integrated licenses. According to the voting procedure designed by the Commission staff that is contained in the Rule, each Commissioner will rank each integrated applicant from 1 to 36. The Commission has twelve voting members.

8. This ranking and voting system was used last week by the Commission when other license categories were considered and licenses were awarded. (Attached as **Exhibit A** is the composite of the ranking sheets for all four license categories published on the Commission's website.) While there is some rough consensus on some of the rankings for various applicants, in each "row," which captures the rankings of each Commissioner for that applicant, in almost all cases there is an outlier or two that gave the applicant a substantially higher number (which ranks them lower) than other Commissioners have done. In all cases, that higher number skews the applicant's ranking and makes the applicant less likely to get awarded a license. If there are two Commissioners who give the applicant a substantially higher number, that would usually be enough to eliminate the applicant from consideration by the Commission.

9. In the case of the integrated license category the Commission is scheduled to consider, rank, and vote on next week, the Commissioners are being asked to rank all 36 companies that applied, even though roughly half the companies did not make live presentations to the Commission. To be clear, each Commissioner will be asked to rank all 36 companies in the order they consider them to be best qualified to perform as an integrated license holder. Each Commissioner will rank each company, giving them a number from the most qualified, which they will give a "1" ranking, to the least qualified which they will give a "36" ranking. They are asked to rank and award all 36 companies, regardless of whether they have information about some of the companies or not.

10. This ranking system allows individual Commissioners to "blackball" or eliminate some companies from further consideration if they give that company a very high ranking of 30 or more. There are only five licenses to be awarded. With the ranking system that is in place, the five companies selected will each have to have a very low score, meaning they were ranked very highly qualified by all of the Commissioners or nearly all of the Commissioners. But if a small minority of Commissioners rated any of those applicants between "30" and "36" instead of closer to "1," then that applicant's average rating would be increased dramatically, even if 9 of the 12 Commissioners ranked that applicant as a "1." That company would be eliminated from consideration by a minority of the Commissioners. Empowering individual Commissioners with the authority to "blackball" or eliminate some companies from consideration violates the principal that only a majority of the Commission is allowed to make decisions and award or not award these licenses. Thus, assuming that all 12 Commissioners voted on an applicant, and nine of them awarded that applicant a first-place vote, the others could effectively veto the judgment of the majority by awarding that applicant a 36. In that event, the applicant would receive an average score of 9.75.

11. Based on the results from last week, when the Commission used this procedure to award cultivator, processor, dispensary, testing lab, and secure transport licenses, a rating of 9.75 would disqualify an applicant from being considered by the Commission for a license, even though most Commissioners voted that applicant as most qualified.

12. To illustrate, the lowest rated cultivator license awarded last week had an average score of 6.9; the lowest rated processor license awarded was 4.7273; the lowest rated dispensary license awarded was 5.5455; and the lowest rated secure transporter license awarded was 4. For the integrated category, the ability of one Commissioner to rank any applicant with a 36 effectively serves to veto that applicant.

13. This system thus has the potential to allow a minority of Commissioners, or even one Commissioner, to veto the judgment of the majority. This voting system is not exemplary of the concept of majority rule or the open deliberation intended under the Alabama Administrative Procedure Act (AAPA).

14. This is a contested case proceeding within the meaning of the AAPA, because the Commission's vote will result in both the grant and denial of licenses. *See* Ala. Code § 41-22-19(a) ("The provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension, or renewal of a license.").

15. The Commission's final decision on the granting of integrated licenses will be a final agency action, and therefore must be by majority vote. *Id.* § 41-22-15 ("In a contested case, a majority of the officials of the agency who are to render the final order must be in accord for the decision of the agency to be a final decision.").

16. Alabama Always likely is the only applicant that meets all of the Compassion Act's requirements for integrated licenses. On information and belief, however, there is a small minority of Commissioners who, in conjunction with the Commission's staff and former Commissioner Stokes, intend to prevent Alabama Always from receiving a license.

17. Any vote by the Commission should be by majority rule, should consider each applicant, and should follow the clear statutory criteria.

18. The Rule therefore threatens to irreparably harm Alabama Always and its rights and privileges. Alabama Always has expended substantial sums of money in its efforts to comply with the Compassion Act and will not be able to recover those sums because the Commission enjoys sovereign immunity.

Count One
(Declaratory Judgment)

19. Alabama Always adopts and incorporates the previous paragraphs as if

specifically alleged in this paragraph.

20. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

21. The AAPA requires any agency rule to be declared invalid if the rule "exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in" the AAPA. *Id.* § 41-22-10.

22. Alabama Always submits that the Rule is invalid.

23. The Commission has no authority for enacting the Rule because it did not comply with the AAPA.

24. In addition, the Rule interferes with and impairs Alabama Always's legal rights.

25. Exhaustion of administrative remedies is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975)."). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

26. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission's Rule is invalid. Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Two
(Injunctive Relief)

27. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

28. As noted, the Rule threatens Alabama Always with irreparable harm. The entry of a temporary restraining order, preliminary injunction, and permanent injunction would preserve the status quo, and would not inconvenience the Commission, particularly since no party before the Commission has the right to have its application ranked and voted on in a manner that violates Alabama law. The balance of the equities therefore favors the issuance of a temporary restraining order and an injunction.

29. The AAPA permits this Court to stay enforcement of an agency rule "by injunctive relief." Ala. Code § 41-22-10.

30. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury.

31. Furthermore, the harm that Alabama Always faces is not susceptible of being compensated with money damages.

32. Alabama Always has no adequate remedy at law.

33. There is no remedy for the Commission's failure to judge all applications fairly and in compliance with its own rules and regulations.

34. Without the requested injunctive relief, Alabama Always will suffer irreparable harm in the form of interference with its business.

35. Alabama Always is likely to succeed on the merits of its claim, for the reasons explained, including because the Commission failed to substantially comply with the AAPA.

36. Any hardship imposed on the Commission by the requested injunction does not outweigh the benefit to Alabama Always in receiving the requested injunction.

37. In addition, not issuing the injunction would severely harm the public.

38. The Act exists to help ensure that the best entities cultivate, transport, and dispense the best medical cannabis to Alabama residents suffering from medical conditions whose symptoms could be alleviated by medical cannabis.

39. The public is deprived of potentially obtaining the best integrated facility licensees when the Commission, by act or omission, violates the AAPA, as it has in this case, and causes ongoing and irreparable harm to the licensing process.

40. Immediate and irreparable injury, loss, or damage will result to Alabama Always before the Commission can be heard in opposition.

FOR THESE REASONS, Alabama Always requests that the Court enter a temporary restraining order, preliminary injunction, and permanent injunction against the use of the Rule as identified above.

Respectfully submitted,

/s/ William G. Somerville
WILLIAM G. SOMERVILLE
MICHAEL A. CATALANO
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PLEASE SERVE DEFENDANT VIA CERTIFIED MAIL AT THE FOLLOWING ADDRESS:

The Alabama Medical Cannabis Commission
c/o John McMillan, Director
P. O. Box 309585
Montgomery, Alabama 36130

VERIFICATION

In accordance with Alabama Rule of Civil Procedure 65(b), James Eaton, the representative for Alabama Always LLC, being first duly sworn in accordance with the law, being informed of and familiar with the facts set forth and the statements made in paragraphs 18, 26, 28, 30–32, 34, and 40 of the foregoing verified complaint, which set forth specific facts that immediate and irreparable injury, loss, or damage will result, make oath that the foregoing averments are true to the best of my knowledge and where stated my information and belief.

Given under my hand and official seal this 8th day of December 2020.

James Eaton, CEO

STATE OF FLORIDA

COUNTY OF LEO

I, the undersigned authority, a Notary Public in and for said State and County, do hereby certify that James Eaton, who is known to me, acknowledged before me, on this day, that, being informed of the contents of the instrument, he has signed, sealed, and delivered the same voluntarily, and with full authority for said entity.

Given under my hand and official seal this the 8th day of December 2023.

NOTARY PUBLIC

My Commission Expires: 12/3/26 [SEAL]

JULIA S. ANDERSON
MY COMMISSION # HH 296816
EXPIRES: December 3, 2026

EXHIBIT A

Alabama Medical Cannabis Commission
Compiled Application Rankings
License Type: Cultivator

Applicant ID	Applicant Name	Average Score Rank	Blakemore	Gamble	Harvey	Harwell	Hatchett	Jensen	Martin	Price	Saliski	Skelton	Szaflarski	Vaughn
1628	CRC of Alabama, LLC	**2.3000**	1	2		4	2	2		2	2	2	3	3
1638	Greenway Botanicals LLC	**2.3000**	2	1		1	1	3		6	1	4	2	2
1618	Gulf Shore Remedies, LLC	**2.5000**	4	4		6	3	1		1	3	1	1	1
1613	Native Black Cultivation **(M)**	**5.0000**	6	3		2	5	6		3	8	3	6	8
1691	Creek Leaf Wellness, Inc.	**5.2000**	5	6		3	4	5		4	4	5	7	9
1639	Twisted Herb Cultivation, LLC	**5.5000**	3	5		5	6	4		8	5	7	8	4
1682	I AM FARMS **(M)**	**6.9000**	7	7		8	8	9		5	9	6	4	6
1699	Blackberry Farms LLC	**8.4000**	8	8		11	7	11		9	7	9	9	5
1697	Pure by Sirmon Farms LLC	**8.5000**	10	11		9	9	10		10	6	8	5	7
1671	Sanitus LLC **(M)**	**9.2000**	9	9		7	11	8		7	10	10	11	10
1665	James Gang Dispensary LLC **(M)**	**10.2000**	11	10		10	10	7		11	11	11	10	11
(M) - denotes minority applicant														

DOCUMENT 187

Alabama Medical Cannabis Commission
Compiled Application Rankings
License Type: Processor

Applicant ID	Applicant Name	Average Score Rank	Blakemore	Gamble	Harvey	Harwell	Hatchett	Jensen	Martin	Price	Saliski	Skelton	Szaflarski	Vaughn
1632	Organic Harvest Lab LLC	**1.7273**	1	1	1	1	1	1		3	2	1	5	2
1617	Coosa Medical Manufacturing	**4.0000**	3	2	5	2	2	6		1	5	4	8	6
1694	1819 Labs LLC **(M)**	**4.0909**	4	4	1	5	3	2		8	4	7	2	5
1648	Enchanted Green LLC **(M)**	**4.7273**	5	6	2	4	9	5		5	1	10	4	1
1653	Jasper Development Group Inc.	**4.7273**	2	3	4	3	5	4		11	3	11	3	3
1629	LyonsWeb Processing LLC	**5.3636**	7	5	3	7	6	9		2	6	3	7	4
1681	Green Acres Organic Pharms Inc.	**5.7273**	6	7	10	11	4	3		4	7	2	1	8
1655	Guaranteed Investments AL LLC	**7.2727**	8	8	6	10	7	7		7	8	6	6	7
1680	Green Phoenix Holdings LLC	**8.9091**	11	10	11	6	10	8		9	9	5	10	9
1646	Longleaf Extracts LLC	**9.2727**	9	11	8	8	11	10		6	10	8	11	10
1654	Arbor Vita Care, Inc.	**9.4545**	10	9	7	9	8	11		10	11	9	9	11
(M) - denotes minority applicant														

EXHIBIT 1887

Alabama Medical Cannabis Commission
Compiled Application Rankings
License Type: Dispensary

Applicant ID	Applicant Name	Average Score Rank	Blakemore	Gamble	Harvey	Harwell	Hatchett	Jensen	Martin	Price	Saliski	Skelton	Szaflarski	Vaughn
1611	CCS of Alabama LLC	**2.3636**	3	4	3	4	5	1		1	2	1	1	1
1635	GP6 Wellness, LLC **(M)**	**3.5455**	2	1	11	1	2	4		3	4	4	4	3
1631	Capitol Medical LLC	**4.3636**	7	5	4	3	1	3		2	5	2	7	9
1643	RJK Holdings AL, LLC	**5.5455**	1	2	1	2	3	8		17	1	17	5	4
1616	Yellowhammer Medical Dispensaries, LLC	**5.8182**	4	3	2	7	4	2		16	6	16	2	2
1673	Emerald Standard, LLC	**6.2727**	5	6	15	5	8	5		4	3	3	8	7
1678	Fleur De Vie Wellness Inc.	**9.2727**	9	9	6	8	9	14		11	9	10	6	11
1641	Alabama Sexual Medicine Specialists, LLC	**9.7273**	13	17	10	6	6	7		7	11	7	9	14
1683	Statewide Property Holdings AL, LLC **(M)**	**10.0909**	8	7	17	10	11	15		8	8	18	3	6
1658	Shangri-La AL LLC **(M)**	**10.3636**	12	14	12	9	13	6		9	10	9	12	8
1705	MedShop Dispensary, LLC	**10.7273**	6	8	18	11	7	17		18	7	11	10	5
1666	LeBleu Fields **(M)**	**10.9091**	10	10	16	14	10	13		5	14	5	13	10
1652	Guaranteed Dispensary AL LLC	**11.9091**	11	13	13	13	12	10		12	12	8	11	16
1610	GreenWellness, LLC	**13.2727**	17	11	9	16	15	18		6	15	6	16	17
1701	CS Alabama Investments	**13.7273**	15	16	7	12	18	16		10	18	12	15	12
1645	Kush Medicinal LLC **(M)**	**14.0000**	18	12	8	18	17	12		13	13	13	17	13
1661	All Green Alabama Medical, LLC	**14.5455**	16	18	5	17	16	9		15	16	15	18	15
1670	Mark Daniel Jennings	**14.5455**	14	15	14	15	14	11		14	17	14	14	18
(M) - denotes minority applicant														

DOCUMENT 187

Alabama Medical Cannabis Commission
Compiled Application Rankings
License Type: Secure Transporter

Applicant ID	Applicant Name	Average Score Rank	Blakemore	Gamble	Harvey	Harwell	Hatchett	Jensen	Martin	Price	Saliski	Skelton	Szaflarski	Vaughn
1689	Alabama Secure Transport, LLC	**1.5455**	1	2	1	1	2	2		2	1	1	1	3
1676	Tyler Van Lines LLC	**2.0000**	3	1	2	2	1	1		3	2	3	3	1
1622	Pick Up My Things **(M)**	**3.3636**	4	3	5	4	4	5		1	3	2	2	4
1688	International Communication LLC **(M)**	**4.0000**	2	6	3	7	3	3		4	4	4	6	2
1633	Soraya Schultz	**5.2727**	5	4	6	3	5	6		6	6	7	4	6
1637	XLCR, Inc. **(M)**	**5.3636**	6	5	7	5	6	4		5	5	6	5	5
1674	Harvell Motor Company Inc. **(M)**	**6.4545**	7	7	4	6	7	7		7	7	5	7	7
(M) - denotes minority applicant														

DOCUMENT 187

EXHIBIT C

ELECTRONICALLY FILED
12/27/2023 3:14 PM
03-CV-2023-901727.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, Plaintiff, v. ALABAMA MEDICAL CANNABIS COMMISSION, WILLIAM SALISKI, JR. D.O., SAM BLAKEMORE, DWIGHT GAMBLE, ANGELA MARTIN, M.D., DR. ERIC JENSEN, LOREE SKELTON, REX VAUGHN, CHARLES PRICE, TAYLOR HATCHETT, JAMES HARWELL, JERZY SZAFLARSKI, M.D., Ph. D, and DION ROBINSON, in their official capacities as members of the State of Alabama Medical Cannabis Commission, Defendants.	)	Case No. CV-2023-901727

VERIFIED SECOND AMENDED COMPLAINT

Alabama Always, LLC (Alabama Always) files this amended complaint pursuant to Alabama Code § 41-22-10 & -20 against the Alabama Medical Cannabis Commission and its Commissioners (collectively, the Commission), to declare a Commission rule invalid, and to enjoin its continued enforcement. Specifically, Alabama Always seeks relief against Alabama Administrative Code r. 538-X-3-.20 and 538-X-3-.20ER (collectively, the Rule). In addition, Alabama Administrative Code r. 538-X-3-.20ER is invalid because it was adopted as a putative "emergency rule," but there are no circumstances constituting an emergency to justify its adoption.

Alabama Always also asks the Court for declaratory and injunctive relief to stay the Commission's post-award and investigative hearing process.

On Tuesday, December 12, the Commission utilized the Rule to "rank" or "score" all applicants for an integrated license. In so doing, the Commission failed to follow its own regulation, Alabama Administrative Code r. 538-X-3-.10(2), which requires applicants to be

"scored averaged, and ranked using an impartial numerical process in accordance with the requirements of" the Darren Wesley "Ato" Hall Compassion Act (the Act).

As with its previous two attempts to award licenses—on June 12 and August 10—the Commission engaged in no debate or deliberation, leaving applicants and the public with no clue as to why the Commission chose certain applicants and not others. There is certainly no indication that the Commission considered the mandatory statutory criteria, such as the 60-day cultivation requirement. The only thing that is clear is the Commission's blind determination to flout the requirements of the Act and the AAPA. The applications currently under consideration were submitted a year ago, and the process is no further along than the day they were submitted. The Commission has demonstrated that it is incapable of managing this process.

Exhaustion of administrative remedies is futile. Although the Act has set forth a procedure for an "investigative hearing," that hearing process violates the fundamental due process requirements of the Alabama Administrative Procedure Act (AAPA) for the grant and denial of licenses. In addition, the Commission's rule which implements the investigative hearing process is not even effective until February 12, 2024. As will be seen, the investigative hearing process is illusory. Because exhaustion would be futile, this Court should take jurisdiction over this controversy without requiring exhaustion.

Parties

1. Alabama Always is an Alabama limited liability company and an applicant for an integrated medical license pursuant to the Act.

2. The Commission is an agency of the State of Alabama subject to the AAPA. *See* Ala. Code § 20-2A-20(p).

3. William Saliski, Jr., D.O.; Sam Blakemore; Dwight Gamble; Angela Martin, M.D.; Dr. Eric Jensen; Loree Skelton; Rex Vaughn; Charles Price; Taylor Hatchett; James Harwell; Jerzy Szaflarski, M.D., Ph.D.; and Dion Robinson are all members of the Commission.

Jurisdiction and Venue

4. Jurisdiction and venue are appropriate by virtue of Alabama Code § 41-22-10, which provides that civil actions such as this are to be prosecuted in the Circuit Court Montgomery County.

5. Jurisdiction is also conferred by Alabama Code § 41-22-20, which permits persons aggrieved by a decision of an administrative agency to obtain relief in this Court.

6. Finally, an action for violation of the Open Meetings Act is proper in the Circuit Court of Montgomery County pursuant to Alabama Code § 36-25A-9(a) because the primary office of the Commission is in Montgomery County, Alabama.

Facts

7. The Court will need no substantial introduction to the underlying facts of this case, the Court having presided over extensive litigation involving the Commission. The Court can certainly take judicial notice of prior and pending proceedings before it.

The Commission's Rule is Invalid.

8. Based on a staff recommendation, at its December 12 meeting, the Commission utilized a voting procedure that gave a minority of Commission members the ability to effectively veto the judgment of the majority.

9. This procedure is contained in an identical pair of rules, Alabama Administrative Code r. 538-X-3-.20 and 538-X-3-.20ER, adopted by the Commission at its October 12, 2023 meeting (collectively, the Rule). The procedure required each Commissioner to rank all 36 applicants for integrated licenses in descending order. The staff will then average the rankings to obtain a single composite ranking, and the average ranking thus generated will determine the order in which the applicants are considered for licenses.

> In order to determine the order in which Applicants should be considered, each Commissioner will be given an opportunity to submit, in an open meeting, *a written form providing an overall preliminary rank, in descending order, of each of the Applicants in the license category*, giving due consideration to all statutory and regulatory criteria. Such forms shall be tabulated and averaged by the Commission staff and used solely to determine the order in which individual Applicants are subsequently considered. In those instances where two or more applicants receive identical average rankings, the order shall be

> determined by a drawing. The Chair will call for a motion to approve or deny each application in the order established above. Following such motion, duly seconded, the Chair will provide an opportunity for further deliberations and a vote.

Ala. Admin. Code r. 538-X-3-.20 & -.20ER. The Rule did not require the Commissioners to rank or score the applicants according to statutory criteria (such as the demonstrated ability to commence cultivation within 60 days of notification of a license award), but instead allowed the Commissioners to vote arbitrarily and capriciously.

10. In addition, the Rule's voting system is not exemplary of the concept of majority rule or the open deliberation intended under the AAPA.

11. This is a contested case proceeding within the meaning of the AAPA, because the Commission's vote will result in both the grant and denial of licenses. *See* Ala. Code § 41-22-19(a) ("The provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension, or renewal of a license.").

12. The Commission's final decision on the granting of integrated licenses is a final agency action, and therefore must be by majority vote. *Id.* § 41-22-15 ("In a contested case, a majority of the officials of the agency who are to render the final order must be in accord for the decision of the agency to be a final decision.").

13. Alabama Always likely is the only applicant that meets all of the Compassion Act's requirements for integrated licenses.

14. Any vote by the Commission should be by majority rule, should consider each applicant, and should follow the clear statutory criteria. But that did not occur at the December 12 meeting.

15. At the December 12 meeting, Alabama Always received votes of 1, 2, 5, 10, 13, 16, 17, 19, and 20, for an average ranking of 11.4444, putting Alabama Always in eleventh place. Consequently, Alabama Always was not considered for a license.

16. There is no explanation of why any Commissioner ranked Alabama Always or any other applicant in a particular place. The numerical rankings were arbitrary and capricious.

17. The rankings also violated the Commission's own rules, which require applicants to be ranked and scored according to the Act's requirements: "Applicants shall be scored, averaged, and ranked using an impartial numerical process in accordance with the requirements of the Act and the Criteria for Awarding Licenses set forth in r. 538-X-3-.11." *See* Ala. Admin. Code r. 538-X-3-.10(1).

18. On information and belief, the Commission and its staff take the position that the Commission can make licensure decisions without regard to procedure, facts, or qualifications. The Commission and its attorneys repeatedly invoke the justification that production of medical cannabis is a "privilege" rather than a "right." Similarly, they regularly contend that the Commission has virtually unlimited discretion to do whatever it wants.

19. But the Commission does not have unlimited discretion, and it is required to follow the procedures prescribed by the AAPA. In fact, in making decisions to grant or deny licenses, the Commission is bound by the "contested case" provisions of the AAPA: "The provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension, or renewal of a license." Ala. Code § 41-22-19(a). There can be no dispute that the Commission both granted and denied licenses at its December 12 meeting.

20. The Commission's rules give lip service to the AAPA, but they substantially violate the AAPA's contested case provisions. Thus, although the Commission's revised Rule 538-X-3-.18(b) provides that investigative hearings will be conducted pursuant to the AAPA's contested case provisions, the Commission has no procedure for providing notice of charges as required by Alabama Code § 41-22-12(b), which requires that notice must contain, *inter alia,* a statement of the legal authority and the matters asserted. Nor has any such notice been issued.

21. At a minimum, therefore, prior to a contested case proceeding, the Commission must give notice to applicants explaining why they were denied a license, and the factual and legal grounds for the denial.

22. Judging from the proceedings during the December 12 Commission meeting,

however, it will be impossible to fashion a notice explaining the legal and factual grounds for denying Alabama Always a license. There were no deliberations during the meeting, and no Commissioner set forth any explanation of why he or she assigned a particular rank to any applicant, including Alabama Always.

23. Because there is no contemporaneous record of why any applicant was granted or denied a license, no notice complying with Alabama Code § 41-22-12(b) can be issued. And even if the Commission's staff were to manufacture such a notice, there would be no reason to believe that the notice reflected the actual state of mind during the votes.

24. Accordingly, any investigative hearing process would turn the due process requirements of the AAPA on its head, because it would require Alabama Always and other denied applicants to ferret out the reasons why their applications were denied.

25. On information and belief, at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the Open Meetings Act (the OMA). These private meetings enabled the Commissioners to vote on candidates without deliberation in violation of the OMA.

26. This would be the third time that the Commissioners held such deliberations in private. Similar votes on applications, in violation of the OMA, occurred during the June 12 and August 10 Commission meetings. During both of those meetings, the Commission emerged from executive session to vote without debate on a slate of applicants.

The Commission's Emergency Rule is Invalid.

27. At the Commission's October 12 meeting, it adopted a new "emergency rule," Alabama Administrative Code r. 538-x-3-.20 (the Emergency Rule). The Emergency Rule provided a procedure for considering applications and for considering the scores that had been generated by the illegal application scoring rules.

28. The AAPA does not permit the adoption of an emergency rule except to avert "an immediate danger to the public health, safety, or welfare . . . ." Ala. Code § 41-22-5(b)(1). There

is no "immediate danger" justifying the adoption of the Emergency Rule without complying with the public notice and comment requirements of the AAPA. The commentary to Section 41-22-5 adds the following:

> Subsection (b) of this section is intended to enable an agency to exercise its rulemaking powers without the constraints of normal procedure as provided by this act when protection of the public health, safety, or welfare requires immediate action or when immediate implementation is required by federal statute or rule. *Such action may include, but is not limited to summary processes such as quarantines, contrabands, seizures and the like* authorized by law without notice.

Id. cmt. (emphasis added). There is simply no "emergency" here.

29. The Commission's express justification for adopting the emergency rule is found in the "Certification of Emergency Rules" it filed with the Legislative Services Agency on October 19, 2023. The Certification recites litigation and delays associated with the licensure process and finds that "uncertainties and delays surrounding the licensing process presents an immediate danger to public health and welfare," and that the adoption of the Emergency Rule is necessary to protect the public health and welfare to carry out the legislative mandate of licensing medical cannabis providers to provide relief to qualified patients.

30. The inability of qualified patients to obtain medical cannabis is not an emergency within the meaning of Alabama Code § 41-22-5(b)(1). The unavailability of medical cannabis is not a recent development; in fact, medical cannabis has never been available in Alabama. The problem with the Commission's Emergency Rule is that declaring a decades-long state of affairs an "emergency" does not make it so. *See Oliver v. Williams*, 567 So. 2d 304, 308 (Ala. Civ. App. 1989) ("However, as the trial court noted, this crisis had been in existence for many years and, thus, did not constitute an 'emergency' as defined in § 41–22–5(b).").

31. The Commission also ignores the availability of cannabis products over the counter in retail shops across that state. Following the passage of the Agriculture Improvement Act of 2018, *see* PL 115-334, December 20, 2018, 132 Stat 4490 (often referenced as the Farm Bill), and related laws, cannabinoid compounds such as CBD and THC (in concentrations of not greater than 0.3%) are available without a prescription or a permit.

32. The Commission's true intent in adopting the Emergency Rule was to create a justification for considering the scores that were created by the illegal scoring system described above.

33. The Commission did not follow the AAPA's public notice and comment procedures before adopting the Emergency Rule. The Rule also does not specify a notice period as required by Alabama Code § 41-22-5(a)(1).

34. The Rule therefore threatens to irreparably harm Alabama Always and its rights and privileges. Alabama Always has expended substantial sums of money in its efforts to comply with the Act and will not be able to recover those sums because the Commission enjoys sovereign immunity.

Count One
(Declaratory Judgment – the Rule)

35. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

36. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

37. The AAPA requires any agency rule to be declared invalid if the rule "exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in" the AAPA. *Id.* § 41-22-10.

38. Alabama Always submits that the Rule is invalid.

39. The Commission has no authority for enacting the Rule because it did not comply with the AAPA.

40. In addition, the Rule interferes with and impairs Alabama Always's legal rights.

41. Exhaustion of administrative remedies is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to

challenging the validity of a rule under § 41–22–10, Code (1975).”). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

42. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission’s Rule is invalid. Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Two
(Declaratory Judgment – the Emergency Rule)

43. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

44. The AAPA permits “[t]he validity or applicability of a rule” to “be determined in an action for a declaratory judgment.” Ala. Code § 41-22-10.

45. The AAPA requires any agency rule to be declared invalid if the rule “exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in” the AAPA. *Id.* § 41-22-10.

46. Alabama Always submits that the Emergency Rule is invalid.

47. There is no emergency as required by Alabama Code § 41-22-5(b)(1) to justify the Commission’s adoption of the Emergency Rule without complying with the public notice and comment requirements of the AAPA.

48. The Commission has no authority for enacting the Rule because it did not comply with the AAPA.

49. In addition, the Rule interferes with and impairs Alabama Always’s legal rights.

50. Exhaustion of administrative remedies is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975)."). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

51. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission's Rule is invalid. Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Three
(Violation of the Open Meetings Act)

52. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

53. The OMA requires that "the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6). Except for executive sessions permitted pursuant in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state laws or statutes, all meetings of a governmental body shall be open to the public." Ala. Code § 36-25A-1(a).

54. As noted, upon information and belief, at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the OMA.

55. These private meetings enabled the Commissioners to vote on candidates without deliberation in violation of the OMA.

56. The OMA permits a Court to issue a temporary restraining order or preliminary injunction based on violations of the OMA. *See* Ala. Code § 36-25A-9(e).

57. Such a temporary restraining order and injunction prohibiting the Commission from issuing the licenses that it awarded at the December 12 meeting that violated the OMA is appropriate here under Alabama Rule of Civil Procedure 65.

58. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury.

59. If the Commission is not enjoined from issuing the five integrated licenses awarded at the December 12 meeting, Alabama Always will suffer immediate and irreparable harm.

60. Specifically, the Commission must "issue" the licenses not later than fourteen days after the deadline for payment of a license fee by the awardee or not later than twenty-eight days after the award. *See* Ala. Admin. Code § 538-X-3-.17.

61. If the Commission issues the licenses, then there will no longer be any licenses available to Alabama Always.

62. Without the requested injunctive relief, Alabama Always will suffer irreparable harm in the form of interference with their business.

63. Alabama Always's reputation and goodwill will also be irreparably damaged without an injunction prohibiting the Commission from issuing the licenses.

64. Besides that, Alabama Always will suffer the loss of its time, money, and energy invested in the application process.

65. Such losses are not susceptible of being compensated with money damages because the Commission and its members are immune from suit for money damages.

66. Alabama Always is likely to succeed on the merits of its claims, for the reasons explained in this complaint.

67. The hardship imposed on the Commission by the requested injunction does not

outweigh the benefit to Alabama Always in receiving the requested injunction.

68. In addition, not issuing the requested injunction would severely harm the public, which is entitled to an open "deliberative process of governmental bodies." *See* Ala. Code § 36-25A-1.

69. Immediate and irreparable injury, loss, or damage will result to Alabama Always.

70. The invalidation of the Commission's actions would not unduly prejudice any third parties. This complaint is being filed less than three weeks after the Commission awarded licenses on December 12, 2023.

FOR THESE REASONS, Alabama Always requests that the Court enter a temporary restraining order, preliminary injunction, and permanent injunction invalidating the action taken by the Commission on the issues unlawfully deliberated at or before the December 12 meeting and, more particularly, the award of licenses to license applicants and enjoining the Commission from issuing licenses based upon the award of licenses voted on at the December 12, 2023 Commission meeting.

Count Four
(Injunctive Relief)

71. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

72. As noted, the Rule threatens Alabama Always with irreparable harm. The entry of a temporary restraining order, preliminary injunction, and permanent injunction would preserve the status quo, and would not inconvenience the Commission, particularly since no party before the Commission has the right to have its application ranked and voted on in a manner that violates Alabama law. The balance of the equities therefore favors the issuance of a temporary restraining order and an injunction.

73. The AAPA permits this Court to stay enforcement of an agency rule "by injunctive relief." Ala. Code § 41-22-10.

74. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury.

75. Furthermore, the harm that Alabama Always faces is not susceptible of being compensated with money damages.

76. Alabama Always has no adequate remedy at law.

77. There is no remedy for the Commission's failure to judge all applications fairly and in compliance with its own rules and regulations.

78. Without the requested injunctive relief, Alabama Always will suffer irreparable harm in the form of interference with its business.

79. Alabama Always is likely to succeed on the merits of its claim, for the reasons explained, including because the Commission failed to substantially comply with the AAPA.

80. Any hardship imposed on the Commission by the requested injunction does not outweigh the benefit to Alabama Always in receiving the requested injunction.

81. In addition, not issuing the injunction would severely harm the public.

82. The Act exists to help ensure that the best entities cultivate, transport, and dispense the best medical cannabis to Alabama residents suffering from medical conditions whose symptoms could be alleviated by medical cannabis.

83. The public is deprived of potentially obtaining the best integrated facility licensees when the Commission, by act or omission, violates the AAPA, as it has in this case, and causes ongoing and irreparable harm to the licensing process.

84. Immediate and irreparable injury, loss, or damage will result to Alabama Always before the Commission can be heard in opposition.

FOR THESE REASONS, Alabama Always requests that the Court enter a temporary restraining order, preliminary injunction, and permanent injunction against the use of the Rule as identified above and staying the Commission's post-award and investigative hearing process.

Respectfully submitted,

/s/ William G. Somerville
WILLIAM G. SOMERVILLE
MICHAEL A. CATALANO
JADE E. SIPES

OF COUNSEL:
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PLEASE SERVE THE NEWLY-ADDED DEFENDANTS VIA CERTIFIED MAIL AT THE FOLLOWING ADDRESS:

The Alabama Medical Cannabis Commission
c/o John McMillan, Director
P. O. Box 309585
Montgomery, Alabama 36130

CERTIFICATE OF SERVICE

I hereby certify that this has been served electronically via this Court's electronic filing system on the following on December 27, 2023:

/s/ Jade E. Sipes
Of Counsel

DOCUMENT 867

VERIFICATION

In accordance with Alabama Rule of Civil Procedure 65(b) and Alabama Code § 36-25A-9(a), James Eaton, the representative for Alabama Always LLC, being first duly sworn in accordance with the law, being informed of and familiar with the facts set forth and the statements made in paragraphs 25, 26, 34, 54, 58–64, 69, 72, 74–78, and 84 of the foregoing amended complaint, which set forth specific facts that immediate and irreparable injury, loss, or damage will result, make oath that the foregoing averments are true to the best of my knowledge and where stated my information and belief.

Given under my hand and official seal this 27th day of December 2020.

James Eaton, CEO

STATE OF FLORIDA

COUNTY OF LEO

I, the undersigned authority, a Notary Public in and for said State and County, do hereby certify that James Eaton, who is known to me, acknowledged before me, on this day, that, being informed of the contents of the instrument, he has signed, sealed, and delivered the same voluntarily, and with full authority for said entity.

Given under my hand and official seal this the 27th day of December 2023.

NOTARY PUBLIC

My Commission Expires: 12/3/26

[SEAL]

JULIA S. ANDERSON
MY COMMISSION # HH 296816
EXPIRES: December 3, 2026

EXHIBIT D

ELECTRONICALLY FILED
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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, Plaintiff, v. ALABAMA MEDICAL CANNABIS COMMISSION, Defendant.	)	Case No. CV-2023-000231

ALABAMA ALWAYS, LLC, Plaintiff, v. ALABAMA MEDICAL CANNABIS COMMISSION, WILLIAM SALISKI, JR. D.O., SAM BLAKEMORE, DWIGHT GAMBLE, ANGELA MARTIN, M.D., DR. ERIC JENSEN, LOREE SKELTON, REX VAUGHN, CHARLES PRICE, TAYLOR HATCHETT, JAMES HARWELL, JIMMIE HARVEY, M.D., JERZY SZAFLARSKI, M.D., Ph. D, and DION ROBINSON, in their official capacities as members of the State of Alabama Medical Cannabis Commission, Defendants.	)	Case No. CV-2023-901727

CONSOLIDATED PETITION FOR JUDICIAL REVIEW AND THIRD AMENDED COMPLAINT

In accordance with Alabama Code §§ 41-22-10 & -20(d) and Alabama Code § 20-2A-57(f), Alabama Always, LLC (Alabama Always) files this consolidated petition for judicial review and third amended complaint against the Alabama Medical Cannabis Commission (the Commission) and the Commission members as follows:

I. The Nature of the Agency Action Which is the Subject of the Petition, and the Particular Agency Action Appealed From

1. Alabama Always appeals from the Commission's December 12, 2023 final agency action denying Alabama Always's application for an integrated facilities license under

the Darren Wesley "Ato" Hall Compassion Act (the Compassion Act).

2. As explained in this petition and third amended complaint, the Commission failed to comply with the Compassion Act, the Alabama Administrative Procedure Act (AAPA), and its own rules. In addition, its actions were unreasonable, arbitrary, capricious, and an abuse of discretion. Finally, the Commission has adopted rules that exceed its authority, or whose adoption violated the AAPA.

II. The Facts and Law on Which Jurisdiction and Venue are Based

3. Alabama Always is an Alabama limited liability company and an applicant for an integrated facility license pursuant to the Compassion Act.

4. The Commission is an agency of the State of Alabama created by the Compassion Act to license medical cannabis cultivators, processors, transporters, dispensaries, and integrated producers.

5. William Saliski, Jr., D.O.; Sam Blakemore; Dwight Gamble; Angela Martin, M.D.; Dr. Eric Jensen; Loree Skelton; Rex Vaughn; Charles Price; Taylor Hatchett; James Harwell; Jimmie Harvey, M.D., Jerzy Szaflarski, M.D., Ph.D.; and Dion Robinson are all members of the Commission.

6. Alabama Code § 20-2A-57(f) grants any person who is aggrieved by an action of the Commission the right to appeal the action in the circuit court where the Commission is located. Venue is thus proper in this Court.

7. In addition, venue is also proper in this Court because Alabama Code § 41-22-20(b) provides that all petitions challenging agency action "shall be filed either in the Circuit Court of Montgomery County or in the circuit court of the county in which the agency maintains its headquarters."

8. Prior to filing this petition, Alabama Always has served the Commission via hand delivery with a notice of appeal and appropriate cost bond, as required by Alabama Code § 41-22-20(b), on January 3, 2024.

9. Alabama Always also seeks relief under Alabama Code § 41-22-10, which

provides for injunctive and declaratory relief against any rule that exceeds an administrative agency's authority or that was adopted in violation of the AAPA.

III. Grounds on which Relief is Sought

The AAPA's Contested Case Provisions

10. The Commission is subject to the AAPA. *See* Ala. Code § 20-2A-20(p).

11. Compliance with the AAPA "assur[es] a uniform minimum procedure to which all agencies will be held in the conduct of their most important functions" and provides a "minimum procedural code for the operation of all state agencies." *Id.* § 41-22-2(a) & (b)(1)c.

12. The AAPA requires each state agency (like the Commission) to adopt "rules of practice." *Id.* § 41-22-4(a)(2). "Adoption of rules describing the internal organization of an agency and the actual procedures and policies of a state agency will enable the public to hold agencies to the standards to which it is intended they be held." *Id.* As explained by the commentary to the AAPA, "there can be no openness in government, indeed no due process of law, without publication of, and full public access to, the rules by which the government governs." *Id.* § 41-22-7 cmt.

13. In addition to its rule-making requirements, the AAPA sets forth minimum procedures for when an applicant (like Alabama Always) is granted or denied a license. A proceeding for the grant or denial of a license is called a "contested case" proceeding. *See id.* § 41-22-19(a). The minimum procedures required by the AAPA include an "opportunity for a hearing" in a contested case proceeding. *Id.* § 41-22-12(a). "These provisions are intended to ensure that no action is taken against the licensee without due process of law." *Id.* § 41-22- 19 cmt.; *see also id.* ("[T]he licensee does have a right to due process of law in the application of licensing provisions.").

14. Before an application for a license can be denied, the AAPA requires the agency to serve notice on the applicant with a "short and plain statement of the matters asserted"—in other words, the reasons why the application was denied. *Id.* § 41-22-12(b). The Compassion Act reiterates this in Alabama Code § 20-2A-57(c), stating that "[t]he commission shall comply

with the hearing procedures of the Administrative Procedure Act when denying, revoking, suspending, or restricting a license."

15. Then a hearing must occur and "[o]pportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved and to be represented by counsel at their own expense." Ala. Code § 41-22-12(e). Discovery can occur before the hearing, and the "[f]indings of fact [from the hearing] shall be based solely on the evidence in the record and on matters officially noticed in the record." *Id.* § 41-22-12(e) & (h).

16. The hearing requirement of the AAPA "conforms to due process requirements by allowing each interested party to present favorable evidence and by providing the opportunity to attack adverse evidence, as well as providing for legal representation at the expense of the client." *Id.* § 42-22-12 cmt.

The Commission's Illegal Rules

17. The Commission has adopted a number of rules in violation of the procedures required by the AAPA, or that exceed the Commission's authority under the Compassion Act.

18. Based on a staff recommendation, at its December 12 meeting, the Commission utilized a voting procedure that gave a minority of Commission members the ability to effectively veto the judgment of the majority.

19. This procedure is contained in an identical pair of rules, Alabama Administrative Code r. 538-X-3-.20 and 538-X-3-.20ER, adopted by the Commission at its October 12, 2023 meeting (collectively, the Rule). The procedure required each Commissioner to rank all 36 applicants for integrated licenses in descending order. The staff will then average the rankings to obtain a single composite ranking, and the average ranking thus generated will determine the order in which the applicants are considered for licenses.

> In order to determine the order in which Applicants should be considered, each Commissioner will be given an opportunity to submit, in an open meeting, *a written form providing an overall preliminary rank, in descending order, of each of the Applicants in the license category*, giving due consideration to all statutory and regulatory criteria. Such forms shall be tabulated and averaged by the Commission staff and used solely to determine the order in which individual Applicants are subsequently considered. In those instances where

> two or more applicants receive identical average rankings, the order shall be determined by a drawing. The Chair will call for a motion to approve or deny each application in the order established above. Following such motion, duly seconded, the Chair will provide an opportunity for further deliberations and a vote.

Ala. Admin. Code r. 538-X-3-.20 & -.20ER. The Rule did not require the Commissioners to rank or score the applicants according to statutory criteria (such as the demonstrated ability to commence cultivation within 60 days of notification of a license award), but instead allowed the Commissioners to vote arbitrarily and capriciously.

20. In addition, the Rule's voting system is not exemplary of the concept of majority rule or the open deliberation intended under the AAPA.

21. This is a contested case proceeding within the meaning of the AAPA because the Commission's vote resulted in both the grant and denial of licenses. *See* Ala. Code § 41- 22-19(a) ("The provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension, or renewal of a license.").

22. The Commission's final decision on the granting of integrated licenses is a final agency action, and therefore must be by majority vote. *Id.* § 41-22-15 ("In a contested case, a majority of the officials of the agency who are to render the final order must be in accord for the decision of the agency to be a final decision.").

23. Alabama Always likely is the only applicant that meets all of the Compassion Act's requirements for integrated licenses.

24. Any vote by the Commission should be by majority rule, should consider each applicant, and should follow the clear statutory criteria. But that did not occur at the December 12 meeting.

The Commission's December 12, 2023 Meeting

25. On December 12, 2023, the Commission voted on awarding licenses to integrated facility applicants, like Alabama Always.

26. At the December 12 meeting, the Commission used the voting and ranking procedure contained in the Rule.

27. As noted, the procedure requires each Commissioner to rank all applicants for integrated licenses in descending order. The staff then averages the rankings to obtain a single composite ranking, and the average ranking thus generated determines the order in which the applicants are considered for licenses.

28. At the December 12 meeting, Alabama Always received votes of 1, 2, 5, 10, 13, 16, 17, 19, and 20, for an average ranking of 11.4444, putting Alabama Always in eleventh place. The Commission then proceeded to vote on applicants in the order of this ranking, issuing the five available licenses before Alabama Always could even be considered for a vote. Consequently, Alabama Always was not considered for a license.

29. There is no explanation of why any Commissioner ranked Alabama Always or any other applicant in a particular place. The numerical rankings were arbitrary and capricious.

30. As with its previous two attempts to award licenses—on June 12, 2023 and August 10, 2023—the Commission engaged in no debate or deliberation, leaving applicants and the public with no clue as to why the Commission chose certain applicants and not others.

31. The rankings also violated the Commission's own rules, which require applicants to be ranked and scored according to the Act's requirements: "Applicants shall be scored, averaged, and ranked using an impartial numerical process in accordance with the requirements of the Act and the Criteria for Awarding Licenses set forth in r. 538-X-3-.11." *See* Ala. Admin. Code r. 538-X-3-.10(1).

32. On information and belief, the Commission and its staff take the position that the Commission can make licensure decisions without regard to procedure, facts, or qualifications. The Commission and its attorneys repeatedly invoke the justification that production of medical cannabis is a "privilege" rather than a "right." Similarly, they regularly contend that the Commission has virtually unlimited discretion to do whatever it wants.

33. But the Commission does not have unlimited discretion, and it is required to follow the procedures prescribed by the AAPA. In fact, in making decisions to grant or deny licenses, the Commission is bound by the "contested case" provisions of the AAPA: "The

provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension, or renewal of a license." Ala. Code § 41-22-19(a). There can be no dispute that the Commission both granted and denied licenses at its December 12 meeting.

34. The Commission's rules give lip service to the AAPA, but they substantially violate the AAPA's contested case provisions. Thus, although the Commission's revised Rule 538-X-3-.18(b) provides that investigative hearings will be conducted pursuant to the AAPA's contested case provisions, the Commission has no procedure for providing notice of charges as required by Alabama Code § 41-22-12(b), which requires that notice must contain, *inter alia,* a statement of the legal authority and the matters asserted. Nor has any such notice been issued.

35. At a minimum, therefore, prior to a contested case proceeding, the Commission must give notice to applicants explaining why they were denied a license, and the factual and legal grounds for the denial.

36. Judging from the proceedings during the December 12 Commission meeting, however, it will be impossible to fashion a notice explaining the legal and factual grounds for denying Alabama Always a license. There were no deliberations during the meeting, and no Commissioner set forth any explanation of why he or she assigned a particular rank to any applicant, including Alabama Always.

37. Because there is no contemporaneous record of why any applicant was granted or denied a license, no notice complying with Alabama Code § 41-22-12(b) can be issued. And even if the Commission's staff were to manufacture such a notice, there would be no reason to believe that the notice reflected the Commissioners' actual state of mind during the votes.

38. Accordingly, any investigative hearing process would turn the due process requirements of the AAPA on its head, because it would require Alabama Always and other denied applicants to ferret out the reasons why their applications were denied.

39. On information and belief, at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the Open Meetings Act (the OMA). These private meetings enabled the

Commissioners to vote on candidates without deliberation in violation of the OMA.

40. This would be the third time that the Commissioners held such deliberations in private. Similar votes on applications, in violation of the OMA, occurred during the June 12 and August 10 Commission meetings. During both of those meetings, the Commission emerged from executive session to vote without debate on a slate of applicants.

The Commission's Emergency Rule is Invalid.

41. As noted, at the Commission's October 12 meeting, it adopted a new "emergency rule," Alabama Administrative Code r. 538-x-3-.20 (the Emergency Rule). The Emergency Rule provided a procedure for considering applications and for considering the scores that had been generated by the illegal application scoring rules.

42. The AAPA does not permit the adoption of an emergency rule except to avert "an immediate danger to the public health, safety, or welfare . . . ." Ala. Code § 41-22-5(b)(1). There is no "immediate danger" justifying the adoption of the Emergency Rule without complying with the public notice and comment requirements of the AAPA. The commentary to Section 41-22-5 adds the following:

> Subsection (b) of this section is intended to enable an agency to exercise its rulemaking powers without the constraints of normal procedure as provided by this act when protection of the public health, safety, or welfare requires immediate action or when immediate implementation is required by federal statute or rule. *Such action may include, but is not limited to summary processes such as quarantines, contrabands, seizures and the like* authorized by law without notice.

Id. cmt. (emphasis added). There is simply no "emergency" here.

43. The Commission's express justification for adopting the emergency rule is found in the "Certification of Emergency Rules" it filed with the Legislative Services Agency on October 19, 2023. The Certification recites litigation and delays associated with the licensure process and finds that "uncertainties and delays surrounding the licensing process presents an immediate danger to public health and welfare," and that the adoption of the Emergency Rule is necessary to protect the public health and welfare to carry out the legislative mandate of licensing medical cannabis providers to provide relief to qualified patients.

44. The inability of qualified patients to obtain medical cannabis is not an emergency within the meaning of Alabama Code § 41-22-5(b)(1). The unavailability of medical cannabis is not a recent development; in fact, medical cannabis has never been available in Alabama. The problem with the Commission's Emergency Rule is that declaring a decades-long state of affairs an "emergency" does not make it so. *See Oliver v. Williams*, 567 So. 2d 304, 308 (Ala. Civ. App. 1989) ("However, as the trial court noted, this crisis had been in existence for many years and, thus, did not constitute an 'emergency' as defined in § 41–22–5(b).").

45. The Commission also ignores the availability of cannabis products over the counter in retail shops across that state. Following the passage of the Agriculture Improvement Act of 2018, *see* PL 115-334, December 20, 2018, 132 Stat 4490 (often referenced as the Farm Bill), and related laws, cannabinoid compounds such as CBD and THC (in concentrations of not greater than 0.3%) are available without a prescription or a permit.

46. The Commission's true intent in adopting the Emergency Rule was to create a justification for considering the scores that were created by the illegal scoring system described above.

47. The Rule therefore threatens to irreparably harm Alabama Always and its rights and privileges. Alabama Always has expended substantial sums of money in its efforts to comply with the Compassion Act and will not be able to recover those sums because the Commission enjoys sovereign immunity.

The Commission's Criteria for Granting Licenses

48. The Commission established criteria for granting licenses under the Compassion Act.

49. Some of these criteria related to market and demographic conditions in Alabama and communities where facilities might be located, such as population, the anticipated number of qualified patients, market demand, unemployment, access to healthcare, and infrastructure. *See* Ala. Admin. Code r. 586-X-3-.11(a)-(g).

50. Other criteria adopted by the Commission related to specific qualifications of

potential licensees. Among these criteria were whether an applicant would fully utilize its license authorization, how quickly an applicant could commence operations and reach full capacity, and whether an applicant would be able to minimize cost to patients. Ala. Admin. Code r. 586-X-3-.11(h)–(j).

51. Other criteria related to financial ability and responsibility, business history, moral suitability, and minority participation. For example, the Compassion Act requires that applicants provide a performance bond in the amount of $2 million dollars or a letter of commitment (or other similar acknowledgment) of the applicant's ability to secure a two-million-dollar performance bond from a highly rated insurance company. Ala. Code § 20-2A-67(c).

52. And still other statutory criteria required cultivators (including integrated facilities) to be able to "demonstrate the ability to commence cultivation of cannabis within 60 days of application approval notification." *Id.* § 20-2A-62(c)(1). And the rules adopted by the Commission pursuant to this statute provide that consideration should be given to "[t]he number of days, if awarded a license, within which the Applicant reasonably projects it will commence operations as to each facility identified in the application, and the number of days within which the Applicant reasonably projects it will reach full capacity as to the operations contemplated with regard to each facility identified in the Application." Ala. Admin. Code r. 538-x-3-.05.

53. There is no indication that the Commission considered any of these statutory or regulatory criteria in awarding or denying licenses.

The Denial of Alabama Always's Application Violates Alabama Law

54. Judicial review of the Commission's action is subject to the AAPA, and this Court's review of the Commission's action and its application of the law is de novo. *See Medical Licensure Comm'n of Alabama v. Herrera*, 918 So. 2d 918, 926 (Ala. Civ. App. 2005) ("[T]here is no presumption of correctness afforded to [an administrative decision-maker's] legal conclusions or its application of the law to the facts.").

55. Alabama Code § 41-22-20 provides that a circuit court "may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

1) In violation of constitutional or statutory provisions;
2) In excess of the statutory authority of the agency;
3) In violation of any pertinent agency rule;
4) Made upon unlawful procedure;
5) Affected by other error of law;
6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
7) Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

Id. § 41-22-20(k).

56. Here, the Commission's action in denying Alabama Always's license application violated the Compassion Act, exceeded the statutory authority of the Commission, violated the Commission's own rules, violated the AAPA, and was arbitrary and capricious for the reasons explained in this petition, including that:

a. the Commission provided no notice or opportunity for hearing before denying Alabama Always's license;

b. The Commission gave no indication that it considered the statutory and regulatory criteria in making its licensure decisions;

c. the Commission did not follow its own rules at the December 12 meeting, which require applicants to be "scored, averaged, and ranked using an impartial numerical process";

d. the Commission provided no explanation for its decision or evidence that it considered the mandatory criteria when granting licenses; and

e. the Commission has not promulgated sufficient rules of practice for its investigative hearing proceeding;

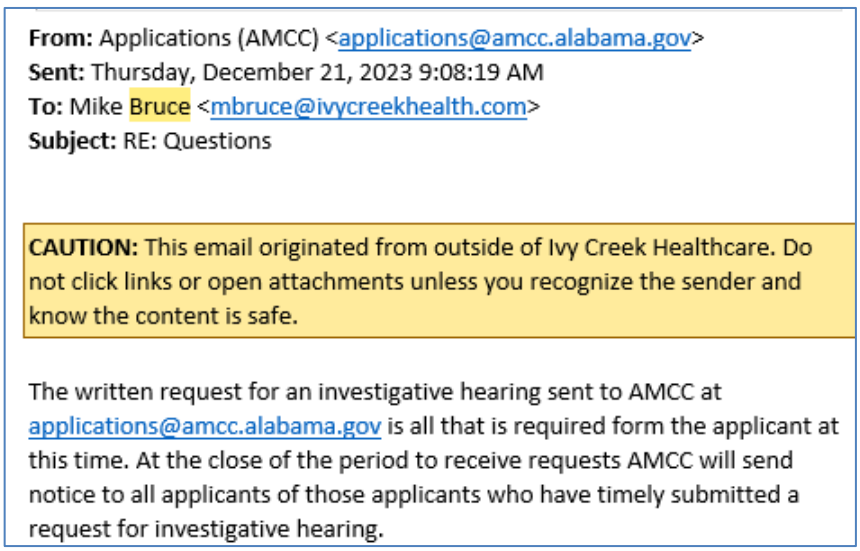
57. The Commission has adopted no rule that requires that an applicant be notified of any reasons prior to the investigative hearing why it is being denied a license.

58. Because there is no rule requiring the Commission to specify the reasons why

the unsuccessful applicants were not "awarded" licenses, not even a rule that has not been properly adopted, the unsuccessful applicants have not been informed why they were not awarded a license.

59. And the Commission has adopted no rule pursuant to the AAPA that requires it to communicate the reasons for its decision to deny licenses to these applicants.

60. The Commission adopted no rule outlining the process for investigative hearings at all. In fact, Alabama Always (and other applicants), sent an email to the Commission on December 21, 2023, asking the Commission for guidance on how to request an investigative hearing. Alabama Always received a reply stating that an email request for a hearing was the only requirement, essentially admitting that they were creating a new process or rule on the fly:



From: Applications (AMCC) <applications@amcc.alabama.gov>
Sent: Thursday, December 21, 2023 9:08:19 AM
To: Mike Bruce <mbruce@ivycreekhealth.com>
Subject: RE: Questions

CAUTION: This email originated from outside of Ivy Creek Healthcare. Do not click links or open attachments unless you recognize the sender and know the content is safe.

The written request for an investigative hearing sent to AMCC at applications@amcc.alabama.gov is all that is required form the applicant at this time. At the close of the period to receive requests AMCC will send notice to all applicants of those applicants who have timely submitted a request for investigative hearing.

61. The Commission's failure to communicate the reasons for these license denials, as well as its failure to adopt rules requiring such communication, constitute discrete violations of the AAPA.

62. Licensure proceedings are "contested cases" under the AAPA. *See* Ala. Code § 41-22-19(a). As noted, the AAPA requires that "in a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice in writing delivered by personal service as in civil actions or by certified mail." *Id.* § 41-22-12(a). The notice must contain a short and plain statement of the "matters asserted," *i.e.*, in this case, the reasons for the denial

of the license. The Commission has issued no such notice relating to any of its license "awards," and it has adopted no rules providing for the issuance of such notice.

63. The unsuccessful applicants, therefore, must file their requests for investigative hearings based on their best guess as to why they were not awarded a license. Or perhaps the "investigative hearing" is so named because the onus is on the unsuccessful applicant to investigate possible reasons why it was denied a license.

64. The Commission has issued no such notice relating to any "investigative hearing" relating to the license "awards." Instead, it has turned the AAPA's contested case requirements on their head by arbitrarily and capriciously adopting a rule (but not in accordance with the AAPA's publication, notice, and comment mandates) requiring the denied applicant rather than the agency to identify the matters asserted.

65. Alabama Always has not received a notification explaining why its application was being denied and giving it an opportunity to be heard as required by the AAPA. The Commission has no rule in place to provide such a notification at any point in the licensure process.

66. In addition, it will be impossible to fashion a notice explaining the legal and factual grounds for denying Alabama Always a license. There were no deliberations during the meeting, and no Commissioner set forth any explanation of why he or she assigned a particular rank to any applicant, including Alabama Always.

67. Because there is no contemporaneous record of why any applicant was granted or denied a license, no notice complying with Alabama Code § 41-22-12(b) can be issued. And even if the Commission's staff were to manufacture such a notice, there would be no reason to believe that the notice reflected the actual state of mind during the votes.

68. Additionally, there is also no indication that the Commission considered the mandatory statutory criteria, such as the 60-day cultivation requirement, when making its licensing awards at the December 12 meeting.

69. The rankings the Commission used also violated the Commission's own rules,

which require applicants to be ranked and scored according to the Compassion Act's requirements: "Applicants shall be scored, averaged, and ranked using an impartial numerical process in accordance with the requirements of the Act and the Criteria for Awarding Licenses set forth in r. 538-X-3-.11." *See* Ala. Admin. Code r. 538-X-3-.10(1).

70. Finally, the Commission has failed to adopted rules of practice that are sufficient under the AAPA. The AAPA, as noted, requires the Commission to "[a]dopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency." Ala. Code § 41-22-4.

71. The Commission has promulgated nothing about time limits for the Commission's decisions on requests for investigative hearings, whether discovery is permissible and under what conditions, the filing of briefs and motions, the standard of review, the forms to be used, the instructions to be followed, or anything else. As argued on December 28, 2023, before this Court, the earliest that the investigative hearings can take place is in February 2024, at least a month after the Commission intends to issue the five integrated facility licenses on January 9, 2024.

72. Any hearings conducted without these things will necessarily violate the AAPA, because the procedures will not have been adopted pursuant to the requirements of the AAPA. Thus, any procedure, any time limit, any instruction, any standard of review, will be invalid because it cannot possibly have been adopted in accordance with the AAPA.

73. The Commission has also offered no procedure (properly adopted as a rule or otherwise) to satisfy the AAPA's requirement that "[o]pportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved." Ala. Code § 41-22-12. To the contrary, the Commission has offered no procedure specifying exactly how the investigative hearing will be conducted, whether and how discovery will be allowed, or what sort of form the Commission's decision on the investigative hearing will take.

74. To the extent that the Compassion Act provides guidance on some of these

issues, the procedure envisioned by the Compassion Act conflicts with the AAPA. The Compassion Act establishes the applicant's right to an investigative hearing, but then states that the Commission cannot limit its decision to testimony and evidence submitted at the hearing:

> After denial of a license, the Commission, upon request, shall provide a public investigative hearing at which the applicant is given the opportunity to present testimony and evidence to establish its suitability for a license. Other testimony and evidence may be presented at the hearing, but the commission's decision must be based on the whole record before the commission and is not limited to testimony and evidence submitted at the public investigative hearing.

Id. § 20-2A-56(e) (emphasis added). This provision, that the Commission's decision may be based on evidence and testimony not submitted at the hearing, is in irreconcilable conflict with the AAPA, which requires that, in a contested case "opportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved." *Id.* § 41-22-12.

75. Any statutory provision that conflicts with the AAPA is invalid, unless the statute expressly provides that it takes precedence over the AAPA. *Id.* § 41-22-25 ("If any other statute . . . diminishes any right conferred upon a person by this chapter or diminishes any requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this named chapter.").

76. The Compassion Act's investigative hearing provision does not expressly provide that it takes precedence over the AAPA and is therefore null and void.

77. Furthermore, any investigative hearing process would turn the due process requirements of the AAPA on its head, because it would require Alabama Always and other denied applicants to both (a) request a hearing (rather than receive notice) and (b) ferret out the reasons why their applications were denied (rather than be provided the reason(s) as required by the AAPA).

The Commission's December 28, 2023 Meeting

78. On December 28, 2023, following this Court's hearing on various parties' (including Alabama Always's) motions for injunctive relief, the Commission held a meeting at which it voted not to stay its previously announced license awards in any category, despite the fact that the Commission's regulations permit it to enter such a stay pending the Commission's investigative hearing process. In fact, the rationale announced in support of the resolution was to place the decision "in the hands of the courts" or words to that effect.

79. There are only five integrated licenses available under the Compassion Act. The Commission's decision not to stay the licensure process effectively ensured that, without a judicially imposed stay, the investigative hearing process would be futile, because after the five licenses are issued, the Commission will lack the power to claw them back.

Exhaustion of Administrative Remedies is Not Required

80. Finally, exhaustion of administrative remedies is futile here. Although the Compassion Act has set forth a procedure for an "investigative hearing," that hearing process violates the fundamental due process requirements of the AAPA for the grant and denial of licenses.

81. The Commission's refusal to stay the licensure process means that, without injunctive relief, the investigative hearing process is a completely illusory post-award and therefore utterly futile.

82. In addition, the Commission's rule which implements the investigative hearing process is not even effective until February 12, 2024. As explained, the investigative hearing process is illusory. Because exhaustion would be futile, this Court should take jurisdiction over this controversy without requiring exhaustion.

83. Exhaustion of administrative remedies, moreover, is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975).").

Count One
(Declaratory Judgment – the Rule)

84. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

85. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

86. The AAPA requires any agency rule to be declared invalid if the rule "exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in" the AAPA. *Id.* § 41-22-10.

87. Alabama Always submits that the Rule is invalid.

88. The Commission has no authority for enacting the Rule because it did not comply with the AAPA.

89. In addition, the Rule interferes with and impairs Alabama Always's legal rights.

90. Exhaustion of administrative remedies is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975)."). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

91. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission's Rule is invalid. Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Two
(Declaratory Judgment – the Emergency Rule)

92. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

93. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

94. The AAPA requires any agency rule to be declared invalid if the rule "exceeds the statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for in" the AAPA. *Id.* § 41-22-10.

95. Alabama Always submits that the Emergency Rule is invalid.

96. There was no emergency as required by Alabama Code § 41-22-5(b)(1) to justify the Commission's adoption of the Emergency Rule.

97. The Commission has no authority for enacting the Rule because it did not comply with the AAPA.

98. In addition, the Emergency Rule interferes with and impairs Alabama Always's legal rights.

99. Exhaustion of administrative remedies is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992) ("[T]he supreme court held that exhausting administrative remedies was not a prerequisite to challenging the validity of a rule under § 41–22–10, Code (1975)."). Exhaustion is also not required due to the futility of exhausting the current procedures established by the Commission.

100. In addition, Alabama Always need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law (and not questions involving agency discretion or factfinding), and involves a threat of irreparable injury, as explained in this complaint.

FOR THESE REASONS, Alabama Always asks this Court for a declaration under the AAPA and the Alabama Declaratory Judgment Act that the Commission's Rule is invalid.

Alabama Always further prays that the Court award Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Count Three
(Violation of the Open Meetings Act)

101. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

102. The Open Meetings Act (OMA) requires that "the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6). Except for executive sessions permitted pursuant in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state laws or statutes, all meetings of a governmental body shall be open to the public." Ala. Code § 36-25A-1(a).

103. As noted, upon information and belief, at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the OMA.

104. These private meetings enabled the Commissioners to vote on candidates without deliberation in violation of the OMA.

105. The OMA permits a Court to issue a temporary restraining order or preliminary injunction based on violations of the OMA. *See* Ala. Code § 36-25A-9(e).

106. Such a temporary restraining order and injunction prohibiting the Commission from issuing the licenses that it awarded at the December 12 meeting that violated the OMA is appropriate here under Alabama Rule of Civil Procedure 65.

107. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury.

108. If the Commission is not enjoined from issuing the five integrated licenses awarded at the December 12 meeting, Alabama Always will suffer immediate and irreparable harm.

109. Specifically, the Commission must "issue" the licenses not later than fourteen

days after the deadline for payment of a license fee by the awardee or not later than twenty-eight days after the award. *See* Ala. Admin. Code § 538-X-3-.17.

110. If the Commission issues the licenses, then there will no longer be any licenses available to Alabama Always.

111. Without the requested injunctive relief, Alabama Always will suffer irreparable harm in the form of interference with their business.

112. Alabama Always's reputation and goodwill will also be irreparably damaged without an injunction prohibiting the Commission from issuing the licenses.

113. Besides that, Alabama Always will suffer the loss of its time, money, and energy invested in the application process.

114. Such losses are not susceptible of being compensated with money damages because the Commission and its members are immune from suit for money damages.

115. Alabama Always is likely to succeed on the merits of its claims, for the reasons explained in this complaint.

116. The hardship imposed on the Commission by the requested injunction does not outweigh the benefit to Alabama Always in receiving the requested injunction.

117. In addition, not issuing the requested injunction would severely harm the public, which is entitled to an open "deliberative process of governmental bodies." *See* Ala. Code § 36-25A-1.

118. Immediate and irreparable injury, loss, or damage will result to Alabama Always.

119. The invalidation of the Commission's actions would not unduly prejudice any third parties. This complaint is being filed less than three weeks after the Commission awarded licenses on December 12, 2023.

FOR THESE REASONS, Alabama Always requests that the Court enter a temporary restraining order, preliminary injunction, and permanent injunction invalidating the action taken by the Commission on the issues unlawfully deliberated at or before the December 12

meeting and, more particularly, the award of licenses to license applicants and enjoining the Commission from issuing licenses based upon the award of licenses voted on at the December 12, 2023 Commission meeting.

Count Four
(Injunctive Relief)

120. Alabama Always adopts and incorporates the previous paragraphs as if specifically alleged in this paragraph.

121. As noted, the Rule threatens Alabama Always with irreparable harm. The entry of a temporary restraining order, preliminary injunction, and permanent injunction would preserve the status quo, and would not inconvenience the Commission, particularly since no party before the Commission has the right to have its application ranked and voted on in a manner that violates Alabama law. The balance of the equities therefore favors the issuance of a temporary restraining order and an injunction.

122. The AAPA permits this Court to stay enforcement of an agency rule "by injunctive relief." Ala. Code § 41-22-10.

123. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury.

124. Furthermore, the harm that Alabama Always faces is not susceptible of being compensated with money damages.

125. Alabama Always has no adequate remedy at law.

126. There is no remedy for the Commission's failure to judge all applications fairly and in compliance with its own rules and regulations.

127. Without the requested injunctive relief, Alabama Always will suffer irreparable harm in the form of interference with its business.

128. Alabama Always is likely to succeed on the merits of its claim, for the reasons explained, including because the Commission failed to substantially comply with the AAPA.

129. Any hardship imposed on the Commission by the requested injunction does not

outweigh the benefit to Alabama Always in receiving the requested injunction.

130. In addition, not issuing the injunction would severely harm the public.

131. The Compassion Act exists to help ensure that the best entities cultivate, transport, and dispense the best medical cannabis to Alabama residents suffering from medical conditions whose symptoms could be alleviated by medical cannabis.

132. The public is deprived of potentially obtaining the best integrated facility licensees when the Commission, by act or omission, violates the AAPA, as it has in this case, and causes ongoing and irreparable harm to the licensing process.

133. Immediate and irreparable injury, loss, or damage will result to Alabama Always before the Commission can be heard in opposition.

FOR THESE REASONS, Alabama Always requests that the Court enter a temporary restraining order, preliminary injunction, and permanent injunction against the use of the Rule as identified above and staying the Commission's post-award and investigative hearing process.

IV. The Relief Sought

134. Additionally, in accordance with Alabama Code § 41-22-20, Alabama Always asks the Court to take jurisdiction of this action and enter appropriate orders for the following relief:

A. Granting a stay of the Commission's award of licenses done at the December 12, 2023 meeting;

B. Reversing the December 12, 2023 vote of the Commission to deny Alabama Always's integrated facility license application;

C. Directing the Commission to comply with the AAPA, the Compassion Act, the Open Meetings Act, and its own regulations;

D. Awarding all other appropriate relief from the Commission action, equitable or legal, including declaratory relief, pursuant to Alabama Code § 41-22-20(k); and

E. Awarding Alabama Always all costs of this action.

Respectfully submitted,

/s/ William G. Somerville
WILLIAM G. SOMERVILLE
MICHAEL A. CATALANO
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PLEASE SERVE THE DEFENDANTS VIA CERTIFIED MAIL:

The Alabama Medical Cannabis Commission
c/o John McMillan, Director
445 Dexter Avenue, Suite 8040
Montgomery, Alabama 36104

EXHIBIT E

ELECTRONICALLY FILED
1/22/2024 10:02 AM
03-CV-2023-000231.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case Number: 03-CV-2023-000231**
	)	
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION, et al.,	)	
	)	
Defendants.	)	

VERIFIED COMPLAINT IN INTERVENTION AND PETITION FOR JUDICIAL REVIEW

Plaintiff-Intervenor, Insa Alabama, LLC, files this Verified Complaint in Intervention and Petition for Judicial Review against Defendants, the State of Alabama Medical Cannabis Commission and its members, and as grounds therefor, states as follows:

Parties

1. Insa Alabama, LLC ("Insa") is an Alabama limited liability corporation and an applicant for an integrated facility license pursuant to the Darren Wesley "Ato" Hall Compassion Act ("the Compassion Act").

2. The State of Alabama Medical Cannabis Commission ("the Commission") is an agency of the State of Alabama created to oversee the production, transportation, testing, and use of medical cannabis in the state, with its primary office located in Montgomery County, Alabama.

3. The Commission's members, who to the extent necessary are sued in their official capacities only, are Rex Vaughn, Sam Blakemore, Dwight Gamble, Dr. Jimmie Harvey, Taylor Hatchett, Dr. Eric Jensen, Dr. Angela Martin, Charles Price, Dr. William Saliski, Loree Skelton, and Dr. Jerzy Szaflarski (collectively "the Commissioners").

The Nature of the Agency Action That is the Subject of the Petition and the Particular Agency Action Appealed From

4. The nature of the agency action for which Insa seeks review is the Commission's failure to comply with the Compassion Act, the Alabama Administrative Procedure Act, and its own rules, as well as the Commission's unreasonable, arbitrary, and capricious actions and abuses of discretion. Finally, Insa seeks review of the Commission's adoption of rules that exceed its authority or whose violation violated the AAPA.

5. The particular agency actions appealed from are the Commission's purported revocation of the integrated facility licenses that were awarded to Insa and other applicants on August 17, 2023, its purported award of licenses on December 12, 2023, and its adoption of Alabama Administrative Code r. 538-X-3-.20ER(6).

Facts and Law Upon Which Jurisdiction and Venue are Based

6. Insa's claims are brought under the Alabama Administrative Procedure Act ("AAPA"), the Open Meetings Act ("OPA"), and Alabama common law.

7. The Commission is subject to the AAPA. *See* Ala. Code § 20-2A-20(p).

8. Jurisdiction and venue over Insa's AAPA claims is proper in this Court under Alabama Code § 41-22-10, which provides that civil actions such as this are to be brought in the Circuit Court of Montgomery County.

9. This Court also has general jurisdiction over Insa's claims for equitable and declaratory relief.

10. Jurisdiction and venue over Insa's OPA claim is proper in this Court pursuant to Alabama Code § 36-25A-9, which provides that claims under the Open Meetings Act may be brought "in the county where the governmental body's primary office is located[.]"

11. Venue is proper in this Court under Alabama Code § 20-2A-57, which grants any person aggrieved by an action of the Commission the right to appeal the action to the circuit court where the Commission is located.

12. Venue is also proper in this Court because "where an agency of the state is a defendant, venue is proper only in Montgomery County, absent specific statutory authority to the contrary or waiver of objection to venue." *Ex Parte Neely*, 653 So. 2d 945, 946 (Ala. 1995).

13. On December 26, 2023, Insa timely served a Notice of Request for Investigative Hearing on the Commission.

14. On December 27, 2023, Insa timely filed a Motion to Intervene in this action challenging the Commission's purported revocation of the licenses that were awarded on August 17, 2023, its purported award of licenses on December 12, 2023, and its adoption of Alabama Administrative Code r. 538-X-3-.20ER(6). This Court granted Insa's motion to intervene on December 29, 2023 (doc. 605).

Factual Background

15. On June 12, 2023, the Commission made an initial award of licenses pursuant to the Compassion Act, including integrated facility licenses.

16. The Commission's rules require that "[a]t least a portion of the review" of applications "shall be conducted under 'blind' conditions, where the reviewers scoring, averaging, or ranking the applications are not made aware of the identity of the applicant or any of the individuals or other entities associated therewith." Ala. Admin. Code r. 538-x-3-.10. Applications were evaluated and scored based on both statutory factors and on criteria promulgated by the Commission. *See* Ala Code. §§ 20-2A-62(c)(1), 20-2A-67(c); Ala. Admin. Code r. 538-X-3-.05, 538-X-3-.11(3)(a)-(n).

17. With respect to the June 12, 2023 award of licenses, the Commission complied with the requirement for a "blind" scoring process by delegating the process of grading applications to the University of South Alabama, which generated a score for each applicant (the "USA Scores").

18. Insa was not awarded an integrated facility license on June 12, 2023, but it was ranked eighth in the USA Scores, just three places below the cutoff for a license. Insa's high ranking came despite Insa having to compress and reduce the visual quality of its application in order to comply with the ten-megabyte limit of the Commission's online portal, as Insa did not receive the "workaround" offered to other applicants.[1]

19. Subsequently litigation was brought to challenge the June 12, 2023 award, including claims that the "Scoring Guide" promulgated by the Commission and used in compiling the USA Scores was a rule requiring notice and comment under the AAPA, in addition to challenges to the USA Scores' accuracy and claims regarding the ten-megabyte workaround.

20. In response to this, on August 10, 2023, the Commission awarded new licenses based on retabulated USA Scores.

21. Insa was among the applicants awarded an integrated facility license on August 10, 2023. It had the fourth-highest rank among the thirty-eight integrated facility license applicants in the retabulated USA Scores.

22. The Commission's second attempt at awarding licenses led to another slew of litigation. Counsel for the Commission met with counsel for various applicants to discuss how to

[1] As this Court is already well aware, the Commission's online application submission portal limited the attachments filed by applicants to ten megabytes in size. Some applicants, such as Insa, complied with this requirement by compressing their application attachments to bring them below ten megabytes in size. However, a limited number of applicants were permitted to provide files larger than ten megabytes to the Commission via a USB drive—the "workaround." Other applicants, including Insa, were never made aware of the availability of the "workaround" prior to the deadline for submitting their applications.

proceed with the consideration of license applications given the issues and objections raised by the applicants.

23. Following this, at an October 12, 2023 meeting, the Commission unilaterally promulgated Alabama Administrative Code r. 538-X-3-.20ER(6) (the "Emergency Rule"), without notice to applicants or their counsel. The Commissioners did not explain or discuss the nature of the "emergency" during this meeting. Instead, counsel for the Commission read a prepared resolution into the record for the meeting. The resolution stated that the "emergency" at issue was that "uncertainties and delays surrounding the licensing process present an immediate danger to public health and welfare," and that the Emergency Rule was necessary to protect public health and welfare and to carry out the Compassion Act's legislative mandate.

24. The Emergency Rule provides that:

> In order to determine the order in which Applicants should be considered, each Commissioner will be given an opportunity to submit, in an open meeting, **a written form providing an overall preliminary rank, in descending order, of each of the Applicants in the license category**, giving due consideration to all statutory and regulatory criteria. Such forms shall be tabulated and averaged by the Commission staff and used solely to determine the order in which individual Applicants are subsequently considered. In those instances where two or more applicants receive identical average rankings, the order shall be determined by a drawing. The Chair will call for a motion to approve or deny each application in the order established above. Following such motion, duly seconded, the Chair will provide an opportunity for further deliberations and a vote.

Ala. Admin. Code r. 538-X-3-.20ER(6).[2] The Emergency Rule did not require "blind" scoring of applications. Instead, it provided for a purely subjective ranking of applicants by the Commissioners, providing ample cover for Commissioners to vote arbitrarily, capriciously, and based on their own self-interest and ulterior motives.

[2] *See* https://amcc.alabama.gov/wp-content/uploads/2023/10/538-X-3-.20ER-Special-Procedures-Relating-to-Applications.pdf.

25. The only "blind" scoring provided for by the Emergency Rule was the limited use of the USA Scores:

> Regarding third-party scoring data and tabulations previously generated for applications:
>
> a. Within ten (10) business days after the date on which any applicant becomes subject to an award of license by the Commission, the Commission will make available to all applicants:
>
> (i) General scoring criteria utilized by the third-party scorers, along with information in the Commission's possession regarding each scorer's training and qualifications, excluding personal identifying information.
>
> (ii) Notice of any instance where the same scorer was not used in scoring the same sections of applications within a license category.
>
> b. In addition to the general disclosures identified in Subparagraph a. above, the Commission will, upon written request received by the Commission within thirty (30) days after the date on which any applicant becomes subject to an award of license by the Commission, provide any such requesting Applicant with the opportunity to inspect scoring sheets and any specific notes of third-party evaluators for such Applicant in the Commission's possession[.]

Ala. Admin. Code r. 538-X-3-.20(5)(a)-(b) & -.20ER(5)(a)-(b).

26. In order to carry out the "do-over" contemplated by the Emergency Rule, the Commission purported to rescind the licenses that had been awarded on August 10, 2023.

27. The Emergency Rule was not the cure-all that the Commission might have hoped for. Several applicants continued to challenge the USA Scores, leading this Court to order mediation. Insa did not participate in the mediation.

28. As part of the mediated agreement between some of the parties, the Commission voluntarily withdrew its use of the USA Scores, as memorialized in an Order of this Court (doc. 491).

29. However, rather than implementing a new scoring process to replace the USA Scores, as required by its own rules, the Commission chose to re-award licenses without conducting or considering any objective, impartial, or "blind" evaluation of applicants whatsoever.

30. Instead, at a December 12, 2023 hearing, Commissioners ranked their preferences for applicants. There was no discussion among Commissioners regarding the merits of the applicants, no deliberation, and no reference to any scoring materials, objective rankings, or statutory criteria.[3] The Commissioners declined to state their rationale or basis for their rankings. If there was any discussion of applicants, it occurred outside the meeting—and in violation of the OMA.

31. Indeed, upon information and belief, this is exactly the case: Some or all of the Commissioners—Rex Vaughn, Sam Blakemore, Dwight Gamble, Dr. Jimmie Harvey, Taylor Hatchett, Dr. Eric Jensen, Dr. Angela Martin, Charles Price, Dr. William Saliski, Loree Skelton, and/or Dr. Jerzy Szaflarski—held serial meetings and/or private meetings prior to the December 12, 2023 hearing to deliberate and exchange information on how they would rank the applicants, rather than doing so in a public hearing as required by the OMA.

32. Insa was not awarded a license at the December 12, 2023 hearing. It was ranked thirteenth out of thirty-three integrated license applicants by the Commission.[4] This is notably and inexplicably lower than Insa's high rankings in both iterations of the impartial and objective USA Scores.

[3] *See* https://www.youtube.com/watch?v=WUD8sNv1wF0.

[4] *See* https://amcc.alabama.gov/wp-content/uploads/2023/12/Compiled-Application-Rankings-Integrated-Facility.pdf.

33. On December 28, 2023, following a hearing before this Court, the Commission held a meeting at which it voted not to stay its previously announced license awards in any category, although its regulations provide it with the authority to enter a stay pending the Commission's investigative process.

Grounds on Which Relief is Sought Under the AAPA

The Emergency Rule and the December 12, 2023 Award of Licenses Violate the Commission's Own Rules

34. As discussed above, the Commission's rules require that "[a]t least a portion of the review" of applications must be "be conducted under 'blind' conditions, where the reviewers scoring, averaging, or ranking the applications are not made aware of the identity of the applicant or any of the individuals or other entities associated therewith." Ala. Admin. Code r. 538-x-3-.10.

35. Following the Commission's voluntary decision not to use the USA Scores, it did not take any subsequent steps to conduct a new "blind" scoring of the applicants, nor did it undertake any impartial numerical scoring at all.

36. While the Commission has the final decision as to the approval or rejection of applicants, it does not have the discretion to award or deny licenses in the absence of any "blind" scoring:

> (1) Review. The Commission, one or more independent consultants selected by the Commission, or a combination of the two, **shall review** submitted applications . . . . At least a portion of the review **shall** be conducted under "blind" conditions, where the reviewers scoring, averaging, or ranking the applications are not made aware of the identity of the applicant or any of the individuals or other entities associated therewith. . . .
>
> (2) Scoring, Averaging and Ranking. Applicants **shall be scored, averaged, and ranked using an impartial numerical process** in accordance with the requirements of the Act and the Criteria for Awarding Licenses set forth in r. 538-X-3-.ll

Ala. Admin. Code r. 538-X-3-.10 (emphasis added).

37. The procedure provided for by the Emergency Rule and the ranking process that took place at the December 12, 2023 meeting hearing failed to satisfy the Commission's own rules. The Commissioners ranked applicants without considering any "blind" scoring of their applications and without reference to any impartial numerical scores. Given the total lack of public deliberation, there is no indication that any of the criteria provided for by rule or by statute were considered at the December 12, 2023. Instead, by abandoning the use of objective scoring and criteria, the Commission invited bias, ulterior motivation, and politics to infect its decision-making process. The issues now before this Court demonstrate precisely why the rules contain this requirement.

The Commission Lacked the Authority to Adopt the Emergency Rule

38. The AAPA provides that a state agency may adopt an emergency rule to avert "an immediate danger to the public health, safety, or welfare[.]" Ala. Code § 41-22-5(b)(1). Unlike the ordinary rulemaking process, adopting an emergency rule does not require the notice or hearing provided for by the AAPA. *Id.*

39. The only "emergency" alleged by the Commission was that "uncertainties and delays surrounding the licensing process present an immediate danger to public health and welfare."

40. The unavailability of medical cannabis is not an emergency under the AAPA. The State of Alabama banned the use of cannabis in 1931, approximately ninety-three years ago. *See Gholston v. State*, 338 So. 2d 454, 460 (Ala. Crim. App. 1976) (citing Act No. 26, Ala. Acts 1931). Regrettable as it may be, this nearly century-long state of affairs cannot be an "emergency." *See Oliver v. Williams*, 567 So. 2d 304, 308 (Ala. Civ. App. 1989) ("However, as the trial court noted, this crisis had been in existence for many years and, thus, did not constitute an 'emergency' as defined in § 41-22-5(b).").

41. In the absence of any valid emergency as defined by the AAPA, the Commission had no authority to promulgate the Emergency Rule without notice or hearing.

The Emergency Rule, the Revocation of Licenses Awarded on August 10, 2023, and the December 12, 2023 Award of Licenses Violate the AAPA's Contested Cases Provision

42. The AAPA sets out the minimum procedures that are required for the grant or denial of a license to an applicant. Such proceedings are "contested case" proceedings under the AAPA. Ala. Code § 41-22-19(a).

43. In a contested case proceeding, the AAPA requires "an opportunity for hearing after reasonable notice in writing[.]" Ala. Code § 41-22-12(a). The written notice must include:

> (1) A statement of the time, place, and nature of the hearing;
>
> (2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
>
> (3) A reference to the particular sections of the statutes and rules involved; and
>
> (4) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

Ala. Code § 41-22-12(b).

44. Following the service of this notice, the AAPA requires that a hearing be held and that all parties be given the opportunity "to respond and present evidence on all material issues involved and to be represented by counsel at their own expense." Ala. Code § 41-22-12(e).

45. Additionally, in a contested case proceeding, an agency's decision must be made by a majority vote. Ala. Code § 41-22-15 ("In a contested case, a majority of the officials of the agency who are to render the final order must be in accord for the decision of the agency to be a final decision.").

46. The Commission's purported awards and denials of licenses at the December 12, 2023 hearing fell far short of this requirement. The Commission did not provide Insa with notice that its application had been denied, nor did it provide an opportunity for Insa to be heard. Additionally, the ranking procedure used by the Commission meant that licenses were awarded or denied without requiring a majority vote by the Commissioners.

47. To the extent the Commission relies on its proposed "investigative hearings" to satisfy this requirement, its efforts are likewise unavailing. The AAPA provides that the notice required in a contested case proceeding must contain a short and plain statement of the "matters asserted"—here, the denial of the license. No such notice has been provided here, nor has the Commission adopted any rule that would require it to provide such notice.

48. Since the Commission's silent convocation on December 12, 2023, Insa has not received any notice of why its application was denied, in violation of the AAPA. Without this notice, it cannot meaningfully prepare for the investigative hearing or address whatever issues may or may not have existed in its application. All it can do is blindly guess—the only "blind" portion of the Commission's process.

49. This state of affairs is the predictable result of the procedure provided for by the Emergency Rule and used at the December 12, 2023 hearing. The Commissioners ranked applicants without any deliberation, and without any reference to objective scoring materials. No Commissioner set forth any explanation of the rankings that they assigned, nor did they state whether or how they considered any of the mandatory statutory criteria. As a result, the Commission is unable to provide any meaningful explanation as to why an applicant was granted or denied a license in the notice required by the AAPA.

COUNT I—DECLARATORY JUDGMENT

50. Insa adopts and incorporates the preceding paragraphs as if specifically restated herein.

51. The AAPA permits "[t]he validity or applicability of a rule" to "be determined in an action for a declaratory judgment." Ala. Code § 41-22-10.

52. The AAPA requires that an agency rule be declared invalid if it "exceeds the statutory authority of the agency or was adopted without substantial compliance with the rulemaking procedures provided for" in the AAPA. *Id.*

53. As discussed above, the Commission exceeded its authority and violated the AAPA in enacting the Emergency Rule and awarding licenses at the December 12, 2023 hearing.

54. The Emergency Rule interferes with and impairs Insa's legal rights.

55. Exhaustion of administrative remedies would be futile here, and is thus not required. Although the Compassion Act sets forth a procedure for a denied applicant to seek an "investigative hearing," the hearing process violates the fundamental due process requirements of the AAPA for the grant and denial of licenses, as discussed above. *See* Ala. Code §§ 41-22-12(a).

56. Moreover, as a result of the Commission's refusal to voluntarily stay the licensure process, Insa would be unable to receive any relief from this purported remedy, as the Commission would be unable to rescind the licenses awarded at December 12, 2023 hearing once those licenses have been issued.

57. Additionally, exhaustion of administrative remedies is not a prerequisite to challenging the validity of a rule. *See State Pers. Bd. v. Cook*, 600 So. 2d 1027, 1027 (Ala. Civ. App. 1992).

58. Finally, Insa need not exhaust any administrative remedies because this lawsuit raises questions of statutory interpretation, concerns pure questions of law, and involves a threat of irreparable injury, as discussed herein.

COUNT II—INJUNCTIVE RELIEF UNDER THE ALBAMA ADMINISTRATIVE PROCEDURE ACT

59. Insa adopts and incorporates the preceding paragraphs as if specifically restated herein.

60. The AAPA permits this Court to stay enforcement of an agency rule by injunctive relief. Ala. Code § 41-22-10.

61. Without a restraining order and injunction prohibiting the Commission from issuing the five integrated facility licenses awarded at the December 12, 2023 hearing, Insa will suffer immediate and irreparable harm.

62. Specifically, Insa would be harmed because the Commission can only issue five integrated facility licenses. *See* Ala. Admin. Code r. 538-X-9-.02(2). Once a license has been awarded to an applicant, it must be "issued" no more than fourteen days after the deadline for the payment of a license fee by the awardee, or no more than twenty-eight days after the award of the license. Ala. Admin. Code § 538-X-3-.17. If the Commission issues the licenses as awarded at the December 12, 2023 hearing, it would no longer be able to issue a license to Insa.

63. Such an outcome would irreparably injure Insa by interfering with its business and damaging its reputation and goodwill in the community, not to mention the time, money, and energy invested in preparing Insa's application and in taking the steps required by the Commission's rules following the initial award of an integrated facility license to Insa.

64. Insa has no adequate remedy at law because it cannot be compensated for its losses through money damages, as the Commission and the Commissioners are immune to suit for money damages.

65. For the reasons explained in this Complaint, Insa is likely to succeed on the merits of its claims.

66. The hardship imposed on the Commission by the requested injunction would not outweigh the benefit to Insa in receiving the requested injunction.

67. The injunctive relief requested would not unduly prejudice any third parties.

COUNT III—INJUNCTIVE RELIEF UNDER THE OPEN MEETINGS ACT

68. Insa adopts and incorporates the preceding paragraphs as if specifically restated herein.

69. The OMA requires that "the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6)." Ala. Code § 36-25A-1(a). "Except for executive sessions permitted pursuant in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state laws or statutes, all meetings of a governmental body shall be open to the public." *Id.*

70. Given the total lack of deliberation at the public hearing on December 12, 2023, and upon information and belief, some or all of the Commissioners held serial meetings and/or private meetings prior to the December 12, 2023 hearing at which the Commissioners deliberated and exchanged information as to how they would rank the applicants or otherwise discuss the selection process, rather than doing so in a public hearing.

71. The OMA permits courts to grant injunctive relief based on violations of the OMA. Ala. Code § 36-25A-9(e).

72. As discussed above, Insa would be immediately and irreparably damaged without a restraining order and injunction prohibiting the Commission from issuing the five integrated facility licenses awarded at the December 12, 2023 hearing.

73. Insa would have no adequate remedy at law for this harm.

74. Insa is likely to succeed on the merits of its claim.

75. The hardship imposed on the Commission by the requested injunction would not outweigh the benefit to Insa in receiving the requested injunction.

76. The injunctive relief requested would not unduly prejudice any third parties.

77. Moreover, not issuing the requested injunction would harm the public, which is entitled to an open "deliberative process of governmental bodies." *See* Ala. Code § 36-25A-1.

RELIEF SOUGHT

Wherefore, premises considered, Insa respectfully requests that this Court take jurisdiction of this action and enter orders granting the following relief:

A. Granting a stay of the commission's award of licenses done at the December 12, 2023 meeting;

B. Reversing the December 12, 2023 vote of the Commission to deny Insa's integrated facility license application;

C. Directing the Commission to comply with the Compassion Act, the AAPA, the OMA, and its own regulations;

D. Awarding Insa all other appropriate relief, equitable or legal, pursuant to Alabama Code § 41-22-20(k); and

E. Awarding Insa all costs of this action.

VERIFICATION

In accordance with Alabama Rule of Civil Procedure 65(b) and Alabama Code § 36-25A-9(a), Greg Allen, the representative for Insa Alabama, LLC, being first duly sworn in accordance with the law and being informed of and familiar with the facts and statements made in this Complaint, which sets forth specific facts that immediate and irreparable injury, loss, or damage will result, make oath that the foregoing averments are true to the best of my knowledge and where stated my information and belief.

Given under my hand this the 22nd th day of January 2024.

Greg Allen

STATE OF ALABAMA
Montgomery **COUNTY**

I, the undersigned, a Notary Public in and for said County and State, hereby certify that Greg Allen, whose name as the representative of Insa Alabama, LLC is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he executed same voluntarily and with full authority for said entity.

GIVEN under my hand and official seal this 22nd day of January, 2024.

(SEAL)

Notary Public
My Commission Expires: June 3, 2025

Respectfully submitted,

/s/ Barry A. Ragsdale
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Attorneys for Insa Alabama, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2024, I filed the foregoing with the Clerk of the Court using the AlaFile system which will cause a copy to be served on all counsel of record.

/s/ Barry A. Ragsdale
Of Counsel

EXHIBIT F

ELECTRONICALLY FILED
12/27/2023 3:33 PM
03-CV-2023-901727.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, Plaintiff, v. ALABAMA MEDICAL CANNABIS COMMISSION, WILLIAM SALISKI, JR. D.O., SAM BLAKEMORE, DWIGHT GAMBLE, ANGELA MARTIN, M.D., DR. ERIC JENSEN, LOREE SKELTON, REX VAUGHN, CHARLES PRICE, TAYLOR HATCHETT, JAMES HARWELL, JERZY SZAFLARSKI, M.D., Ph. D, and DION ROBINSON, in their official capacities as members of the State of Alabama Medical Cannabis Commission, Defendants.	)	Case No. CV-2023-901727

MOTION FOR EXPEDITED DISCOVERY

Plaintiff Alabama Always, LLC asks the Court to allow it to conduct limited depositions to discover what Defendant State of Alabama Medical Cannabis Commission (the Commission) and its staff discussed before the Commission's December 12, 2023 meeting concerning the voting or ranking procedures used at the meeting. In further support, Alabama Always states the following:

1. Contemporaneously with the filing of this motion, Alabama Always has filed a verified second amended complaint and motion for temporary restraining order and preliminary injunction seeking relief arising out of, among other things, the Commission's failure to comply with the Alabama Administrative Procedure Act (AAPA), the Open Meetings Act (OMA), and its own rules and regulations. In particular, Alabama Always alleges in its second amended complaint that at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the

applicants, in violation of the OMA. These private meetings enabled the Commissioners to vote on candidates without deliberation in violation of the OMA.

2. Because of the substantial likelihood that the Commission's wrongful conduct will continue to cause Alabama Always severe and irreparable harm, Alabama Always has moved for a temporary restraining order and preliminary injunction.

3. Alabama Always therefore requests to obtain limited discovery to learn what occurred during the Commissioner's improper deliberations, including learning the extent to which any information discussed by the Commission or its staff concerned Alabama Always. Without learning the extent of those discussions, Alabama Always cannot obtain complete relief in this case. And it has long been the law that equity jurisdiction allows the Court the ability to afford a party complete relief. *First Nat'l Bank v. Bradley*, 134 So. 621, 622 (Ala. 1931) ("Where a court of equity rightfully obtains jurisdiction for equitable purposes, it will retain the same for such purposes and give full relief . . . .").

4. Notably, Alabama Always' request for discovery in this matter is not unique or novel. Courts in OMA cases routinely allow plaintiffs to obtain discovery about votes or information discussed during improper deliberations. *See, e.g.*, *Birmingham News Co. v. Bell*, 17 Media L. Rep. (BNA) 1597 (Cir. Ct. Jefferson Cnty., Ala., Equity Div., Feb. 12, 1990) (requiring the city council to disclose the person for whom each council member voted using a secret ballot); *Birmingham News Co. v. Cooper*, 13 Media L. Rep. (BNA) 1655 (Cir. Ct. Jefferson Cnty., Ala., Equity Div., Oct. 29, 1986) (ordering the production of the record of votes at a wrongfully-closed meeting under former open meetings law).

5. Alabama Always also asks the Court to afford it the opportunity to fully learn of the extent of the Commission's wrongful conduct before any preliminary injunction hearing. Because the hearing on Alabama Always's request for a preliminary injunction may be held before Alabama Always is permitted to conduct discovery under the normal

timeframes prescribed under Rules 30, 34, 36 and 45, and because Alabama Always will be required to present substantial factual support of its entitlement to injunctive relief at that hearing, Alabama Always needs to obtain accelerated discovery of facts and information relevant to this matter prior to the time prescribed by Rules 30, 34, 36 and 45. Courts routinely order expedited discovery when a party is seeking a preliminary injunction. *See, e.g., KBG Holding Corp. v. Union Bank*, 56 F. App'x 111, 114 (4th Cir. 2003) (noting that "[t]he parties engaged in expedited discovery in preparation for the . . . hearing on the . . . motions for preliminary injunction"); *Radio Sys. Corp. v. Sunbeam Prods, Inc.*, 2013 WL 416295, at *2 (E.D. Tenn. Jan. 30, 2013) (noting that "expedited discovery is generally appropriate in cases requesting preliminary injunction relief"); *Meritain Health Inc. v. Express Scripts, Inc.*, 2012 WL 1320147, at *2 (E.D. Mo. April 17, 2012) (granting the plaintiff's motion for expedited discovery and noting that "[e]xpedited discovery is generally appropriate in cases, such as this, where a party is attempting to prepare for a preliminary injunction hearing"); *Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984) (ordering expedited discovery where it would "better enable the court to judge the parties' interests and respective chances for success on the merits" at a preliminary injunction hearing).

6. Finally, the Commission's purported denial of Alabama Always's application for a license is a contested case under the AAPA. *See* Ala. Code § 41-22-19(a) (noting that the AAPA's contested case provisions "apply to the grant, denial, revocation, suspension, or renewal of a license"). Under the AAPA, "[i]n a contested case, all parties shall be afforded an opportunity for hearing," and "[o]pportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved and to be represented by counsel at their own expense." *Id.* § 41-22-12(a) & (e). Without learning what the Commission

did and said in the improper deliberations, Alabama Always cannot "respond and present evidence," as required by the AAPA.[1]

FOR THESE REASONS, Alabama Always asks this Court to allow it to conduct limited discovery by deposing the Commissioners and the Commission staff to determine what communications they had concerning the voting and ranking process used at the December 12, 2023 Commission meeting. Alabama Always specifically asks the Court to order that persons or entities (parties or non-parties) served with a notice of deposition or subpoena must appear for deposition within at least 7 days of the service of a deposition notice on them or their attorneys.

Respectfully submitted:

/s/ William G. Somerville
WILLIAM G. SOMERVILLE
MICHAEL CATALANO
JADE E. SIPES
Attorneys for Alabama Always, LLC

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[1] This is not the Commission's only violation of the AAPA as this Court may recall.

CERTIFICATE OF SERVICE

I hereby certify that this has been served electronically via this Court's electronic filing system on the following on December 27, 2023:

/s/ Jade E. Sipes
OF COUNSEL

EXHIBIT G

ELECTRONICALLY FILED
12/27/2023 7:09 PM
03-CV-2023-000231.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case Number: 03-CV-2023-000231**
	)	
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
	)	
Defendant.	)	

MOTION FOR EXPEDITED DISCOVERY

Intervenor, Insa Alabama, LLC ("Insa"), respectfully requests that this Court allow it to conduct limited discovery to determine what Defendant, the State of Alabama Medical Cannabis Commission ("the Commission"), and its staff discussed before the Commission's December 12, 2023 meeting concerning the voting or ranking procedures used at the meeting. As grounds therefore, Insa states as follows:

1. Insa has filed a Motion to Intervene in this matter as a plaintiff with respect to the Commission's failure to comply with the Alabama Administrative Procedure Act ("AAPA"), the Open Meetings Act ("OMA"), and its own rules and regulations. Upon information and belief, at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the OMA. These private meetings enabled the Commissioners to vote on candidates without deliberation in violation of the OMA.

2. Because of the substantial likelihood that the Commission's wrongful conduct will continue to cause plaintiffs severe and irreparable harm, multiple motions for temporary restraining orders and preliminary injunctions have been filed.

3. Limited discovery in this matter is appropriate to learn what occurred during the Commissioner's improper deliberations, including learning the extent to which any information

discussed by the Commission or its staff concerned Insa. Without learning the extent of those discussions, Insa cannot obtain complete relief in this case. It has long been the law that equity jurisdiction allows the Court the ability to afford a party complete relief. F*irst Nat'l Bank v. Bradley*, 134 So. 621, 622 (Ala. 1931) ("Where a court of equity rightfully obtains jurisdiction for equitable purposes, it will retain the same for such purposes and give full relief . . . .").

4. Insa's request for discovery in this matter is not unique or novel. Courts in OMA cases routinely allow plaintiffs to obtain discovery about votes or information discussed during improper deliberations. *See, e.g., Birmingham News Co. v. Bell*, 17 Media L. Rep. (BNA) 1597 (Cir. Ct. Jefferson Cnty., Ala., Equity Div., Feb. 12, 1990) (requiring the city council to disclose the person for whom each council member voted using a secret ballot); *Birmingham News Co. v. Cooper*, 13 Media L. Rep. (BNA) 1655 (Cir. Ct. Jefferson Cnty., Ala., Equity Div., Oct. 29, 1986) (ordering the production of the record of votes at a wrongfully-closed meeting under former open meetings law).

5. Insa also asks this Court to afford it the opportunity to fully learn of the extent of the Commission's wrongful conduct before any preliminary injunction hearing. Because the hearing on the pending motions for preliminary injunctions may be held before Insa is permitted to conduct discovery under the normal timeframes prescribed under Rules 30, 34, 36 and 45 of the Alabama Rules of Civil Procedure, and because Insa will be required to present substantial factual support of its entitlement to injunctive relief at that hearing, Insa needs to obtain accelerated discovery of facts and information relevant to this matter prior to the time prescribed by Rules 30, 34, 36 and 45. Courts routinely order expedited discovery when a party is seeking a preliminary injunction. *See, e.g., KBG Holding Corp. v. Union Bank*, 56 F. App'x 111, 114 (4th Cir. 2003) (noting that "[t]he parties engaged in expedited discovery in preparation for the . . . hearing on the

. . . motions for preliminary injunction"); *Radio Sys. Corp. v. Sunbeam Prods, Inc.*, 2013 WL 416295, at *2 (E.D. Tenn. Jan. 30, 2013) (noting that "expedited discovery is generally appropriate in cases requesting preliminary injunction relief"); *Meritain Health Inc. v. Express Scripts, Inc.*, 2012 WL 1320147, at *2 (E.D. Mo. April 17, 2012) (granting the plaintiff's motion for expedited discovery and noting that "[e]xpedited discovery is generally appropriate in cases, such as this, where a party is attempting to prepare for a preliminary injunction hearing"); *Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984) (ordering expedited discovery where it would "better enable the court to judge the parties' interests and respective chances for success on the merits" at a preliminary injunction hearing).

6. Finally, the Commission's purported denial of Insa's application for a license is a contested case under the AAPA. *See* Ala. Code § 41-22-19(a) (noting that the AAPA's contested case provisions "apply to the grant, denial, revocation, suspension, or renewal of a license"). Under the AAPA, "[i]n a contested case, all parties shall be afforded an opportunity for hearing," and "[o]pportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved and to be represented by counsel at their own expense." Ala. Code § 41-22-12(a), (e). Without learning what the Commission did and said in the improper deliberations, Insa cannot "respond and present evidence," as required by the AAPA.

Wherefore, premises considered, Insa respectfully requests that this Court allow it to conduct limited discovery by deposing the Commissioners and the Commission staff to determine what communications they had concerning the voting and ranking process used at the December 12, 2023 Commission meeting. Insa specifically asks the Court to order that persons or entities (parties or non-parties) served with a notice of deposition or subpoena must appear for deposition within at least 7 days of the service of a deposition notice on them or their attorneys.

Respectfully submitted,

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Attorneys for Insa Alabama, LLC

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2023, I filed the foregoing with the Clerk of the Court using the AlaFile system which will cause a copy to be served on all counsel of record.

/s/ Barry A. Ragsdale
Of Counsel

EXHIBIT H

ELECTRONICALLY FILED
12/28/2023 9:15 PM
03-CV-2023-000231.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

YELLOWHAMMER MEDICAL DISPENSARIES, LLC,	)	
Plaintiff,	)	
v.	)	**Case Number: 03-CV-2023-901798**
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
Defendant.	)	
PURE BY SIRMON FARMS, LLC	)	
Plaintiff,	)	
v.	)	**Case Number: 03-CV-2023-901802**
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
Defendant.	)	
ALABAMA ALWAYS, LLC, et al., **Plaintiff,**	)	
v.	)	**Case Number: 03-CV-2023-000231** **MASTER CASE FILE**
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
Defendant.	)	

TEMPORARY RESTRAINING ORDER

Plaintiff Yellowhammer Medical Dispensaries, LLC ("Yellowhammer") has filed a Motion for Temporary Restraining Order and Preliminary Injunction ("Yellowhammer's

Motion," Doc. 13 in CV 2023-901798 and Doc. 537 in the Master File). In addition, Plaintiff Pure by Sirmon Farms, LLC has filed a similar motion ("Pure's Motion," Doc. 11 in CV 2023-901802). On December 28, 2023, the Court heard argument on those two motions, as well as on a number of additional and similar motions filed by other litigants seeking immediate injunctive relief. This Order addresses only Yellowhammer's Motion and Pure's Motion.

By way of background, the Alabama Medical Cannabis Commission (the "Commission") purported to award medical cannabis business licenses on December 1, 2023 and December 12, 2023 in various license categories in the State of Alabama, pursuant to the Darren Wesley 'Ato' Hall Compassion Act, Ala. Code § 20-2A-1, *et seq*. (the "Act"). Yellowhammer is an applicant for a Dispensary license, and Pure for a Cultivator license; these categories were the subject of some of the Commission's December 1 awards. The December 12 awards concerned only "Integrated Facility" licenses. The Commission is authorized to issue only four (4) Dispensary licenses under the Act, and it purported to award all four licenses on December 1. By contrast, the Commission is authorized to award up to 12 Cultivator licenses, but the Commission considered applications from only 11 applicants in that category. Both Yellowhammer and Pure were not awarded licenses in their respective categories. Both Yellowhammer and Pure seek to enjoin the Commission from taking any actions in furtherance of the December 1 license awards, including specifically enjoining any issuance of licenses to awarded applicants.

The four elements necessary to establish entitlement to immediate or preliminary injunctive relief are well known.

First, there must be at least a reasonable chance of success on the merits of the claims at issue. Yellowhammer and Pure contend, among other things, that the Commission violated its own Rules in awarding licenses on December 1. The Court heard extensive argument about these issues on the record on December 28, 2023. One such contention is that the Commission did not comply with its scoring, averaging and

ranking rules (Ala. Admin. Code rr. 538-x-3-.10 and -.11). From the arguments made at the December 28, 2023 hearing, the Court concludes there is at least a reasonable chance of success on the merits of those claims.

Second, the applicant must establish the threat of immediate and irreparable injury. That too is met with respect to Yellowhammer, though not with respect to Pure.

Taking them in reverse order, Pure has not shown an immediate and irreparable injury which will likely result without an injunction. As noted above, Pure is a Cultivator applicant, a license category for which the number of applicants did not even exceed the number of available licenses. Therefore, Pure has an adequate administrative remedy by way of its statutory investigative hearing, through which Pure could potentially be awarded a license. Pure's administrative remedy is either an adequate remedy at law or, at the least, defeats Pure's claim of irreparable injury without injunctive relief. Pure's Motion is therefore **DENIED** on this basis.

Yellowhammer, however, has demonstrated a threat of immediate and irreparable injury. Yellowhammer is a Dispensary license applicant – a category in which the Commission awarded its statutory maximum number of licenses, thus rendering the remedy of an investigative hearing likely insufficient to provide it a meaningful avenue for review of the Commission's adverse licensing decision. At the December 28 hearing, Commission counsel clarified that Dispensary licenses are to be issued by the Commission on December 29, 2023. The Court was advised during the December 28 hearing (which began at 10 am) that the Commission was to meet on the afternoon of December 28. Because it appeared to the Court that Commission action might or might not affect the timeline for issuing Dispensary licenses (as well as potentially those in other categories), the Court advised all parties at the conclusion of the December 28 hearing that it intended to wait until the Commission met to evaluate Yellowhammer's threat of irreparable injury. After the hearing concluded, however, the Commission met (the recording of the meeting is available online)[1] and passed a Motion refusing to impose any administrative stay or other delay of the process. Therefore, based on the

Commission's action on the afternoon of December 28 and the threat of immediate license issuance on December 29, Yellowhammer faces an immediate threat of irreparable injury if the Commission is not enjoined from issuing licenses in the Dispensary category.

Third, the Court finds that the Commission will suffer no hardship if immediate injunctive relief is granted. The Commission argued to the Court that delays would affect its ability to get medicine to needy patients. While the Court is sympathetic to that concern, that concern is not injurious to the Commission itself, and regardless, that concern has existed since the Commission's first set of licensing decisions came under attack, now six months ago.

Fourth, the public interest and the balancing of equities favors immediate injunctive relief. Again, the Court is sympathetic to the public interest in getting medicine in the hands of patients. That said, the Commission's third round of licensing awards is at issue, and the prior two award rounds remain the subject of ongoing litigation – meaning that the Commission's effort to issue licenses now, based on the third round, is already on uneven ground. Additionally, any balancing of the equities here weighs heavily in favor of Yellowhammer, whose injury will very likely be irreparable if immediate injunctive relief is denied and the Commission issues licenses, thus virtually eliminating any reasonable chance for Yellowhammer to obtain any meaningful review of the adverse licensing decision.

Based on the foregoing, the four factors here weigh in favor of granting immediate injunctive relief for Yellowhammer as to the Dispensary license category.

Accordingly, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

1. "Pure's Motion," Doc. 11 in CV 2023-901802, is **DENIED**.
2. "Yellowhammer's Motion," Doc. 13 in CV 2023-901798 and Doc. 537 in the Master File, is **GRANTED IN PART**. Specifically, the Commission, its officers, agents, servants, employees, attorneys, and other persons acting in

active concert or participation with them who receive notice of this order by service or otherwise, are **ENJOINED and RESTRAINED** from taking any action in furtherance of the December 1, 2023 awards of licenses in the Dispensary Category, including without limitation the issuance of any licenses.

3. Yellowhammer alleges, without opposition from the Commission, that it has already paid to the Commission a $40,000 license fee pursuant to Yellowhammer's prior awards of licenses – money which the Commission is apparently continuing to hold. Therefore, the Court **ORDERS** that bond is set at $40,000, consisting of the $40,000 which is already being held by the Commission at this time paid by Yellowhammer.
4. The Court will set a hearing on a Motion for Preliminary Injunction as to Yellowhammer and Pure by separate Order.
5. The Court has under submission other similar motions filed by applicants for licenses in the Integrated Facility category. The Court understands from Commission counsel, as represented on the record on December 28, 2023, that the Commission will not issue licenses in that category until January 9, 2024 at the earliest.

DONE this 28th day of December, 2023.

/s/ JAMES H ANDERSON
CIRCUIT JUDGE

EXHIBIT I

ELECTRONICALLY FILED
1/3/2024 1:53 PM
03-CV-2023-000231.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case Number: 03-CV-2023-000231**
	)	
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
	)	
Defendant.	)	

INSA ALABAMA, LLC'S AMENDED MOTION FOR EXPEDITED DISCOVERY

Insa Alabama, LLC ("Insa") hereby amends its Motion for Expedited Discovery as follows:

1. On June 12, 2023, the State of Alabama Medical Cannabis Commission ("the Commission") made its initial award of licenses, including integrated facility licenses.

2. The June 12, 2023 award of licenses was made based on an impartial, objective, and "blind" scoring process, as required by Ala. Admin. Code r. 538-x-3-.10, which the Commission delegated to the University of South Alabama (the "USA Scores").

3. Insa was not awarded an integrated facility license on June 12, 2023, but it was ranked eighth in the USA Scores, just three places below the cutoff for a license. This high ranking was despite Insa having to reduce the quality of its application in order to comply with the ten-megabyte limit of the Commission's online portal, as Insa did not receive the "workaround" offered to other applicants.

4. Following litigation challenging the June 12, 2023 award, including claims regarding alleged errors in the USA Scores, on August 17, 2023, the Commission awarded new licenses based on retabulated USA Scores.

5. Insa was among the applicants awarded an integrated facility license on August 17, 2023. It had the fourth-highest rank among the thirty-eight integrated facility license applicants in the retabulated USA Scores.[1]

6. On October 12, 2023, after a considerable amount of litigation, the Commission unilaterally promulgated Emergency Rule 538-X-3-.20E (the "Emergency Rule"). The Emergency Rule allowed for the use of the USA Scores and provided that applicants would have an opportunity to obtain general scoring information and their specific scoring materials from the Commission.

7. Following the promulgation of the Emergency Rule, this Court ordered mediation. As part of the mediated agreement between parties, the Commission voluntarily withdrew its use of the USA Scores. It also purported to revoke the licenses awarded to Insa and others on August 17, 2023.

8. However, rather than implementing a new scoring process to replace the USA Scores, as required by its own Rules, the Commission chose to re-award licenses without conducting any objective, impartial, or "blind" evaluation of applicants whatsoever. Instead, at a December 12, 2023 hearing, Commissioners ranked their preferences for applicants, without any reference to scoring material or other objective information. There was no discussion among Commissioners regarding the merits of the applicants, no deliberation, and no reference to any objective scores or rankings.[2]

[1] *See* https://amcc.alabama.gov/wp-content/uploads/2023/09/Applicant-Summary-Report_rev-20230911-1.pdf.

[2] *See* https://www.youtube.com/watch?v=WUD8sNv1wF0.

9. Insa was not awarded a license at the December 12, 2023 hearing. It was ranked twenty-first out of thirty-three integrated license applicants, drastically lower than its high rankings in both iterations of the USA Scores.[3]

10. Under the Rules, applications must be "scored, ranked, and averaged," with some of that scoring taking place "in the blind." Ala. Admin. Code § 538-x-3-.10. The scoring must employ an "impartial numerical system" that scores applications "in accordance with the requirements of the Act and the Criteria for Awarding Licenses set forth in r. 538-x-3-.11." *Id.* The December 12, 2023, awards represent a marked departure from the Commission's own Rules—a departure that the Commission does not have the authority to make.

11. By abandoning the use of objective scoring, the Commission invited subjective bias, ulterior motivation, and politics to infect its decision-making process, demonstrating exactly why the Rules require an objective component. While the award of licenses was ultimately at the Commissioners' discretion, they did not have the discretion to make awards without considering the objective, impartial scores required by the Rules.

12. Although the Commission has allowed applicants who were denied a license to request an investigative hearing, this opportunity is meaningless if applicants cannot receive and review their scoring materials, as provided for by the Emergency Rule. The sole rankings used on December 12, 2023, were the Commissioners' subjective preferences, and the Commissioners declined to state their rationale or basis for their rankings. If there was any discussion of applicants, it occurred outside the meeting—and in violation of the Open Meetings Act.

13. Based on the Commission's violation of its own rules, its decision to abandon any objective criteria in evaluating applicants, and the wide disparity between Insa's two previous USA

[3] *See* https://amcc.alabama.gov/wp-content/uploads/2023/12/Compiled-Application-Rankings-Integrated-Facility.pdf.

Scores and the Commissioners' subjective rankings, Insa believes that limited depositions and written discovery targeted at how the Commissioners made their rankings, what objective information they considered in making their rankings, and any communications regarding the applicants that occurred outside of the December 12, 2023 hearing would be appropriate.

14. This information would be directly relevant to Insa's interest in maintaining the license awarded to it on August 17, 2023, and the questions of whether the Commission acted arbitrarily or capriciously or violated the Open Meetings Act with respect to the December 12, 2023, meeting. It will also be vital to this Court's decision as to whether to enjoin the issuance of integrated facility licenses on January 9, 2024.

15. Unless enjoined by this Court, the licenses awarded on December 12, 2023, will issue in six days, on January 9, 2024, making expedited discovery all the more vital.

Wherefore, premises considered, Insa respectfully requests that the Court permit it to take limited discovery in this matter by taking depositions of Commission members and written discovery.

Respectfully submitted,

/s/ Barry A. Ragsdale

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Attorneys for Insa Alabama, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2024, I filed the foregoing with the Clerk of the Court using the AlaFile system which will cause a copy to be served on all counsel of record.

/s/ Barry A. Ragsdale
Of Counsel

EXHIBIT J

ELECTRONICALLY FILED
1/3/2024 6:55 PM
03-CV-2023-000231.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS LLC, CAPITOL MEDICAL, LLC, FFD ALABAMA HOLDINGS, LLC, FFD ALABAMA HOLDINGS, LLC ET AL, Plaintiffs,	)	
V.	)	Case No.: CV-2023-000231.00
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION, Defendant.	)	

TEMPORARY RESTRAINING ORDER

This Document Also Relates to the Following Actions:
Alabama Always, LLC v. AMCC, CV 2023-901727
Yellowhammer Medical Dispensaries, LLC v. AMCC, CV 2023-901798
Jemmstone Alabama, LLC v. AMCC, CV 2023-901800
3 Notch Roots, LLC v. AMCC, CV 2023-901801
Pure by Sirmon Farms, LLC v. AMCC, CV 2023-901802

On December 28, 2023 at 10:00 a.m., the Court heard a number of motions for preliminary injunction and temporary restraining order (the "Motions") filed by Plaintiffs Alabama Always, LLC (Doc. 40 in CV 2023-901727); INSA Alabama, LLC (Doc. 559 in Master Case); Theratrue Alabama, LLC (Doc. 520 in Master Case), Jemmstone Alabama, LLC; (within Doc. 2 in CV 2023-901800); 3 Notch Roots, LLC (Doc. 3 in CV 2023-901801); and Southeast Cannabis, LLC (Doc. 540 in Master Case). Pre-hearing notice was provided to Defendant Alabama Medical Cannabis Commission (the "Commission") and other interested parties before the hearing, and counsel for the Commission and other interested parties were present and presented argument.

Some of the background for this present order is set out in the Court's post-

hearing Temporary Restraining Order relating to Yellowhammer Medical Dispensaries, LLC (the "Yellowhammer Orders," Docs. 590 & 592). The Yellowhammer Orders concerned certain motions filed by medical cannabis license applicants in the Cultivator and Dispensary license categories. Plaintiffs in the present Motions are all unsuccessful applicants for Integrated Facility licenses. They seek injunctive relief to stay the Commission's award of medical cannabis licenses for Integrated Facilities, purportedly awarded by the Commission on December 12, 2023. Integrated licenses are to be issued by the Commission, without further Commission action, on January 9, 2023. Of relevance here, Plaintiffs claim, as referenced in the Court's Yellowhammer Orders, that the Commission failed to follow its scoring rules in the December 12, 2023 license awards. Plaintiffs have argued, *inter alia*, that because of the limited number of licenses that the Commission is statutorily authorized to issue in the Integrated Facility category, the Commission's investigative hearing procedure will be completely ineffectual absent an immediate injunction.

During the December 28 hearing, the Court apprised the parties that it would issue a ruling after the Commission's December 28 meeting, at which the Commission would consider whether to issue its own stay of the licensure process. The Court was thereafter informed that the Commission passed a motion during its December 28 meeting refusing to issue any stay regarding its licensure processes.

The four elements necessary to establish entitlement to immediate or preliminary injunctive relief are well known.

First, there must be at least a reasonable chance of success on the merits of the claims at issue. Plaintiffs contend the Commission violated its own Rules in awarding

licenses on December 1. The Court heard extensive argument about these issues on the record on December 28, 2023. One such contention is that the Commission did not comply with its scoring, averaging and ranking rules (Ala. Admin. Code rr. 538-x-3-.10 and -.11). From the arguments made at the December 28, 2023 hearing, the Court concludes there is at least a reasonable chance of success on the merits of those claims.

Second, Plaintiffs must establish the threat of immediate and irreparable injury. Plaintiffs have met that element as well. Each is an applicant for an Integrated Facility license, a license category in which the Commission had purportedly awarded its statutory maximum number of licenses, thus rendering the investigative hearing process likely insufficient to provide these Plaintiffs a meaningful avenue for review of the Commission's adverse licensing decision. As noted above, the Commission met after the December 28, 2023 hearing before this Court and passed a Motion refusing to impose any administrative stay on the licensing process. Commission counsel advised the Court, on the record on December 28, that Integrated Facility licenses are to be issued on January 9, 2024. Based on the Commission's action on the afternoon of December 28 and the threat of immediate license issuance on January 9, Plaintiffs face an immediate threat of irreparable injury if the Commission is not enjoined from issuing Integrated Facility licenses.

Third, the Court finds that the Commission will suffer no hardship if immediate injunctive relief is granted. The Commission argued to the Court that delays would affect its ability to get medicine to needy patients. While the Court is sympathetic to that concern, that concern is not injurious to the Commission itself, and regardless, that

concern has existed since the Commission's first set of licensing decisions came under attack, now six months ago.

Fourth, the public interest and the balancing of equities favors granting immediate injunctive relief. Again, the Court is sympathetic to the public interest in getting medicine in the hands of patients. That said, the Commission's third round of licensing awards is at issue, and the prior two award rounds remain the subject of ongoing litigation – meaning that the Commission's effort to issue licenses now, based on the third round, is already on uneven ground. On this point, the Court has also taken into account the post-hearing filings of Sustainable Alabama, LLC and Flowerwood Medical Cannabis, LLC (Docs. 615 & 622 in Master File), in which they argue licenses should immediately issue to them because they are "three-time" awardees and that the public interest has not beem appropriately weighed in prior injunctions. While the Court understands those parties' frustrations, the Court also notes that all three rounds of awards have been challenged as legally infirm: the first two rounds of awards were abandoned by action of the Commission itself, and now there is a serious question as to whether the third round is also invalid. Moreover, both the statute at issue and the public policy of the State of Alabama require that the State's business be conducted in accordance with the Alabama Administrative Procedures Act, and the serious questions as to compliance with the AAPA is a serious public interest concern. Finally, any balancing of the equities here weighs heavily in favor of Plaintiffs, whose injury will very likely be irreparable if immediate injunctive relief is denied and the Commission issues licenses, thus virtually eliminating any reasonable chance for Plaintiffs to obtain any meaningful review of the adverse licensing decision.

Based on the foregoing, the four factors here weigh in favor of granting immediate injunctive relief to Plaintiffs as to the Integrated Facility license category.

Accordingly, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

2. The Motions filed by Plaintiffs Alabama Always, LLC (Doc. 40 in CV 2023-901727); INSA Alabama, LLC (Doc. 559 in Master Case); Theratrue Alabama, LLC (Doc. 520 in Master Case), Jemmstone Alabama, LLC; (within Doc. 2 in CV 2023-901800); 3 Notch Roots, LLC (Doc. 3 in CV 2023-901801); and Southeast Cannabis, LLC (Doc. 540 in Master Case), are **GRANTED IN PART**. Specifically, the Commission, its officers, agents, servants, employees, attorneys, and other persons acting in active concert or participation with them who receive notice of this order by service or otherwise, are **ENJOINED** and **RESTRAINED** from taking any action in furtherance of the December 12, 2023 awards of licenses in the Integrated Facility license category, including without limitation the issuance of any licenses. The intent of the Court that all rights of all applicants shall be preserved.

3. This Order is conditioned upon each Plaintiff's posting bond in the amount of $25,000.00, in a form satisfactory to the Clerk of Court.

4. The Court will set a hearing on Motions for Preliminary Injunction and requests for discovery by separate Order.

DONE this 3rd day of January, 2024.

CIRCUIT JUDGE

EXHIBIT K

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03-CV-2023-000231.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case Number: CV-2023-000231**
	)	
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO THE MOTIONS FOR EXPEDITED DISCOVERY

COMES NOW the Defendant, the Alabama Medical Cannabis Commission ("Commission") and with this files its Response in Opposition to the Motions for Expedited Discovery filed by Intervenor Insa Alabama ("Insa") (Doc. 564, 636) and Consolidated Plaintiff Alabama Always, LLC ("AA") (*Alabama Always, LLC v. Alabama Medical Cannabis Commission*, Case No.: 03-CV-2023-901727 (Doc. 44)) based on the Alabama Open Meetings Act ("AOMA"), Ala. Code § 36-25A-1, *et seq*, and moves this Honorable Court to deny the Motions. As grounds, the Commission states as follows:

I. Neither Movant Has Met the AOMA's Procedural Requirements.

An AOMA plaintiff must: (1) be a proper plaintiff, (2) file a verified complaint, (3) state specifically the applicable grounds under § 36-25A-9(b)(1)-(4), (4) name individual defendants in the verified complaint, (5) state specifically the impact of the alleged violation greater than that to the public at large, and (6) must personally serve the verified complaint on the individually named governmental body members. Ala. Code § 36-25A-9(a).

Neither Movant has met all of the AOMA's procedural requirements. Insa has failed every single one. AA has failed requirements (1), (3), and (6).

A. By failing AOMA requirement (1), neither Movant has sufficiently alleged standing before the Court.

Regarding requirement (1) above, § 36-25A-9(a) provides in the relevant part that "enforcement of this chapter . . . may be sought by civil action . . . by any media organization, any Alabama citizen impacted by the alleged violation to an extent which is greater than the impact on the public at large, the Attorney General, or the district attorney for the circuit in which the governmental body is located . . .."

Significantly, § 36-25A-9(a) confers standing to Alabama "*citizens*" impacted, not "persons." Section 36-25A-2 ("Definitions") does not define the terms "person" or "citizen." See § 36-25A-2. This Court previously raised the standing issue *sua sponte* during its August 17, 2023, hearing on AA's Motion for TRO (Doc. 133). (See TRO Hearing Transcript, August 17, 2023, at 4 ln. 10-15 (" - - well, the statute says citizen. It doesn't say person, which would include a corporation. And we've got, I know, two cases. Alabama Always amended to add Mr. Ben McNeill as the party - - proper party . . ..")).

AA amended its pleading back then but has done the same thing again and admits it is an Alabama LLC (*Alabama Always*, 901727 (Doc. 37 at 2, ¶ 1)). AA has put forward no authority that the AOMA confers corporate entities standing to allege an AOMA violation. Without jurisdiction, this Court has no alternative but to dismiss the AOMA claims. Ex parte Alabama Educ. Television Comm'n, 151 So. 3d 283 (2013) (internal quotations and citations omitted) (dismissing the plaintiff former executive director of Alabama Public Television ("APT")'s AOMA action for lack of standing, reasoning that although plaintiff was an "Alabama citizen" under § 36-25A-9(a), he failed to

satisfy each requirement for standing under Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992): injury in fact, causation, and redressability.). Therefore, AA's Motion is due to be DENIED.

Similarly, § 36-25A-9(g) provides in the relevant part that "[i]f more than one cause of action is filed pursuant to this chapter, all causes of action based on or arising out of the same alleged violation or violations shall be consolidated into the action that was first filed and any party may intervene into the consolidated action pursuant to the Alabama Rules of Civil Procedure . . .." (Emphasis added). Insa has failed to put forward any authority suggesting that the word "party" in -9(g) should be defined more broadly than the list of proper plaintiffs enumerated in -9(a) of the same section, nor can it put forward any authority suggesting why or how the Court could allow their intervention in an action seeking relief under the AOMA over which it lacks subject matter jurisdiction. And without subject matter jurisdiction over the first-party plaintiff, this Court has no authority to entertain a subsequent motion to intervene. See R.H. v. D.W.M., 822 So.2d 444, 447 (Ala. Civ. App. 2001). Therefore, Insa's Motion is due to be DENIED.

B. Insa's remaining procedural faults under the AOMA and the *Alabama Rules of Civil Procedure*.

Even putting AOMA standing aside, Insa has only intervened in this action (Doc. 559) and filed its Amended Motion for Expedited Discovery (Doc. 636).[1] Without filing a Complaint or any claims against the Commission, Insa fails all of the procedural requirements above. Therefore, Insa's Motion is due to be denied.

Moreover, Insa's complaint (or lack thereof) was shy of the AOMA's procedural requirements and the *Alabama Rules of Civil Procedure*. In neither of its only two filings does Insa

[1] Tellingly, Insa filed its original Motion for Expedited Discovery on December 27, 2023 (Doc. 564). The Commission filed a Proposed Order on Friday, December 29, 2023, denying the Motions on the grounds set forth herein, including the procedural issues with Insa's Motion. Insa has since filed an Amended Motion that does nothing to cure those issues. (Doc. 636). Insa's failure to file pleadings at all, and admit its objective of answering whether it should file a lawsuit before it files one, is grounds for the Court's denial of its Motion on its own.

purport to complain against the Commission, whether for TRO or Preliminary Injunction, adopting another party's allegations, or otherwise. Without a complaint, Insa's Motion is a motion for pre-suit discovery, and it fails the prerequisites of Ala. R. Civ. P. 27, as there is already an ongoing action. The *Alabama Rules of Civil Procedure* do not permit a fishing expedition. Therefore, Insa's Motion is due to be DENIED.

C. AA's remaining AOMA procedural faults.

Nor has AA's Motion met the remaining AOMA procedural requirements. AA's Operative Complaint (*Alabama Always*, 901727 (Doc. 37)) fails requirements (1), (3), and (6). AA, like Insa, has not stated specifically the applicable grounds under § 36-25A-9(b)(1)-(4), stated how the alleged violation impact is greater to AA than to the public at large, or personally served the individually named defendants, all in violation of § 36-25A-9(a).

II. Even If Either Movant Were Procedurally Proper, Neither's Factual Allegations Entitle it to Discovery, Especially Not Expedited.

Even assuming AA (and Insa) had sufficiently alleged standing and satisfied the AOMA procedural requirements, AA's Motion (and Insa's) is due to be denied for failure to put forward factual allegations entitling it to expedited discovery.

The AOMA expressly allows discovery only after a plaintiff establishes a prima facie case by presenting substantial evidence of at least one of the claims under § 36-25A-9(b)(1)-(4) at a preliminary hearing. See Ala. Code § 36-25A-9(b) and (c). But, between its Operative Complaint and its Motion, AA concludes that "at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the [A]OMA" (*Alabama Always*, 03-CV-2023-901727 (Doc. 44 at 1-2, ¶ 1) (Doc. 37 at 6, ¶ 25)) and that "[t]hese private meetings enabled the Commissioners to vote on candidates without

deliberation in violation of the [A]OMA." (*Alabama Always*, 03-CV-2023-901727 (Doc. 44 at 2, ¶ 1)). AA's sole factual allegation in support is that the "Commission engaged in no debate or deliberation" at the awards meeting on December 12. (*Alabama Always*, 03-CV-2023-901727 (Doc. 37 at 2)). It is plainly insufficient to allege simply that there was not enough deliberation in public to reason that, therefore, the Commission must have improperly deliberated in private.

Additionally, a "serial meeting" is "any series of gatherings of two or more members of a governmental body, at which . . ." one of the six (6) enumerated situations in § 36-25A-2(13) occurs, and none of the exclusions apply. Beyond its conclusion, AA has not put forward any supporting factual allegations, much less alleged that any of those situations occurred or that any exclusions did not apply. AA has failed to allege that there was even a quorum present at any of these alleged private meetings, which a "deliberation" requires. See Ala. Code. § 36-25A-2(1). And AA has failed to put forward any authority requiring the Commission to deliberate. In short, as stated above, the *Alabama Rules of Civil Procedure* do not permit a fishing expedition. Without sufficient factual allegations of wrongdoing, neither Movant is entitled to discovery, much less expedited.

Furthermore, Plaintiffs are not entited to ANY discovery until after a preliminary hearing at which evidence is presented. Section § 36-25A-9(b) of the Alabama Code states as follows:

> (b) In the preliminary hearing on the complaint, the plaintiff shall establish by a preponderance of the evidence that a meeting of the governmental body occurred and that each defendant attended the meeting. Additionally, to establish a prima facie case the plaintiff must present substantial evidence of one or more of the following claims:
>
> (1) That the defendants disregarded the requirements for proper notice of the meeting pursuant to the applicable methods set forth in Section 36-25A-3.
>
> (2) That the defendants disregarded the provisions of this chapter during a meeting, other than during an executive session.

> (3) That the defendants voted to go into executive session and while in executive session the defendants discussed matters other than those subjects included in the motion to convene an executive session as required by Section 36-25A-7(b).
>
> (4) That, other than a claim under subdivisions (1) through (3), the defendants intentionally violated other provisions of this chapter.
>
> (c) If the court finds that the plaintiff has met its initial burden of proof as required in subsection (b) at the preliminary hearing, the court shall establish a schedule for discovery and set the matter for a hearing on the merits. If, at the preliminary hearing, the plaintiff has presented its prima facie case that an executive session appears to have been improperly conducted as set out in subsection (b)(3), the defendants shall bear the burden of proof at the hearing on the merits to prove by a preponderance of the evidence that the discussions during the executive session were limited to matters related to the subjects included in the motion to convene an executive session required in Section 36-25A-7(a).

Here, there has been no preliminary hearing. There was no evidence presented at the TRO to establish entitlement to discovery. There was no testimony regarding a meeting, because no evidence was presented at all. There was no evidence as to the Defendants attending the meeting, as no individual defendants have been joined. Of the four items listed in subparagraphs (b)(1) through (4), only (2) has been alleged by any party, and, once again, there is no substantial evidence of any meeting. There is allegation that a meeting may have taken place but no evidence – and without evidence, there can be no discovery. Subsection (c) demonstrates that the evidence must be shown at the preliminary hearing before discovery is permitted. Plaintiffs can have no such discovery because they have not met the prerequisites.

III. Insa's Amended Motion Does Not Cure Its Improper Discovery Request

Separate from the injunctive relief requested by its peers, Insa requests "expedited" discovery from the Commission for two reasons. The first concerns the Commission's adoption of the Emergency Rule and subsequent ranking of applicants. Doc. 636. The second concerns speculation that "at least some of the commissioners" violated the Alabama Open Meetings Act. Doc. 564 ¶

1. Based on the filings before the Court, such discovery is wholly inappropriate at this time. The Commission addresses each ground in turn.

Insa amended its Motion on January 3, 2023 to add assertions about the Commission's adoption of the Emergency Rules. Doc. 636. For the reasons discussed above, that position is unmeritorious as a matter of law and does not entitle Insa to any special expedited discovery. Insa cites no case indicating that it is entitled to expedited discovery in this scenario. *See id*. And, in any event, any discovery into the bases a Commissioner used to compare one applicant with another is a denial-appeal in disguise, for which administrative remedies must first be exhausted. Insa has not done so. *See Glenn*, 46 So. 3d at 930–32. It surely cannot be entitled to "expedited" discovery when it is not even yet entitled to be in court.

The Open Meetings Act arguments are weaker still—and Insa's Amended Motion cures none of the deficiencies of its original filing. The Open Meetings Act provides that "all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3." Ala. Code § 36-25A-1(a). But the term "meeting" does not apply unless a quorum—a majority of voting members—is present. Ala. Code § 36-25A-2(6)a; § 36-25A-2(12). The Alabama Supreme Court has been clear: the provisions of the Open Meetings Act "appl[y] when members amounting to a quorum of [a] given body gather to deliberate a matter that the participants expect to come at some later date before *the same body as to which those members constitute a quorum.*" *Slagle v. Ross*, 125 So. 3d 117, 129 (Ala. 2012) (emphasis in original).

Like Rule 9(b) does for fraud claims, the Open Meetings Act imposes a heightened pleading standard for enforcement actions brought under it. The Act requires a verified complaint that "state[s] specifically the applicable ground or grounds for the complaint" and "name[s] in their

official capacity all members of the governmental body remaining in attendance at the alleged meeting held in violation of this chapter." Ala. Code § 36-25A-9(a) (emphasis added). Also, "[i]n the preliminary hearing on the complaint, the plaintiff shall establish by a *preponderance of the evidence* that a meeting of the governmental body occurred and that each defendant attended the meeting" and "[t]hat the defendants disregarded the requirements for proper notice." Ala. Code § 36-25A-9(b) (emphasis added).

The Court need not even reach a sufficiency of the pleadings analysis because there is no pleading to analyze—let alone a verified one. Insa is a plaintiff in intervention. Doc. 559 (granted from the bench on Dec. 28, 2023). But despite Rule 24's requirement that Insa's motion "be accompanied by a pleading setting forth the claim or defense for which intervention is sought," it did not do so. Not even when it filed its Amended Motion. It has filed no Complaint in this action, and there are no Open Meetings Act Allegations to address.

Assuming, however, the Court is willing to consider the unverified representations in Insa's Motion, Docs. 564, 636, those, too are woefully deficient. The whole of Insa's substantive representations to the court concerning Open Meetings Act violations is as follows: "Upon information and belief, at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the OMA. These private meetings enabled the Commissioners to vote on candidates without deliberation in violation of the OMA." Doc. 564 ¶ 1. That's it.

These two conclusory sentences do not provide the "name" of "*all members* of the governmental body remaining in attendance at the alleged meeting held in violation of this chapter." Ala. Code § 36-25A-9(a) (emphasis added). Who does Insa believe violated the rules by conducting meetings outside the Act? The Court's guess is as good as the Commission's. If Insa

has it on "information and belief" that "at least some commissioners" violated the Open Meetings Act, it needs to identify them in a proper, verified pleading. Indeed, even Insa's Amended Motion recognizes the speculative nature of this fishing expedition: "*If* there was any discussion of applicants,it occurred outside the meeting—and in violation of the Open Meetings Act." Doc. 636 ¶ 12. "If" does not cut it.

Two sentences in an unverified motion should not entitle a plaintiff to all the tools of civil discovery—let alone on an expedited basis. As the Court will recall, Counsel for Insa represented during the December 28th hearing that Insa would provide more specific allegations. It filed an Amended Motion (not any Complaint), but it has advanced the ball no farther down the field.

Insa aggressively contends that "Courts in [Open Meetings Act] cases routinely allow plaintiffs to obtain discovery about votes or information discussed during improper deliberations." Doc. 564 at 2. Respectfully, its own citations undermine that proposition. *See id.* Insa's citation to two cases from over 30 years ago—not from the *Alabam*a or *Southern Reporter*, but from the *Media Legal Reports*—supports the opposite inference: that this relief is extraordinary. If courts "routinely" granted such relief, Insa would be able to point the Court to a case from something more recent than the H.W. Bush administration.

Without even a real pleading for the Court to consider, a request for expedited discovery is premature. The Court should deny Insa's Motion and require it to plead in accordance with the Open Meeting Act's requirements.

Therefore, both Insa's and AA's Motions are due to be DENIED.

/s/ William H. Webster
SCOTT M SPEAGLE (SPE050)
WILLIAM H. WEBSTER (WEB030)
MICHAEL JACKSON (JAC015)
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Email: mark@wilkersonbryan.com

CERTIFICATE OF SERVICE

I now certify that a copy of the foregoing has been served on all counsel of record by directing same to the address via United States first class mail, postage prepaid, or by electronically filing the foregoing with the Clerk of Court using the AlaFile system, which will send notification of such filing on this the 3rd day of January 2024:

William Sommerville (SOM 005)
Michael Catalano (CAT 010)
Jade Sipes (SIP 002)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
1901 Sixth Avenue North, Suite 2600
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/s/ William H. Webster _____
OF COUNSEL

EXHIBIT L

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS LLC, CAPITOL MEDICAL, LLC, FFD ALABAMA HOLDINGS, LLC, FFD ALABAMA HOLDINGS, LLC ET AL, Plaintiffs,	)	
V.	)	Case No.: CV-2023-000231.00
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION, Defendant.	)	

ORDER GRANTING EXPEDITED DISCOVERY

The Court finds that the motions for expedited discovery filed by Plaintiffs Insa Alabama, LLC and Alabama Always, LLC (collectively "Plaintiffs") are due to be granted for good cause shown. In order to restore public confidence in the licensing process, any allegations of potential improper conduct must be addressed, and the Court believes that expedited discovery can assist in this.

Plaintiffs are collectively authorized to take up to six (6) depositions upon five calendar days' notice, with such depositions to be completed no later than January 19, 2024. Plaintiffs are further collectively authorized to serve ten (10) requests for production within one week, with responses (including responsive documents) due no later than January 19, 2024. Finally, Plaintiffs are collectively authorized to issue ten (10) interrogatories and ten (10) requests for admission, to be issued within one week, with responses due no later than January 19, 2024. For good cause shown, the Court may raise the limits set in this Order.

DONE this 3rd day of January, 2024.

/s/ JAMES H ANDERSON
CIRCUIT JUDGE

EXHIBIT M

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, et. al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: CV-2023-000231
	)	
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
	)	
	)	
Defendant.	)	

MOTION FOR RECONSIDERATION OF EXPEDITED DISCOVERY ORDER AND ALTERNATIVELY, ENTRY OF A PROTECTIVE ORDER LIMITING THE SCOPE OF DISCOVERY

COMES NOW the Defendant, the Alabama Medical Cannabis Commission ("Commission"), by and through its undersigned attorneys, and pursuant to Alabama Rule of Civil Procedure 26(c) moves this Court to reconsider its January 3, 2024, Order granting expedited discovery [Doc. 646] and, alternatively, to enter of a Protective Order limiting the scope of such discovery. In support thereof, the Commission states as follows:

1. Intervenor Insa Alabama ("Insa") and Consolidated Plaintiff Alabama Always, LLC ("AA") have filed Motions for Expedited Discovery based on the Alabama Open Meetings Act ("AOMA"), Ala. Code § 36-25A-1, *et seq*. AA has alleged that "at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the [Alabama Open Meetings Act ("AOMA")]." [Doc. 607 at 22].

2. Insa, which has not filed a verified complaint as required for an AOMA violation claim, has nonetheless alleged that it has it on "information and belief" that "at least some commissioners" violated the AOMA by holding "serial or private meetings prior to the scheduled

meeting to discuss how they would rank. [Doc. 564 at ¶ 1]. AA argues that discovery is needed to "learn what occurred during the Commissioner's deliberations . . ." [Doc. 564 at 23] and Insa argues discovery is needed to learn "how the Commissioners made their rankings, what objective information they considered in making their rankings, and any communications regarding the applicants that occurred outside of the December 12, 2023 hearing. . . ." [Doc. 636].

3. On January 3, 2024, the Commission filed its Response in Opposition to the Motions for Expedited Discovery. [Doc. 640]. As set forth in the Response, which is incorporated herein, neither AA nor Insa have met any of the statutory requirements to advance an AOMA claim or to conduct related discovery.

4. Shortly after the Commission's Response was filed, the Court entered an Order permitting Plaintiffs Insa Alabama, LLC ("Insa") and Alabama Always, LLC ("AA") to conduct discovery, stating in relevant part:

> Plaintiffs are collectively authorized to take up to six (6) depositions upon five calendar days' notice, with such depositions to be completed no later than January 19, 2024. Plaintiffs are further collectively authorized to serve ten (10) requests for production within one week, with responses (including responsive documents) due no later than January 19, 2024. Finally, Plaintiffs are collectively authorized to issue ten (10) interrogatories and ten (10) requests for admission, to be issued within one week, with responses due no later than January 19, 2024. For good cause shown, the Court may raise the limits set in this Order.

[Doc. 646].

5. The Commission urges the Court to reconsider its Order granting discovery in the midst of the Commission's ongoing administrative process in light of the failure of the Plaintiffs to meet any prerequisites for an AOMA claim. Mere speculation based on the length of public debate in a public meeting is not enough.

6. Alternatively, the Commission requests the Court issue a protective order limiting any discovery to those facts that, if established, would constitute a potential AOMA violation, as specified in the statute:

> 1, The existence of any non-public meeting of a quorum of the Board in which the specific applications, or their rankings, were deliberated. Ala. Code § 36-25A-2 (1),(6) and (12).
>
> 2. The existence of any meeting, not open to the public, involving two or more Commission members not involving a quorum, when:
>
> a. Each individual gathering is attended by at least one member to also attends one or more other gatherings in the series (Ala. Code § 36-25A-2(13)1);
>
> b. The total number of members attending two or more of the series of gatherings collectively constitutes a quorum (Ala. Code § 36-25A-2 (13)2);
>
> c. The participating members deliberate specific matters that they expect to come before the Commission—in this case the specific applications and scoring (Ala. Code § 36-25A-2 (13)4);
>
> d. The meeting was held "for the purpose of circumventing the [AOMA]" (Ala. Code § 36-25A-2 (13)5); or
>
> e. Where "at least one of the meetings occurs within seven days of a vote on any of the matters deliberated" (Ala. Code § 36-25A-2 (13)5).

7. There is no basis for any further discovery or examination of Commissioners or agency staff and any such discovery will cause undue burden and expense on the agency and individual Commissioners. The Commission's statutory authority, administrative regulations, voting records, minutes, meeting transcripts and public documents speak for themselves. Individual testimony regarding statutory or rule interpretation is improper,[1] as would be testimony

[1] "Although witnesses may be permitted, in a proper case, to give an opinion on an ultimate fact involved in a case, witnesses may not give an opinion on a question of domestic law or on matters that involve questions of law; expert testimony proffered solely to establish the meaning of a law is presumptively improper. Thus, an individual opinion of an expert or nonexpert that amounts to a conclusion of law cannot be properly received in evidence, because the determination of such questions is exclusively within the province of the court." 31A AM. JUR. 2D *Expert and Opinion Evidence* § 117 (2002). *See also* 32 C.J.S. *Evidence* § 851 (2008) ("As a general rule, an expert witness may not give his or her opinion on a question of domestic law [as opposed to foreign law] or on matters which involve questions of law, and an expert witness cannot instruct the court with respect to the applicable law of the case, or infringe on the judge's role to instruct the jury on the law.... An expert may not testify as to such questions of law as the interpretation of a statute, ... or case law, ... or the legality of conduct."). *Ex parte Alabama Power Co*., --- So. 3d ---, 2011 WL 3633099, at *9 (Ala. Aug. 19, 2011). MCMK-EVID § 12. While the Commissions interpretation of its own

by any individual expanding on the meaning of prior decisions or determinations by the Commission as a whole. Further, questions regarding the individual opinions or other mental processes of members of Commission members are neither material nor relevant and are protected by the Deliberative Process Privilege. Likewise, any similar questions directed at the Commission staff will inevitably intrude upon the deliberative process at the Commission.

8. A Protective Order limiting the scope of discovery is particularly important at this juncture in the administrative process. The investigative hearings, which have not yet commenced, will require the continuing exercise of judgment and discretion on the part of Commissioners. Likewise, the outcome of the current court proceeding any properly filed appeals, is also unknown. Should this case later be remanded back to the Commission, either by this Court or upon appellate review, the Commission and its staff will be further involved in yet more proceedings. The Plaintiffs should not be permitted to use the discovery process to harass the decision makers or otherwise gain advantage in these proceedings.

9. Finally, AA's claims regarding alleged non-compliance with the Administrative Procedure Act are properly raised in an appeal, and do not provide an independent basis for discovery. AA's claims that the challenged action violates statutory provisions and rules, or were otherwise made upon unlawful procedure, are among the specified basis for an appeal under the AAPA and are premature given the yet to commence investigative hearing process. Should the court on appeal find that additional administrative proceedings or findings are required, it may remand the case back to the Commission with instructions. Ala. Code § 41-22-20 (k).

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regulations and underlying statutes are due deference by this Court, such interpretations are made and expressed in the course of actions taken by the Board or, in some cases, its Executive Director, and not through oral deposition testimony by individual members.

10. As to the Commission's alternative request for entry of a Protective Order, the undersigned certifies that, at approximately 10:45 AM on this date, he has sought to confer with opposing counsel in a good faith effort to reach agreement without the need for further court action. Several of the opposing counsel have responded indicating that they will be delayed in responding due to other commitments. Given the deadlines involved, counsel is filing this Motion and will update the court of any status change.

WHEREFORE, premises considered, the Commission moves this Court to reconsider its order granting discovery and to deny the Plaintiffs' motions. Alternatively, the Commission moves for entry of a Protective Order limiting the scope of discovery to those facts establishing the: (A) existence of any non-public meeting of a quorum of the Board in which the specific applications, or their rankings, were deliberated as specified in Ala. Code § 36-25A-2 (1),(6) and (12), or (B) existence of a prohibited "serial meeting" as specified in Ala. Code § 36-25A-2(13)1-5.

A Proposed Order granting a Protective Order is attached hereto.

RESPECTFULLY SUBMITTED, on this the 5th day of January 2024.

/s/ Mark D. Wilkerson
WILLIAM H. WEBSTER (WEB030)
SCOTT M SPEAGLE (SPE050)
MICHAEL JACKSON (JAC015)
WALKER N. KOWALCHYK (KOW004)
MARK D. WILKERSON (WIL072)
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served on all counsel of record by directing same to the address via United States first class mail, postage prepaid, or by electronically filing the foregoing with the Clerk of Court using the AlaFile system, which will send notification of such filing on this the 5th day of January 2024:

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/s/ Mark D. Wilkerson
OF COUNSEL

EXHIBIT N

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, et. al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: CV-2023-000231
	)	
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
	)	
	)	
Defendant.	)	

PROTECTIVE ORDER

This matter is before the Court on the Motion of the Defendant, in the alternative, for entry of a protective order pursuant to Rule 26(c) of the Alabama Rules of Civil Procedure.

For good cause shown, IT IS ORDERED THAT the Court's Order granting expedited discovery [Doc. 646] is hereby amended to limit Plaintiffs' written discovery and oral questioning to those facts that would constitute a potential AOMA violation, specifically:

1, The existence of any non-public meeting of a quorum of the Board in which the specific applications, or their rankings, were deliberated. Ala. Code § 36-25A-2 (1),(6) and (12).

2. The existence of any meeting, not open to the public, involving two or more Commission members not involving a quorum, when:

a. Each individual gathering is attended by at least one member to also attends one or more other gatherings in the series (Ala. Code § 36-25A-2(13)1);

b. The total number of members attending two or more of the series of gatherings collectively constitutes a quorum (Ala. Code § 36-25A-2 (13)2);

c. The participating members deliberate specific matters that they expect to come before the Commission—in this case the specific applications and scoring (Ala. Code § 36-25A-2 (13)4);

d. The meeting was held "for the purpose of circumventing the [AOMA]" (Ala. Code § 36-25A-2 (13)5); or

e. Where "at least one of the meetings occurs within seven days of a vote on any of the matters deliberated." Ala. Code § 36-25A-2 (13)5.

Without limiting the forgoing, the Plaintiffs shall not engage in written discovery or a line of questioning seeking the mental processes of individual Commissioners or staff members regarding any prior decision or any matter that may come before the Commission in the future.

Nothing in this Protective Order shall prevent any party from objecting to discovery that it believes to be otherwise improper or to require disclosure of materials which a party contends are protected from disclosure by the attorney-client privilege or the attorney work-product doctrine. Any plaintiff who objects to a claim of privilege by the Commission may move the court for an order to produce the specified information, in which event the Commission's privilege determination will stand until the Court rules on the motion or the parties reach agreement on the issue.

The Court shall retain Jurisdiction to enforce or modify this Protective Order.

DONE AND ENTERED this the ___ day of January, 2023.

Hon. James H. Anderson
CIRCUIT JUDGE

EXHIBIT O

ELECTRONICALLY FILED
1/13/2024 10:39 AM
03-CV-2023-000231.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	**Case Number: 03-CV-2023-000231**
	)	**MASTER CASE FILE**
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
	)	
Defendant.	)	
	)	

ORDER

The Court held a hearing on January 11, 2024 via Zoom to consider (1) the Emergency Motion of the Alabama Medical Cannabis Commission (the "Commission") to Stay Discovery (Doc. 710), and (2) Alabama Always, LLC's and Insa Alabama, LLC's Motion for Status Conference (Doc. 731). In addition, the Court heard some related argument pertaining to Jemmstone and Bragg Canna's Joinder in Motion for Expedited Discovery and Opposition to Trulieve's Motion for Protective Order (Doc. 677), and Verano Alabama, LLC's Joinder in Motions for Expedited Discovery (Doc. 749).

As stated on the record during the hearing, it is hereby **ORDERED** as follows:

1. The Joinders in Motion for Expedited Discovery (Jemmstone/Bragg Canna, Doc. 677, and Verano, Doc. 749) are **GRANTED**.

2. All aspects of the TROs previously entered as to Dispensary and Integrated Facility licenses (Docs. 590/592 and 642) shall remain in place, pending further order of the Court.

3. The January 24, 2024 hearing at 9:30 a.m. previously set on the Motion for Preliminary Injunction shall remain in place, but its purpose will be different, as described below. The hearing on the Motions for Preliminary Injunction is **RESET** for **February 28, 2024 at 10:00 a.m.**

4. On or before January 18, 2024, counsel for the Commission and a delegation from counsel for the challenging Plaintiffs (consisting of Messrs. Somerville, Ragsdale, and Green) shall meet and confer concerning the scope of discovery to which the parties can agree, and whether disputes concerning the scope of allowable discovery can be resolved completely.

5. Counsel will notify the Court on or before close of business on January 19, 2024 as to whether outstanding disputes remain concerning discovery.

6. In the event an agreement is not reached, the Court will hear and adjudicate the remaining disputes concerning the scope of allowable discovery at the hearing previously set for January 24, 2024. The Court will also take up the Commission's Response in Opposition to the Motions for Expedited Discovery (Doc. 640); Motion for Reconsideration of Expedited Discovery Order and Alternatively, Entry of a Protective Order Limiting the Scope of Discovery (Doc.

682); Motion to Reconsider the TROs (Doc. 694); and the Emergency Motion for Stay of Discovery (Doc. 710).

DONE and **ORDERED** this 13th day of January, 2024.

/s/ JAMES H. ANDERSON
CIRCUIT JUDGE

EXHIBIT P

ELECTRONICALLY FILED
1/23/2024 11:44 AM
03-CV-2023-000231.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case Number: CV-2023-000231**
	)	
STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,	)	
	)	
Defendant.	)	

SUPPLEMENT TO THE COMMISSION'S MOTION TO RECONSIDER EXPEDITED DISCOVERY ORDER AND PROTECTIVE ORDER LIMITING SCOPE OF DISCOVERY

COMES NOW the Defendant, the Alabama Medical Cannabis Commission ("the Commission") by and through its undersigned attorneys, and (1) under Rule 26(c), *Alabama Rules of Civil Procedure,* supplements its previous responses in opposition to the Temporary Restraining Orders ("TROs"), requests for further injunctive relief, and Motions for Expedited Discovery filed by Alabama Always, LLC ("AA") and Insa Alabama, LLC ("Insa"); (2) moves that this Court dismiss the claims against it; and (3) for any remaining claims, again requests that this Court reconsider its Order Granting Expedited Discovery (Doc. 646) and its Temporary Restraining Orders (Docs. 592 and 642). In support hereof, the Commission adopts and incorporates as if fully stated herein its Response in Opposition to the Motions for Expedited Discovery (Doc. 640), its initial Motion for Reconsideration and Protective Order (Doc. 682), its Motion for Reconsideration of the Court's partial Grant of Plaintiffs' Motions for Temporary Restraining Order and Opposition to a Preliminary Injunction (Doc. 694), and its Emergency Motion for Stay of Discovery Pending a Petition for Writ of Mandamus (Doc. 710). In further support hereof, the Commission states as follows:

INTRODUCTION[1]

Before the Court are claims from numerous disappointed medical cannabis applicants who applied for but were not awarded one of the limited number of medical cannabis licenses ("Challengers")[2]. With few exceptions (the "unique claims"),[3] the Challengers' claims fall into two broad categories: Alabama Open Meetings Act[4] ("AOMA") claims[5] and Alabama Administrative Procedure Act[6] ("AAPA") claims. No claim under either of these categories is entitled to discovery, and most, if not all, of them are due to be disposed of as a matter of law. Therefore, respectfully, the Court exceeded its discretion in granting expedited discovery.

STATEMENT OF FACTS

Under *Alabama Rule of Civil Procedure* 26(c) and the Order of this Court following the January 11 hearing, the parties met and conferred on January 17, 2024. Although progress was made and the parties reached agreement on much of the requested discovery to the extent any discovery is allowed, the parties were unable to resolve all their discovery disputes.

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[1] The Commission limits its introduction and statement of the facts to only the facts and procedural history necessary for the Court to reconsider or grant a protective order.

[2] The Challengers include **AA** (see Doc. 721 (Motion for Expedited Discovery)) (see also Case No. 2023-900727 (Doc. 44 ("AA's Complaint")), **Insa** (Doc. 800 (Insa's Complaint); Doc. 563, 636 (Motion for Expedited Discovery as amended)), **Jemmstone Alabama, LLC** (Case No. 2023-901800 (Doc. 2 ("Jemmstone's Complaint"))) (see also (Doc. 677 ("Joint Joinder in Motions for Expedited Discovery")); **Bragg Canna of Alabama, LLC** ("Bragg Canna") (Doc. 633 ("Bragg Canna's Complaint"), 677 ("Joint Joinder in Motions for Expedited Discovery")), **Samson Growth, LLC** ("Samson") (see Doc. 728 ("Samson's Complaint"), 744 ("Samson's Joinder")), **Verano Alabama, LLC** ("Verano") (see Case No. 2024-900009 ("Verano II") (Doc. 2 ("Verano II's Complaint"))) (see also Doc. 749 ("Verano's Joinder")), **TheraTrue Alabama, LLC** ("TheraTrue") (see Doc. 517 ("TheraTrue's Complaint")), **Pure by Sirmon Farms, LLC** ("Pure") (see Case No. 2023-901802 (Doc. 2 ("Pure's Complaint"))), **Yellowhammer Medical Dispensaries, LLC** ("Yellowhammer") (see Doc. 711 ("Yellowhammer's Complaint")), **3 Notch Roots, LLC** ("3 Notch") (see Case No. 2023-901801 (Doc. 2 ("3 Notch's Complaint"))), **Southeast Cannabis Company, LLC** ("Southeast") (see Doc. 699 ("Southeast's Complaint")), and **Emerald Standard, LLC** ("Emerald") (see Doc. 793 ("Emerald's Complaint")).

[3] The unique claims are 3 Notch's First Amendment claim (3 Notch's Complaint Count Two)), 3 Notch's "The mediation settlement was a rule" allegation (3 Notch's Complaint's Count Two) and Pure's "We didn't participate in the presentation because it was optional" allegation (Pure's Complaint's allegations at ¶¶ 42-45)).

[4] Ala. Code § 36-25A-1, et seq.

[5] AA's Complaint's Count Three; Insa's Complaint's Count III; Verano's Complaint's Count Three.

[6] Ala. Code § 41-22-1, et seq.

STANDARD OF REVIEW

A Rule 12(b)(6) dismissal is appropriate "'when it appears beyond doubt" from the facts in the complaint and the documents attached to it "that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" Jackson v. Ala. Bd. of Adjustment, 160 So. 3d 821, 823 (Ala. Civ. App. 2014) (quoting Nance By & Through Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993) (citations in turn omitted)) (affirming grant of Board of Adjustment's motion to dismiss).

Alabama courts review a Rule 12(b)(1) motion under two standards: facial and factual challenges. Ex parte Safeway Ins. Co. of Ala., Inc., 990 So. 2d 344, 349-50 (Ala. 2008). "Facial challenges, such as motions to dismiss for lack of standing at the pleading stage, attack the factual allegations of the complaint that are contained on the face of the complaint." Id. at 349 (internal citations and quotations omitted). But "[f]actual challenges, by contrast, are addressed to the underlying facts contained in the complaint." Id. at 350 (internal citations and quotations omitted). That is, "[w]here a defendant disputes the factual allegations in the complaint that form the basis for a court's subject matter jurisdiction, the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant." Id. (internal citations and quotations omitted). "Instead, a court deciding a Rule 12(b)(1) motion asserting a factual challenge must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss" and "[i]n such situations, the plaintiff's jurisdictional averments are entitled to no presumptive weight; the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties." Id. (internal citations and quotations omitted).

Rule 26(b)(1) limits the scope of discovery to those non-privileged matters "(i) relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party; and (ii) proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Ala. R. Civ. P. 26(b)(1).

Alabama Rule of Civil Procedure 26(c) allows for protective orders "by the person from whom discovery is sought, and for good cause shown" and gives the Court the discretion to "make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .." Ala. R. Civ. P. 26(c); *see also* Ex parte Employers Nat. Ins. Co., 539 So. 2d 233, 236 (Ala. 1989) (affirming denial of protective order) ("The Rule does not allow an arbitrary limit on discovery; instead, it vests the trial court with judicial discretion in the discovery process. The question on review, then, becomes one of whether, under all the circumstances, the court has abused this discretion.") (internal citation omitted). The same is true in the context of Rule 27 pre-litigation discovery, which Insa did not avail itself of prior to its intervention and demand for discovery, which this Court granted. *See* City of Mobile v. Howard, 59 So. 3d 41, 44 (Ala. 2010) ("[R]elief under Rule 27 is discretionary with the trial court, and a trial court's ruling on a Rule 27 petition will not be reversed in the absence of an abuse of discretion") (internal quotations and citations omitted).

ARGUMENT

I. At a minimum, the Court exceeded its Discretion in Granting Expedited AAPA Discovery.

The Challengers have made much of the scope of discovery since the Commission's previous filings and the Court's Order granting discovery, namely, whether the Challengers themselves limited the scope of discovery to the AOMA claim in the only active motion for expedited discovery.[7] But, putting aside the AOMA claims for a moment, the Court never had jurisdiction over most, if not all, of the AAPA Claims (collectively "Claims"), and the only ones even properly before this Court are by the Plaintiffs' admissions purely questions of law, for which discovery is inappropriate and unnecessary.

Based on their statements in open Court and the filed pleadings, the respective Challengers make the following (paraphrased) AAPA claims:

(1) the Commission was bound by its own Rules regardless of the Court's mediation order;

(2) the Commission did not follow its own rules by using the procedures of its Emergency Rule to award licenses in December 2023;[8]

[7] Insa, one of two movants for expedited discovery, has only yesterday filed a complaint in intervention, violating *Alabama Rule of Civil Procedure* 24(c). Ala. R. Civ. P. 24(c) ("A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene." Ala. R. Civ. P. 24(c). "The purpose of requiring an intervenor to file a pleading is to place the other parties on notice of the claimant's position, the nature and basis of the claim asserted, and the relief sought by the intervenor." Dillard v. City of Foley, 166 F.R.D. 503, 506 (M.D. Ala. 1996) (internal citation omitted) (interpreting the less rigorous Federal Rules of Civil Procedure 24(c) intervention procedure, denying proposed intervention for untimeliness and procedural defect of failing to file a complaint). When Insa moved for expedited discovery, it had failed to commence any action against the Commission. Therefore, even if Insa's Motion asked for AAPA discovery (it did not), this Court was (respectfully) without jurisdiction to grant that motion. All that remains is AA's Motion for expedited discovery, which, by its own plain and unambiguous language, is limited to the AOMA.

[8] AA's Complaint Count One (challenging the October Rules generally); Insa's Complaint's allegations; Jemmsone's Complaint Count One; Bragg Canna's Complaint allegations; Verano's Complaint Count One; TheraTrue's Complaint Count Four; Yellowhammer's Complaint Count Three; 3 Notch's Complaint Count One; Southeast's Complaint Count Three; Emerald Standard's Complaint Count One.

(3) the Commission's Emergency Rule is invalid for lack of a legitimate emergency;[9]

(4) the Commission's investigative hearing is not a meaningful review, either because

(a) the Commission has not adopted procedures for those hearings as it should have[10] or

(b)(1) the Commission did not provide a sufficient basis for denying an applicant a license or awarding a license to another applicant,[11] and

(b)(2) the investigative hearing cannot be meaningful unless the Commission is made to say why the Commission denied the applicant a license;[12]

(5) the "Verano problems" that

(a)(1) the Commission improperly rescinded the applicant's license award[13] (including that the Commission has no post-award discretion to rescind) and (a)(2) because that was improper, the Commission could not thereafter have awarded the maximum number of licenses without re-awarding a license to the applicant,[14] and

[9] AA's Complaint Count Two; Insa's Complaint Count I; Jemmstone's Complaint Count Two; Verano's Complaint Count Two; Yellowhammer's Complaint Count Four; Southeast's Complaint Count Four; Emerald's Complaint Count Two.

[10] AA's Complaint allegations; Samson's Complaint allegations.

[11] AA's Complaint allegations (¶ 66 (alleging insufficient notice and that notice would be "impossible" with no deliberations)); Bragg Canna's Complaint's allegations; Samson's Complaint's allegations.

[12] AA's Complaint's allegations (notice); Bragg Canna's Complaint's allegations; Samson's Complaint's allegations (asking the Court to require the Commission to conduct investigative hearings before issuing licenses).

[13] TheraTrue's Complaint's allegations (¶ 115 (August)), Count One (October); Pure's Complaint's Count One (August and October); Yellowhammer's Complaint's Count One (August and October); Southeast's Complaint's Count One (August and October);

[14] TheraTrue's Complaint's Count Five; Pure's Complaint's allegations; Yellowhammer's Complaint's Count Five; Southeast's Complaint's Count Five;

(b) the rules created a false dichotomy between a "license awarded" and a "license issued" and are for that reason invalid in excess of statutory authority;[15] and

(6) the rules concerning the Commission's stay authority are invalid[16] and in excess of the statutory authorization.[17]

Dispositively, none of the Challengers have awaited administrative review but instead have appealed directly to this Court.[18]

A. The exhaustion-of-administrative-remedies doctrine dictates that claims (2) and (4)(a)-(b)(2) must be dismissed, either because the Court lacks jurisdiction or because the Challengers failed to adhere to the generally mandatory prudential limitation.

Under the AAPA, the legislature can require "the exhaustion of administrative remedies [as a] jurisdictional prerequisite to filing an action." Stowe v. Ala. Bd. of Pardons & Paroles, 245 So. 3d 610, 614 (Ala. Civ. App. 2017) (internal quotation marks omitted) (quoting Ex parte Crestwood Hosp. & Nursing Home, Inc., 670 So. 2d 45 (Ala. 1995)) (addressing jurisdiction *ex mero motu*); *see also* W.A.A. v. Bd. of Dental Examiners of Ala., 156 So. 3d 973, 977 (Ala. Civ. App. 2014) (holding the circuit court was without subject-matter jurisdiction to rule on discovery orders where the legislature vested that decision in the discretion of the administrative hearing officers). "[E]ven in the absence of such an express [jurisdictional] condition" from the legislature,

[15] TheraTrue's Complaint's Count Two; Pure's Complaint's Count Two; Yellowhammer's Complaint's Count Two; Southeast's Complaint's Count Two;

[16] TheraTrue's Complaint's Count Three; Pure's Complaint's Count Three; Yellowhammer's Complaint's Count Six; Southeast's Complaint's Count Six; Emerald's Complaint's Count Three.

[17] Some parties moved for injunctive relief on these grounds: AA's Complaint's Count Four; Insa's Counts II and III; Jemmstone's Complaint's Count Three; Verano's Complaint's Count Three and Four; TheraTrue's Count Seven; Yellowhammer's Complaint's Count Three and Four; 3 Notch's Complaint's Count Three; Southeast's Complaint's Count Three and Four; Emerald's Complaint's Count One and Two.

[18] All Challengers, with the exception of Emerald, have requested the Commission an investigative hearing. They have not yet received such a hearing because, tellingly, that process is ongoing. The Commission has yet to render its final decision.

"administrative exhaustion is generally mandatory as a '"judicially imposed prudential limitation."'" Johnson v. Ala. Sec'y of Lab. Fitzgerald Washington, No. SC-2022-0897, 2023 WL 4281620 (Ala. June 30, 2023), *cert. granted sub nom.* Williams v. Washington, Ala. Sec. of Lab., No. 23-191, 2024 WL 133549 (U.S. Jan. 12, 2024) (Sellers, J., concurring specially) ("I agree that the trial court properly dismissed the plaintiffs' complaint on the basis that the circuit court lacked subject-matter jurisdiction.").

"Generally, judicial review of administrative determinations is limited to final orders or actions." Dawson v. Cole, 485 So. 2d 1164, 1167 (Ala. Civ. App. 1986) (internal citation omitted) (affirming the trial court's finding in part because whether the agency gave the plaintiff sufficient notice of the hearing while the decision was pending was not yet ripe for adjudication "because of [its] dependency, at least in part, upon the resolution of disputed facts."). Thus, even when the agency's enabling Act allows for "[a]ny party aggrieved by any final judgment or decision" of the agency to appeal to the circuit court, "[a] plaintiff is required to exhaust [its] administrative remedy before seeking a trial de novo" in the circuit court unless an exception applies. Ex parte Lake Forest Prop. Owners' Ass'n, 603 So. 2d 1045, 1046 (Ala. 1992) (citing without quoting the board of adjustment statute, Ala. Code § 11-52-81).

"The [exhaustion] doctrine does not apply when (1) the question raised is one of interpretation of a statute, (2) the action raises only questions of law and not matters requiring administrative discretion or an administrative finding of fact, (3) the exhaustion of administrative remedies would be futile and/or the available remedy is inadequate, or (4) where there is the threat of irreparable injury." Ex parte Lake Forest, 603 So. 2d at 1046-47. But, "[a]lthough" the Alabama Supreme Court "ha[s] recognized exceptions to the exhaustion-of-administrative-remedies doctrine, an action for declaratory judgment was never intended to be used as a substitute for

appeal." City of Graysville v. Glenn, 46 So. 3d 925, 930 (Ala. 2010) (internal cite and quote omitted).

Even where the agency's jurisdiction is not exclusive, attempting to challenge the sufficiency of the evidence before an administrative agency is not an exception to the exhaustion-of-administrative-remedies requirement, and "'[t]he question [whether the official acted upon no evidence or improper evidence] should be determined by the usual method of direct review'" by the agency, not a declaratory judgment in the trial court. Graysville, 46 So. 3d at 930 (quoting Mitchell v. Hammond, 39 So. 2d 582, 584 (Ala. 1949)) (affirming the trial court's dismissal for failure to exhaust administrative remedies, agreeing with the agency defendant that the plaintiff was seeking a "review" of the decision to issue the permit, not an interpretation of the statute as they claimed, and even though the agency's jurisdiction was not expressly exclusive, that was a matter for the agency).

Just like the plaintiffs in Graysville, Claim (2) Challengers allege that by not relying on the USA scoring, the Commission used insufficient evidence when it didn't award the Challengers a license according to its pre-mediation rules. And much like the defendant in Graysville, the Alabama Legislature has authorized the Commission to address those questions specifically in the investigative hearing process. Moreover, the Legislature, this Court, and the Middle District of Alabama have agreed that the Commission has the authority to rescind an award. (ENCHANTED GREEN LLC, Plaintiff, v. ALABAMA MEDICAL CANNABIS COMMISSION, et al., Defendants., No. 2:23-CV-696-ECM, 2024 WL 150498 at *5 (M.D. Ala. Jan. 12, 2024) ("In the state court litigation concerning medical cannabis licenses, the state court reasoned that "[i]f a 'license issued' is not a property right, then its precursor, a 'license awarded,' surely cannot be a

property right." [] This Court agrees with the state court's reasoning on this point.")) (Order Attached as **Exhibit A).**

Even less compelling than in Graysville, where the plaintiffs at least pretended they sought review of a statute, Claims 4(b)(1) and (2) allege that "I don't know that I need discovery on things that are public already . . . the issue here is exactly what [Commission Counsel] is trying to protect under some privilege, which is why did you rank these people the way you ranked them, why did you vote the way you voted." (See January 11, 2024, Hearing Transcript, attached as **Exhibit B**, at 18:11-19); *see also* **Exhibit B** at 22:21-24 (". . .I don't know how anything proceeds without the commissioners being required to state on the record why they voted and the circumstances under which they voted."). That the Claim (2), (4)(b)(1), and (4)(b)(2) Challengers attempt to proceed in this Court, and moreover seek to depose Commission members regarding their mental processes *while the administrative process is still ongoing (i.e., before the Commission's final decision following the investigative hearings)*, is both improper and disingenuous. By their admission, requiring the Commissioners to say what they were thinking in ranking the applicants is the whole point of their discovery.[19] Any demand for such discovery (and, if denied, any argument it should have been provided) is plainly not a matter for this Court's review in the first instance, because the Commission will not have made its final decision until after the investigative hearings – an administrative remedy all but one of the Challengers have sought.

[19] The only thing to be accomplished by discovery of such mental processes is, perhaps, to delve into the reasons each individual Commissioner ranked the applicants, which by rule was merely to determine the order in which the Commission would consider the applicants for a license vote, in the absence of a successful motion to do otherwise (as could have occurred with respect to AA, when one Commissioner made a motion, not seconded, that AA should be considered without respect to the ranked order). This kind of inquiry is directed at the same claim raised by AA, when it sought to enjoin the Commission from using its Emergency Rule at the December 12 integrated facilities license award meeting, suggesting that it might be "blackballed," which the Court did not find persuasive.

Moreover, the Challengers cannot reasonably suggest nor can they properly demonstrate that the investigative hearing process is futile. To the extent there are concerns over the existence of an administrative remedy in the integrated facility and dispensary categories, where the maximum number of licenses has been awarded, the Court has sufficiently protected the Challengers by granting a stay of the issuance of such licenses. The Challengers cannot simply assume without evidence or precedent that an investigative hearing would be futile, or that reasonable and necessary discovery as a precursor to such a hearing will be denied them, when they have yet to ask for the discovery, much less have they undertaken the investigative hearing process. No one has.

Furthermore, the Plaintiffs' claims that the challenged action violates statutory provisions and rules, or were otherwise made upon unlawful procedure, are among the specified bases for an appeal under the AAPA. This Court has the power to remand the case to the Commission should it find, in a properly filed appeal after administrative remedies are exhausted, that there was unlawful procedure or an inadequate record. Plaintiffs' claims seeking judicial relief without first exhausting their administrative remedies are premature in light of the yet-to-commence investigative hearing process. Should this Court, on appeal, find that additional administrative proceedings or findings are required, it may remand the case back to the Commission with instructions. Ala. Code 1975, § 41-22-20 (k). Until then, however, Plaintiffs are in the wrong forum making the wrong arguments at the wrong time. For these reasons, this Court should not permit discovery as to Claims (2), (4)(b)(1), and (4)(b)(2) and find that these claims are not exempt from the exhaustion of administrative remedies doctrine. The Commission strongly urges this Court to reconsider its decision to grant discovery in this respect.

The (4)(a) and (4)(b) Challengers' response that without the expedited discovery, the administrative remedy becomes "the height of absurdity" (See **Exhibit** B at 29:1-4) is, while colorful, similarly unavailing, given the Commission's Enabling Act and the holdings of this Court and the Middle District of Alabama, the only other court to see the issue. Where an administrative body has the authority to reconsider its previous decisions, and the enabling legislation provides such a remedy, the remedy is not futile; thus, invoking and exhausting that remedy is "the necessary predicate for judicial review." Ex parte Cincinnati Ins. Co., 51 So. 3d 298, 310 (Ala. 2010) (granting petition for writ of mandamus directing trial court to dismiss the claims for failure to exhaust administrative remedies, precluding examining trial court's grant of motion to compel discovery); *see also* Dawson, 485 So. 2d at 1167 (holding in part that because there is no general constitutional right to prehearing discovery in administrative proceedings, a plaintiff can bring such a due process challenge only as-applied, reasoning "the mere allegation of a constitutional issue [] sufficient to make the general rule of exhaustion inapplicable.").

As this Court is aware, given its Order in the previous Verano litigation, the Commission has express revocation authority and implied and inherent rescission authority, giving it the power to reconsider its previous licensing decisions and authority to make a determinative ruling on any of these Challengers' complaints. The investigative hearing is, therefore, not futile. Thus, discovery as to Claims 4(a) and (b) is due to be reconsidered and excluded because they are, at the very least, not exceptions to the prudential limitation.

Moreover, regarding 4(a), the failure to give an administrative body "the opportunity to apply [its] standards" in an administrative proceeding will not support a circuit court challenge that the agency failed to "promulgate and apply ascertainable" standards for evaluating the claim or that the denial of an application under such was arbitrary and capricious. DeBuys v. Jefferson

Cnty., 511 So. 2d 196, 199 (Ala. Civ. App. 1987) (affirming judgment in favor of the county, reasoning, in part, "[o]nce again, the fact that the plaintiffs refused to go before the Committee to present their permit requests causes their argument to fail. The plaintiffs have no right to attack the standards used by the Committee in making determinations on permit applications when they refused to give the Committee the opportunity to apply those standards to their requests.")

Just like the plaintiffs in DeBuys, Claim (4)(a) Challengers allege that the Commission did not promulgate the procedure by which a Challenger or disappointed applicant can effectively participate in the investigative hearing. They also challenge the Commission's ranking procedures. Similarly, Pure claims that the Commission failed to adequately notify the parties that the offered oral presentation was important. But no Challenger has alleged, nor can they allege, that they have first allowed the Commission to apply the investigative hearing procedures to its request for a hearing or even *render a decision*. Those arguments, therefore, will not support challenging those procedures' efficacy in this Court before exhausting the administrative remedy. Thus, Claims (4)(a) are due to be excluded from discovery.

B. The Verano Problem claims (5) are due to be dismissed.

Similar to the challenge that "[n]othing in the Alabama Code or the [Commission's Enabling Act]" provides the Commission authority to 'void' a license" (See *Verano Alabama, LLC v. AMCC*, Case No. 2023-901165 (Doc. 2 at 2 ¶ 6)), which this Court dismissed for failure to state a claim, Claims (5) challengers are back again, alleging "[b]ecause the [Enabling Act] does not support the Commission's position that the 'rescission' of a previously awarded license is somehow distinguished from the revocation of such license, the Commission has exceeded its statutory authority" (See Southeast's Second Amended Complaint (Doc. 699 at 19 ¶ 77), but distinguishing their case that their situation is different because the Commission hasn't admitted

any potential errors in the scoring. (See December 28, 2023, Hearing Transcript, attached as **Exhibit C** at 24:8-10 ("But, you know, they don't have the same excuse to rely on for what they did on October 26th.")). Unfortunately, that was not the crux of this Court's reasoning in the previous Verano dismissal.

As both this Court and now the federal court for this district have agreed, "If a 'license issued' is not a property right, then its precursor, a 'license awarded,' surely cannot be a property right, and the Commission was within its inherent power to rescind or void that award without the circumstances or obligations accompanying a 'revocation.'" (See *Verano*, 901165 (Doc. 59 at 3)) *see also* ENCHANTED GREEN LLC, *supra*, 2024 WL 150498 at *5). The Commission further adopts and incorporates every argument in its Motion to Dismiss in the Verano case as if fully stated herein. (See the Commission's Motion to Dismiss in *Verano*, attached as **Exhibit D**). For the same reasons that the Court dismissed the Verano case, the Claim (5) challengers are due to be dismissed for failure to state a claim, and the Court at least exceeded its discretion in granting discovery regarding those issues. See Ex parte Cooper, No. SC-2023-0056, 2023 WL 5492465 at *8 (Ala. Aug. 25, 2023) (the plaintiff had "no need for the discovery sought" related to a bad-faith claim that the Court determined was due to be dismissed).

C. Without admitting that (1), (3), and (6) should survive, discovery is at least inappropriate and unnecessary as to Claims (1), (3), and (6).

What remains are claims (1) and (3), which, together, present the validity of the Commission's pre-mediation settlement rules after the Court's mediation Order and the Emergency Rule, Claim (6) concerns the Commission's rules for its stay authority, and the unique claims in *supra*, note 2. Without admitting that those claims are exceptions to the exhaustion requirement or would otherwise survive dismissal, how would even the best deposition or written

discovery advance the claims of any such Challenger? None of them have or can provide an answer to that question.

Discovery regarding a pure question of law, as opposed to a question of fact, is unnecessary. See Ex parte Cincinnati, 51 So. 3d at 301, 310-11 (granting mid-discovery petition for writ of mandamus directing trial court to dismiss the claims for failure to exhaust administrative remedies, rejecting the argument that the administrative remedy was futile, which precluded examining the trial court's grant of motion to compel discovery); Ex parte Alabama Dep't of Forensic Scis., 709 So. 2d 455, 457-58 (Ala. 1997) (granting pre-discovery petition for writ of mandamus directing trial court to dismiss the claims against the defendants); Ex parte City of Tuskegee, 932 So. 2d 895 (Ala. 2005) (holding petition for writ of mandamus as to questions of law, rather than fact, was not premature); Cousins v. Ala. Power Co., 597 So. 2d 683, 687 (Ala. 1992). Claims (1), (3), and (6) Challengers have pled and consistently maintained these are "pure questions of law (and not questions involving agency discretion or factfinding) . . .." (See AA's Consolidated Petition for Judicial Review and Third Amended Complaint (Doc. 721 at 17 ¶ 91; 18 ¶ 100)).[20] The requested discovery is not relevant to any of those claims, it's not proportional to the need to resolve those legal issues, and the burden surely outweighs any benefit, which is zero. Therefore, the Court respectfully at least exceeded its discretion in granting expedited discovery on those claims.

[20] This Court's TRO order stated that the Challengers' reasonable chance for success on the merits rested on the allegation that the Commission was obligated to replace the prior scoring scheme with some other type of scoring. It therefore follows that discovery should be limited to what the Court found was the reasonable chance for success on the merits. However, because whether the scoring had to be replaced is a cold question of law, no discovery on that issue is necessary or appropriate.

For all of these reasons, the Court exceeded its discretion as to any of the AAPA claims, either because the exhaustion requirement counsels for its exclusion, or because it is plainly a question of law as to which discovery is not warranted. At a minimum, discovery would yield no benefit to Plaintiffs that sufficiently outweighs the burden to be placed on the Commission in requiring it. Regarding the Verano claims, discovery is inappropriate because even assuming all the allegations as to those claims are true, those Challengers have failed to state a claim for which relief could even be granted, which requires dismissal, not discovery. Therefore, the Court should reconsider and exclude any AAPA claims from the scope of discovery or enter a protective order excluding the AAPA claims from the scope of discovery.

II. The Court exceeded its Discretion in Granting Expedited AOMA Discovery.

"The Open Meetings Act (OMA) requires that 'the deliberative process of governmental bodies shall be open to the public during meetings as defined in Section 36-25A-2(6). Except for executive sessions permitted pursuant in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state laws or statutes, all meetings of a governmental body shall be open to the public.' Ala. Code § 36-25A-1(a)." (See AA's Consolidated Petition for Judicial Review and Third Amended Complaint (Doc. 721 at 17 ¶ 91; 18 ¶ 100)); *see also* *Verano Alabama, LLC v. AMCC* ("Verano II"), Case No.: 2024-900009 (Doc. 2 at 16-17, ¶ 64; Insa's Complaint (Doc. 800 at 7 ¶ 31 ("*Indeed, upon information and belief, ...*") (Emphasis added)). No AOMA Challenger has met the procedural requirements to bring an AOMA claim, and thus, no Challenger has invoked the Court's jurisdiction. Even if they had, their claims are insufficient, and even if they weren't, discovery is statutorily premature.

A. No AOMA Challenger has met the procedural requirements to bring an AOMA claim, and thus, no Challenger has invoked the Court's jurisdiction.

An AOMA plaintiff must: (1) be a proper plaintiff, (2) file a verified complaint, (3) state specifically the applicable grounds under § 36-25A-9(b)(1)-(4), (4) name individual defendants in the verified complaint, (5) state specifically the impact of the alleged violation greater than that to the public at large, and (6) must personally serve the verified complaint on the individually named governmental body members. Ala. Code § 36-25A-9(a).

No AOMA plaintiff, neither AA, Insa, nor Verano II, satisfies these requirements. Perhaps most significant is their failure to satisfy requirement (1) that they are proper plaintiffs, i.e., "citizens," absent which the Court lacks jurisdiction to hear their claims. The Commission has located no Alabama cases interpreting the list of proper plaintiffs in 36-25A-9(a) to include business organizations. And without jurisdiction, this Court has no alternative but to dismiss the AOMA claims. Ex parte Alabama Educ. Television Comm'n, 151 So. 3d 283 (2013) (dismissing the plaintiff former executive director of Alabama Public Television ("APT")'s AOMA action for lack of standing, reasoning that although the plaintiff was an "Alabama citizen" under § 36-25A-9(a), he failed to satisfy each requirement for standing under Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992): injury in fact, causation, and redressability) (internal quotations and citations omitted). The Court raised this point *sua sponte* and *ex mero motu* when some of these challengers last claimed an AOMA violation, and it was correct in doing so.

Much more could be said and has been said about the flaws in the Plaintiffs' AOMA claims, including but not limited to the failure to allege claims against individual Commissioners rather than against the Commission as an agency, and Plaintiffs' failure to present evidence to support their claims at a preliminary hearing before demanding discovery. The Commission adopts and incorporates as if fully stated herein every argument in its previous filings (Doc. 640, 682, 694) in

response and opposition to the AOMA claims purported against it. For those reasons, the Court has, at a minimum, exceeded its discretion in granting the expedited discovery requested by the Plaintiffs.

B. Alleging that there was not enough deliberation in public is insufficient to state an AOMA claim, much less to give rise to the need for expedited discovery.

The bare assertions that a governmental body "has 'secret closed-door meeting[s] at times other than [its]'" public meeting to discuss public meeting matters " 'in violation of the Alabama Open Meetings Act,'" or that the body "'routinely issues orders regarding employee matters without first having convened a meeting pursuant to the requirements of the [AOMA],'" or that some broad class of the public "'will suffer irreparable harm should the deliberations [] be held in the darkness of secret closed meetings without requiring the'" government to comply with the AOMA, without more, are altogether insufficient to give rise to a justiciable controversy that qualifies for the Court's review. Walker Cnty. Comm'n v. Kelly, 262 So. 3d 631, 637 (Ala. 2018) (dismissing declaratory judgment for chairman and individual civil service board members for lack of standing). Even less appropriate than the plaintiffs in Walker Cnty., who were at least individuals, the Challengers are all business organizations, and the sole factual allegation they put forward to support their claims is that they *think* there were some improper meetings. (See AA's Consolidated Petition for Judicial Review and Third Amended Complaint (Doc. 721 at 7-8 ¶ 39 19 ¶ 103, ("On information and belief, at least some of the Commissioners held serial or private meetings prior to the scheduled meeting to discuss how they would rank the applicants, in violation of the Open Meetings Act (the [A]OMA). These private meetings enabled the Commissioners to vote on candidates without deliberation in violation of the [A]OMA.")); *Verano II* (Doc. 2 at 11 ¶ 33, 17 ¶ 65)); *see also* Insa's Complaint (Doc. 800 at 7 ¶ 30 ("*If* there was any discussion of applicants, it occurred outside the meeting—and in violation of the OMA.") (Emphasis added.)).

AA, Insa and Verano (the AOMA claimants) submit no affidavits and allege no factual support regarding when the meeting was, who participated, or what the participant(s) discussed. It is simply, as Counsel for TheraTrue (who has not pled an AOMA claim) stated in open Court, "[i]f there was no deliberation on the record, where did it occur?" (See **Exhibit C** at 114-15:25-1). There is at least one necessary assumption in that leap for which no one has provided nor can they provide authority—that the law *required* the Commission to deliberate or what a sufficient amount of deliberation would have been. The Commission has already stated where a Challenger must first address the sufficiency of the evidence before the Commission. As if the operative pleadings were not enough, Counsel for TheraTrue's statement on the record insisting discovery for claims his client has not filed is strong evidence of the obvious—the Challengers' AOMA claims are nothing more than a classic fishing expedition to find out if they may be entitled to file a claim. The standard proceeding is a lawsuit, then discovery and the *Alabama Rules of Civil Procedure* do not permit a fishing expedition. Even if such a claim were properly before this Court, the AOMA and the *Alabama Rules of Civil Procedure* would not permit it to survive to the discovery stage. Plaintiffs must have more than mere speculation and a conclusion that something improper occurred before they can make a valid claim, much less obtain discovery on it. Therefore, the Challengers' AOMA claims are due to be dismissed.

C. Even if the Plaintiffs had invoked the Court's jurisdiction and their fishing expedition was sufficient to state a claim, AOMA discovery is statutorily premature.

The AOMA expressly allows discovery only after a plaintiff establishes a prima facie case by presenting substantial evidence of at least one of the claims under § 36-25A-9(b)(1)-(4) at a preliminary hearing. See Ala. Code § 36-25A-9(b) and (c). As previously argued, the Plaintiffs have utterly failed to demonstrate any evidence to support their claims, and they have admitted,

circularly, that they are seeking discovery to try to obtain the very evidence they need to get to the discovery stage. Even assuming that the AOMA Challengers have sufficiently pled such claims to survive dismissal, the plain language of the AOMA sets out a discovery schedule, which requires first that any such Challenger meet their burden at the preliminary hearing, which has not occurred. Thus, discovery is statutorily premature, and the Court, respectfully, has at least exceeded its discretion in granting expedited discovery.

For these reasons, no AOMA Challenger has met the procedural requirements to bring an AOMA claim, and thus, no Challenger has invoked the Court's jurisdiction, and the AOMA claims are due for the Court's disposal. Even if they had properly invoked the Court's jurisdiction, their claims are insufficient: their bare allegations, as the Challengers rely on, provide neither evidence nor authority to support the assumption that the Commission acted improperly. Further, even if it could somehow be determined that the Challengers' allegations, on their own, were sufficient, discovery is statutorily premature because the AOMA expressly and unambiguously requires a preliminary hearing before discovery. Therefore, at a minimum, the Court exceeded its discretion in granting expedited discovery and should at least exclude the AOMA claims from discovery.

CONCLUSION

In sum, none of the claims before the Court entitle the Challengers to discovery. The AAPA Claims should be excluded from discovery because the Verano II claims (Claims (5)) are due to be dismissed for failure to state a claim; Claims (2) and (4)(a)-(b)(2) are subject to the administrative remedies exhaustion requirement; and following the disposal of those claims, discovery becomes unnecessary and inappropriate, the burden to the Commission far outweighing the zero benefit to the Challengers. Finally, the AOMA claims are due for the Court's dismissal, either for lack of standing or failure to state a claim, and if not, the Court should at least exclude

the AOMA claims from discovery as statutorily premature. Therefore, the Court has respectfully exceeded its discretion in granting any discovery and should reconsider, or at least enter a protective order limiting the discovery to the AAPA claims (1), (3), and (6), for good cause shown, and any other just and equitable relief the Court deems appropriate to the Commission.

Respectfully submitted this the 23rd day of January, 2024.

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CERTIFICATE OF SERVICE

I now certify that a copy of the foregoing has been served on all counsel of record by mailing the same via United States first class mail, postage prepaid, or by electronically filing the foregoing with the Clerk of Court using the AlaFile system, which will send notification of such filing on this the 23rd day of January, 2024.

/s/ William H. Webster
OF COUNSEL

EXHIBIT Q

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

MONTGOMERY, ALABAMA

FIFTEENTH JUDICIAL CIRCUIT

ALABAMA ALWAYS, LLC, et al.,

Plaintiffs,

V. Case Number:

03-CV-2023-231

MASTER CASE FILE

STATE OF ALABAMA MEDICAL

CANNABIS COMMISSION,

Defendant.

* * * * * * *

PROCEEDINGS, held before James H. Anderson, Circuit Judge, via Zoom, on January 11, 2024.

* * * * * * *

Mary R. King, RMR, CCR-387
Official Court Reporter

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Mark D. Wilkerson, Esq.

ALSO PRESENT: Justin Aday, Esq.

* * * * *

THE COURT: Some of the technical difficulties we're having this morning is the one reason I usually don't like these Zoom meetings, but I had a motion for an emergency hearing and then a motion for status.

So I wanted to -- first, so that Mrs. King can get everybody, if you're representing somebody and you want to be possibly on the record today, we'll just have to take our time and identify yourselves. We can see on the screen, but if y'all could do your best one at a time, and Mrs. King can see who's here.

So I'm going to start with representatives for the commission because I saw them -- I saw Mr. Webster and Mr. Jackson. It was kind of scary seeing both of them. Oh, there's Mr. Aday. That's even worse -- no. Good morning, guys. And Mr. Wilkerson.

(Brief interruption)

THE COURT: Barry, we're really glad you're okay and home.

All right. So --

MR. RAGSDALE: Well, thank you.

THE COURT: Mary, did you see the people from the commission?

(Brief interruption)

THE COURT: All right. So we've got them. We've got them.

And let's start with -- well, since we talked about him, Mr. Ragsdale, could you identify yourself?

MR. RAGSDALE: Sure. I am Barry Ragsdale. Along with Robert Vance, we represent Insa Alabama.

THE COURT: All right. Somebody step up next.

MR. MAIN: Judge, you've got Saxon Main and Ham Wilson on behalf of Verano Alabama.

THE COURT: Okay.

MR. CONNALLY: Joel Connally with Sustainable Alabama.

MR. GARRETT: Kent Garrett with Flowerwood.

MR. BEN ESPY: Ben Espy and Bill Espy, Bragg Canna of Alabama, LLC.

MR. GREEN: Wilson Green for

Jemmstone, Alabama.

MR. ESSIG: Brandon Essig for 3 Notch Roots.

MR. SCHILLECI: Vince Schilleci and Tom Sisco, CCS of Alabama.

MR. BLOOM: Richard Bloom of Trulieve Alabama.

MR. SOMERVILLE: Will Somerville for Alabama Always.

MR. BROM: Steven Brom for Theratrue Alabama, LLC.

MR. DUNGAN: Patrick Dungan for Southeast Cannabis Company, Yellowhammer Medical Dispensaries and Pure by Sirmon Farms.

MS. SIPES: Jade Sipes for Alabama Always.

MR. CATALANO: Michael Catalano, Alabama Always.

MR. PULLIAM: Max Pulliam, Emerald Standard.

MR. MILLS: Wallace Mills, Specialty Medical.

(Brief interruption)

MR. VANN: Judge, this is Richard

Vann, Samson Growth, LLC.

THE COURT: Welcome to the party, Richard.

MR. VANN: Thank you, Judge. Good morning.

MR. MCKNIGHT: David McKnight, Sustainable Alabama.

THE COURT: Is anybody else making an appearance?

Mary, you said there's somebody we didn't hear.

COURT REPORTER: Jim Pewitt.

(Brief interruption)

THE COURT: Is anybody else making an appearance?

And then, like I said, of course, this is -- normally, we would have this in open court and every -- hopefully, the word got out. I did hear some of the press, which is -- you're welcome to listen on this.

Okay. So I've got two motions in front of me. And I want to say something before we begin so you know where the Court is coming from.

I had granted the TRO, and I wanted to

allow some limited discovery prior to the preliminary hearing.

And I know people have been pushing -- some folks have been pushing for discovery for different reasons. There are a multiple number of reasons, but the Court thinks it would be best considering the history of this and how this case has gone on, and there's so much in this case, that we would have some discovery prior to the preliminary hearing.

We had a -- our TRO hearing that we had, because so much -- it almost amounted to a preliminary hearing, but I thought in my discretion I would allow limited discovery.

And so I think what we've got on the motion to stay -- and y'all tell me -- I'll ask the commission attorneys if I'm wrong. Of course y'all object to the discovery; and if I've abused my discretion, that's something you want to take up in a mandamus.

And so, if no one objects, I will grant a stay but will keep the restraining

order in place. And I just see that that will put off things, but I wanted to first ask the commission if that's what they're asking for, other than just outright dismissal of everything.

But if I'm -- I'm inclined to allow discovery, but if everyone is in agreement to let -- if there's going to be a mandamus over what I think is a discretionary call on my part and to see if I've abused my discretion in allowing this limited discovery, that would be something, I think, to take up.

And if it's going to go up, the only way I see that happening where I would agree to it is if we agree to continue the setting of the preliminary hearing date.

So what does the commission have to say?

MR. JACKSON: All right. Judge, this is Mike Jackson for the commission.

Your Honor has entered an order allowing discovery and without putting really any scope or limit other than number of depositions, number of requests,

but otherwise has not put any limitations or scope on what that discovery is. So we have asked for a motion for a protective order asking you to revisit that.

Our initial contention is that they're not entitled to any discovery, understanding what Your Honor has said about you're inclined to allow it. But, then, secondarily, if you're going to, then beyond putting the limits on the deposition requests and interrogatories, we think you should put a limitation on what the discovery is going to be addressed to.

And Your Honor is right, depending upon what Your Honor's ruling is after today's hearing, our intent would be possibly -- depending upon your ruling -- to file a petition for writ of mandamus to see if Your Honor has abused your discretion in the order of discovery.

So you're reading it correctly, that would be our intent; but then it depends upon what your final ruling today may be.

THE COURT: Okay. Now, has there

been negotiation with the multitude of parties that are wanting to get the discovery about an agreement on the limitation?

MR. JACKSON: Judge, there's been -- there's been emails. I don't know about conversations. And we -- when we filed the motion for protective order, we filed it after trying to make contact with Alabama Always and Insa, and they were in depositions, and we understand that. We filed it without conferring.

But, then, after we filed it, we did confer and ask whether they would agree to any limitations on the discovery. And the answer was they would not a agree to any limitations.

THE COURT: Okay. Let me ask somebody -- Mr. Somerville, do you want to speak to that or --

MR. SOMERVILLE: Your Honor, the request that we got was that we limit discovery to the Open Meetings Act claims only, and we did not agree to that.

We certainly would be willing to

discuss some sort of reasonable limitations to discovery.

THE COURT: My -- the Court's intent was to allow discovery to help with any issues that might come up at the preliminary hearing stage, not just the Open Meetings Act allegations, because there are other basic allegations made.

Does anyone else want to speak towards that?

MR. RAGSDALE: I would, Your Honor, if it's all right. This is Barry Ragsdale for Insa.

I think we're open to discussing reasonable limitations on discovery, as we are in any case.

You know, the question really is, is the commissions's position no discovery or you only get discovery on Open Meetings Act, in which case, we're probably going to get to an impasse pretty quickly. But if, instead, they're open to discussing limitations on that, I would ask the Court to give us an opportunity to do that at least to see if we can.

And, you know, part of the problem is I've been out of pocket -- not that I'm necessary to this process -- but if there is an agreement to be reached on discovery, we would like an opportunity to do that. But, you know, we may find out very quickly that the commission's position is so intransigent that that's not going to get us far. But we're not there yet I don't think.

THE COURT: Does anybody else want to speak to that?

MR. WILKERSON: Judge, this is Mark Wilkerson.

I would just say we've received written discovery from the plaintiffs on Tuesday, I believe, which was after we filed our motion. Many of those questions -- some of those questions involve -- they are pretty broad and extensive and actually relate to information or conversations that may extend back all the way to April 2022, if not beyond -- 2023, if not beyond.

So the scope of the written discovery

we've seen in some respects is very broad; and if that is an indication as to what they anticipate doing in their depositions, we expect there are going to be further -- would be further objections that may not be able to be resolved preliminarily in conversations.

And the other thing I would point out is that this judge -- you -- the judge will have a preliminary injunction hearing. And that would be an opportunity while you're in the room to resolve any evidentiary or issues, objections, the scope of any called testimony they may call at that time.

We just believe that open-ended discovery prior to that -- prior to a hearing in front of Your Honor is going to be very difficult to accomplish. But we are obviously happy to have conversations with the plaintiffs' lawyers.

THE COURT: I would like to deal with the objectionable stuff after -- without having to go through it at the preliminary injunction hearing. And then

there may be some things you just agree to disagree on. I understand that.

Let me ask --

MR. BEN ESPY: Excuse me, Judge. This is Ben Espy.

THE COURT: Go ahead.

MR. BEN ESPY: What I -- just to make it clear, is the AMCC's position that they are not going to agree to discovery beyond the OMA issue or are they willing to discuss discovery on the other issues we've raised in our complaints and preliminary injunction?

Because if they're keeping it to the OMA, I don't think there is any reason for us to talk, because my complaint doesn't even address the OMA. My complaint addresses the other issues.

I see the OMA issue as a side issue we would get into if it's determined through those depositions that the commissioners were deliberating outside of the public meeting.

My issues are with what they did at the meetings itself that do not

contemplate the OMA at this time. So if their position is a strict it's an OMA issue or nothing, I don't know that having a discussion with them gets us very far.

THE COURT: I didn't hear that. Do y'all want to speak to that?

MR. WILKERSON: Certainly, Judge. To the extent that they're requesting information that's part of the public record, there's no objection to providing that information, I mean, the transcript to the extent they exist of meetings; obviously, the minutes are already known to the parties; any information that -- other information would be part of the public domain, I mean, there's no objection whatsoever to providing that information.

The question is, I think, questions as to the mental processes, as an example, of an individual commissioners. These are commissioners that are going to be required to continue to make decisions as part of investigative hearing process, for example, on issues that are now before the

Court.

We just think it's inappropriate to be able to ask those individuals as to what were you thinking when you made this vote.

MR. BEN ESPY: Your Honor, can you hear me?

THE COURT: Yes.

MR. BEN ESPY: Okay. I mean, I certainly would like to hear what Mr. Ragsdale, Mr. Somerville and Mr. Green think about that, but that -- I mean, I don't know that I need discovery on things that are public already, right? I mean, that doesn't do me a lot of good.

I mean, the issue here is exactly what Mr. Wilkerson is trying to protect under some privilege, which is why did you rank these people the way you ranked them, why did you vote the way you voted. That's not deliberative process. There's no privilege that protects that, but that's what they're trying to protect.

We are certainly entitled to ask those questions, particularly in light of what these commissioners did on the 12th. What

they did, quite frankly, is inexplicable to me, and they should be required to answer questions about it. And that's exactly what they're objecting to.

So, again, I would defer to Mr. Ragsdale and Mr. Somerville since they are sort of the lead on this, but it doesn't sound like to me a meet and confer is going to get us very far if the position is if you already know it, you can ask about it.

MR. GREEN: Just to cede the floor -- before I cede the floor to Mr. Ragsdale, just briefly -- Wilson Green for Jemmstone -- I know the Court is aware of this, but Jemmstone and Mr. Espy's client, Bragg Canna, have pending before you a joinder in the request for discovery. I think, as a technical matter, I just --

THE COURT: I'll deem that granted.

MR. GREEN: -- want to make that clear for the record.

THE COURT: That's granted.

That's granted for purposes of today.

MR. GREEN: Thank you.

We just stand in the same stead as Insa and Alabama Always on these issues.

MR. MAIN: And Your Honor, Verano Alabama filed a similar motion yesterday.

MR. RAGSDALE: And --

THE COURT: Go ahead, Mr. Ragsdale.

MR. RAGSDALE: I was going to say, now that all of these copycats are in, I would say this. We have served discovery. We got it to them, I think -- Tuesday, I think Mark said, and I think that's right. It's relatively short, obviously. You made -- you put limits on what could be done. It's not your typical discovery that would be in a case like this or in a civil case, let me say.

And if we could encourage and maybe even -- I don't know -- order the commission to respond to that in terms of whatever objections they have rather than waiting until the discovery is due to do that -- which, frankly, only stretches out

the period -- but if they could go ahead and file whatever objections they have, give us an opportunity to see if we can reach an agreement. I will tell you, I'm skeptical that we can, but, you know, let's give peace a chance.

THE COURT: There may be some things you can agree to and some things you can't.

MR. RAGSDALE: I agree with you. And we can narrow the scope. And then if they still feel like they need to go, is it down the street to the Supreme Court -- I think that's right -- or to the Court of Civil Appeals, then we can do that, and we can discuss the stay.

I just think, at this point, we haven't really exhausted our opportunities to see if we can reach some agreement on what issues are subject to discovery and which are not.

Again, I'm skeptical, but I also have great faith in the lawyers for the commission to be reasonable.

THE COURT: Where are we on a

timetable? I was trying to compress this and was assuming if there was going to be some discovery it would be going on this week. And I'd like for y'all to have a chance to work out what you could. And what you can't work out, I'll be available to make rulings on to make everybody happy or not.

MR. SOMERVILLE: Your Honor.

THE COURT: Yes. Go ahead.

MR. SOMERVILLE: This is Will Somerville for Alabama Always.

I'm sort of getting the impression that the commission is going to take the position that the commissioners don't have to offer any explanation or discussion about why they voted a certain way. And it seems to me that that just goes to the heart of the entire issue that we've been discussing all these months.

And I don't know how anything proceeds without the commissioners being required to state on the record why they voted and the circumstances under which they voted. And I don't think that's protected by any

deliberative process privilege that's ever been recognized by any Alabama court. So I think that's an important issue to bear in mind during all these discussions.

MR. WILKERSON: Judge, if I could respond to that.

I think the -- there is a remedy ultimately in this case, because what they're saying is that there's not an established record to show why the commission has issued orders in this matter.

And one of -- part of our response is that, you know, we didn't write the legislation, but the legislation says that the process is not over as to those denied parties. They have a right to investigative hearing. And many of them, including Alabama Always, have filed a request in addition to an answer.

The Administrative Procedures Act makes it clear on an appeal of an agency -- a final order of the agency, if Your Honor were to find -- if the Court were to find that the record is insufficient that

they can remand the case back for further findings of the agency. That is the typical remedy in an administrative process.

I think one of the issues here is that the process is ongoing and that until that process is finished, nobody on this call knows what the administrative record is going to be as to the denied clients. That record has not yet been fully established for those parties that have sought an investigative hearing.

MR. SOMERVILLE: Your Honor, we've already made clear -- I think we've presented facts in our complaint and elsewhere that are sufficient to show this, but the administrative remedy they are proposing is futile. And, in fact, the commission, I think, recognizes that, because during their vote on December 28th, they said, basically, we're done with this. We're going to put it in the hands of the courts, and they said that repeatedly on the record.

And in order -- so there's no

administrative process that's even available as a practical matter because they said they're not going to stay the process themselves.

There's no way for them to explain to us why we did or did not get a license.

There's no way for them to comply with the requirements of the Administrative Procedures Act and give us notice as to why we didn't get a license or as to why anybody else did. And so it is in the hands of the courts because the commissioners said this is in the hands of the courts.

MR. BEN ESPY: Your Honor, this is Ben Espy, for the record.

The commission spent more time deliberating over whether they would take affirmative action to not take affirmative action to not grant a stay than they have in discussing any applicant at any time under any three of the votes.

And when they did that, they were very clear on the record. And if you can -- if you watched, you saw this. And quite

frankly, the transcript does not do it justice. I would encourage the Court to actually watch that hearing if you have not seen it. But they were very clear, what they were doing.

And despite Judge Price saying to them and Ms. Skelton saying to them, if we don't want to issue a stay, we just don't issue one, and Mr. Blakemore saying, oh, no, no, no. I understand that, but I want sent a message. I want there to be a message sent that we're ready to get the show on the road. We want to issue these licenses. We want these people moving. We want to get the show on the road. And if the Court wants to do something, then we're going to put it in the hands of the Court. But we're basically done here.

So to suggest that we're going to get a fair hearing and an investigative process is total acutely illusory at this point. They want to issue their licenses. They want to move forward and whatever else happens is just really not their problem.

And that is why, after the vote, when they only got two no votes, they said what did our legal eagles vote no for? Judge Price voted no. Ms. Skelton voted no. And Judge Price said, well, I voted no because there was no reason to vote. If there's not going to be a stay, we just don't have a stay.

And Ms. Skelton said I voted no because what we've just done is moot the process. We have mooted the appellate process by making the vote we've made today. That is what Ms. Skelton said.

And she is one hundred percent right. It is a total waste of our time to be forced into this kangaroo court of an investigative hearing in light of what has occurred and particularly what occurred with the way the ranking and the scoring was used by certain commissioners at that commission meeting.

We are beyond the vanilla of not -- of following the APA and not following the OMA. We have drifted deeply into the rocky road of something significantly

worse. And that bears discovery and that bears the light of day, not being wrapped up under some nonexistent deliberative privilege.

There is no deliberative privilege that covers this. This is an Open Meetings Act body. Their deliberation should take place in public.

To the extent they are attempting to protect deliberations, they are almost admitting that there must have been deliberations in private, which would be illegal.

So I don't see -- I think it's an enormous waste of time to try to force us into an investigative process that the commissioners themselves have made quite clear in their last vote they do not tend to pay very much attention to.

MR. SOMERVILLE: And they're using the deliberative process privilege that as far as I can tell doesn't really exist in Alabama as an excuse to continue not to tell anybody why they made these decisions.

It's the height of absurdity to ask us to go into an investigative hearing without any information about why we were denied a license.

I guess the investigation is for us to figure out -- to investigate why we didn't get a license.

THE COURT: Well, let me kind of cut to where we are, practically speaking.

Right now, I've got a hearing set on January 24th. And I'm not real sure what, if any, discovery can be done between now and the 19th when I originally had cut it off. So I want to give y'all an opportunity to try to see what you can or can't agree to.

I do want to ask everyone about extending the date for the preliminary hearing. How long do you think we need to go through a process so that we can get -- if we get to the point where the commission is uncomfortable and thinks there's some abuse of discretion, I want to give them the opportunity to -- if they want to mandamus, they can.

But, so, having that said, you know, I want this process to move along. And I want the licenses to be issued, but it needs to be done right, and we need to let the folks at Alabama know that it's done right.

So how long do you think you would need to negotiate what you can agree to and can't agree to? Do you think you could do that by one day next week?

Let me ask the commission.

MR. WILKERSON: We are happy to engage in conversations with plaintiffs' counsel. And I would suggest you give us five days.

MR. JACKSON: Five working days. A week.

THE COURT: So next Friday?

MR. JACKSON: Yes, sir.

THE COURT: That would be the 19th?

MR. RAGSDALE: 19th, yes, sir.

THE COURT: Okay. So -- and then I'm going to -- and here is what I want you to do from an orderly standpoint,

since we have so many folks. What we want is one set of written questions that are agreed upon by the defendants -- the plaintiffs and one set of deposition requests agreed upon so that they can address it with one group.

MR. GREEN: And, Judge, on that point, just to be clear, we had already done that for Bragg Canna and Jemmstone. We had coordinated on those points.

THE COURT: All right. And I appreciate that, but if everyone would do that.

And let me ask you this. Probably where are we on the limited number -- are we comfortable with those numbers?

MR. RAGSDALE: I think we are at this point, Your Honor. And of course, obviously, it depends to the extent that the commission is cooperative with those numbers. We tried very hard, obviously, to negotiate something that all the parties could -- not the commission, obviously -- but the plaintiffs could all agree on. And at this point, we think we

fit within those numbers that you provided, and the deposition numbers work for us. That may change, but it's going to depend, frankly, on the commission.

THE COURT: Okay. Well, you know, we'll see what comes between now and the 19th.

All right. Now, when is a date if we agree on discovery -- I'm assuming we're in a perfect world and we agree, and we have some discovery that will begin -- when can we set this preliminary hearing date? Any suggestions of how long you would need?

I'll ask the commission first.

MR. JACKSON: February sometime, just thinking out loud, Judge, obviously, depending upon if we can reach an agreement. But I would think it would be too soon before mid-February, so mid-February or after.

THE COURT: All right. Any of the plaintiffs?

MR. RAGSDALE: I'm an optimist, Judge. I think we can meet that date. It

probably makes sense to put it a little closer to the end of February. But, you know, we're going to quickly, I think, be able to discover whether or not -- pardon the pun -- we can agree on what the scope of discovery and whether or not the commission feels that they need to file a mandamus petition. I think we'll probably know that by the end of next week.

And once that's done, if we've reached agreement, the end of February gives us enough time to complete that discovery. And it also gives enough time, obviously, for the commission to seek whatever relief they need.

MR. GREEN: Judge, on the flip side, if an agreement is not reached by the 19th, it might be a good idea since the 24th has already got a pin in it that the 24th be used as a hearing date on --

THE COURT: Right.

MR. GREEN: -- irresolvable issues.

THE COURT: I was thinking that. And then I could -- then both sides could

tell me why the other side is wrong. And then we could do something, and then, at that point, maybe revisit whatever decision -- if either side wants to mandamus to get some relief.

So February -- I think -- now, this is tricky because Mrs. King is taking down the record, and she also does my schedule.

(Brief interruption)

THE COURT: Why don't we look at Tuesday, February 27th, as --

MR. BILL ESPY: Judge, the Espys have a problem on the 27th on a meeting we got stuck with.

THE COURT: Is that with the new coach?

MR. BILL ESPY: I wish. I'm not getting on that phone call next, Judge. But, right now, we have -- the 27th we've got a problem.

THE COURT: What about the 28th?

MR. BILL ESPY: The 28th works.

MR. BEN ESPY: The 28th is fine with us, Your Honor.

THE COURT: Everybody else look

at your calendars and see if Wednesday, February 28th would be preliminary injunction day.

MR. WILKERSON: Give us a moment, Judge.

THE COURT: Yes.

(Brief pause)

MR. JACKSON: I've got a trial beginning on Monday, but it should be over by the 28th. I have a trial -- a federal court trial the 26th, but it should be over by the 28th.

THE COURT: You can't say hello in three days, Jackson.

MR. JACKSON: Yes, you're right. You're right about that.

THE COURT: That's your billing. I'm sorry.

MR. SOMERVILLE: Your Honor, that day is good for me. Will Somerville.

THE COURT: Mr. Ragsdale. Mr. Green.

MR. RAGSDALE: Absolutely.

MR. GREEN: We'll figure out how to make it work. I have a bench trial on

the 27th in Baldwin County, but who knows where that is going to land, so --

THE COURT: We're looking at Wednesday, February 28 for the TRO.

We're looking at the 24th as a day for hearing to resolve any remaining discovery disputes. I'll give y'all until the 19th to try to get that resolved. And then y'all can advise the Court what needs to be heard on the -- or doesn't need to be heard on the 24th.

So all discovery is stayed until we have either a total agreement or have the hearing.

MR. JACKSON: Right.

Judge, I think I know the answer to this, but are you going to allow the commission to argue its pending motion for protective order and the opposition to discovery -- complete discovery at all on the 24th regardless if we reach agreement or not?

THE COURT: Yes. Yes. Because if y'all have got things that y'all can't agree to that want to be protected, and

they can't agree --

MR. JACKSON: Yes, sir.

THE COURT: -- I'll do that then.

MR. JACKSON: Okay.

MR. MILLS: Judge, as a practical matter, given the number of lawyers involved, do we need to discuss or do the parties need to discuss some time limitations on these depositions, because I can envision some of these going on for days.

THE COURT: They're not going to go on for days. We'll have our standard time you can spend, you know, whatever reasonable time. That's something y'all can agree on. Y'all let me know. If not, I'll do something on the 24th about how long -- you can't agree on how long.

MR. DUNGAN: Your Honor, Patrick Dungan, Southeast Cannabis Company.

We have not filed a joinder motion like some of the others have, and -- but we had assumed that as a party in the case we would be entitled to the responses and even a seat at the table.

THE COURT: That's my intent.

MR. DUNGAN: I'd like to confirm that.

THE COURT: For everyone that's a party, you will be able to participate. But, again, I want you to cooperate with each other.

MR. DUNGAN: Sure. Thank you, Judge.

MR. SCHILLECI: Your Honor, this is Vince Schilleci, CCS of Alabama.

THE COURT: Hang on just a second. Let me get this dog.

(Brief pause)

THE COURT: All right.

MR. SCHILLECI: Judge Anderson, Vince Schilleci from CCS of Alabama. We're a dispensary awardee, so we know we're kind of the low man in this group of integrated folks, but there's one motion that we filed on the 29th in response to your TRO staying the dispensary licenses.

We had filed a motion for you to amend -- to adopt Mr. Dungan's order which stayed only two licenses. Depending on

how that -- how you rule on that motion, we don't know how to participate in the discovery process. We wouldn't want to participate if you grant it, so --

THE COURT: Here's what -- because of the circumstance with the dispensaries and this -- if the selection process was flawed, it's flawed, you know. And I know you had two that had gotten licenses every time. I won't do that. But as far as that goes, I'm not going to mess -- I've already messed it up pretty good for you, so those would still be stayed.

MR. SCHILLECI: Thank you.

THE COURT: I take it there's -- and you can't -- it's hard. Y'all are not going to be dispensing anything until we get some product, so I want to move it along; but, hopefully, we know by February. But you're welcome to participate in this discovery process and get everything as it affects your client.

MR. SCHILLECI: Thank you, Your Honor.

MR. JACKSON: Judge, can we ask who the point of contact is for the plaintiffs for these negotiations as opposed to having to deal with multiple people?

THE COURT: Okay. Well, I'm going to have to give you a three-headed committee, because they had their head in there, Mr. Ragsdale, Mr. Green and Mr. Somerville.

MR. JACKSON: Okay.

MR. RAGSDALE: We agree on everything, Judge, so it will be easy to --

THE COURT: Yes, they just disagree with you. That's good.

All right. And along those lines, I'll ask my scrivener, Mr. Green, if he'll circulate an order that sets out what we decided today.

There's silence.

MR. RAGSDALE: He's nodding.

MR. GREEN: I'm on mute. Will do.

THE COURT: Okay. So, basically,

y'all try to work it out by the 19th. If it hasn't after the 19th, let me know. If we need a hearing, we'll have a hearing on the 24th. We'll resolve that. And then we'll have the -- it will give us time to do discovery and/or mandamuses or whatever. And we'll set the preliminary injunction for February 28.

MR. RAGSDALE: Sounds great, Judge.

MR. BEN ESPY: Thank you, Your Honor,

THE COURT: And, apparently, I need to include my denial to amend my order on the dispensaries, to make sure that's included.

Is there anything else for the good of the order? Is there anything I left out?

MR. BEN ESPY: No, sir, Your Honor.

MR. RAGSDALE: Thank you, Judge.

THE COURT: Thank you.

Mr. Jackson, is your arm sore from rolling Toomer's Corner?

MR. JACKSON: I thought about

going over there, but I stayed away.

THE COURT: All right. Good to see y'all -- or most of you guys.

(Court adjourned)

CERTIFICATE

STATE OF ALABAMA

COUNTY OF MONTGOMERY

I, Mary R. King, Official Court Reporter and Registered Merit Reporter for the 15th Judicial Circuit for the State of Alabama, Montgomery, Alabama, do hereby certify that I reported in machine shorthand the foregoing proceedings as stated in the caption hereof; that my shorthand notes were later transcribed by me or under my supervision, and that the foregoing pages contain a full, true and correct transcript of said proceedings and testimony set out herein; that I am neither kin nor of counsel to any parties in this proceeding, nor in any way interested in the results thereof.

Dated the 12th day of January 2024.

/s/ MARY R. KING, CCR, RMR
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MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

MONTGOMERY, ALABAMA

FIFTEENTH JUDICIAL CIRCUIT

ALABAMA ALWAYS, LLC, et al.,

Plaintiff,

V. **Case Number: 03-CV-2023-231**

MASTER CASE FILE

STATE OF ALABAMA MEDICAL CANNABIS COMMISSION,

Defendant.

***This Document Also Relates to the Following Actions*:**

Alabama Always, LLC v. AMCC, CV 2023-901727

Yellowhammer Medical Dispensaries, LLC v. AMCC, CV 2023-901798

Jemmstone Alabama, LLC v. AMCC, CV 2023-901800

3 Notch Roots, LLC v. AMCC, CV 2023-901801

Pure by Sirmon Farms, LLC v. AMCC, CV 2023-901802

*** * * * * * ***

PROCEEDINGS, held before James H. Anderson, Circuit Judge, on December 28, 2023.

*** * * * * * ***

Mary R. King, RMR, CCR-387
Official Court Reporter

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ALSO PRESENT: Justin Aday, Esq.

THE COURT: I hope everybody had a happy holiday. Wishing everybody a good holiday -- except Ragsdale. And I saw the gentlemen with them -- and I said gentleman because Jackson wasn't with them when he walked in -- from the commission, I said it's Ground Hog Day.

We're back here again. Now, what I'd like to do first from a procedural standpoint to make sure we've got everything that we need to look at this morning --

(Brief interruption)

THE COURT: Okay. I've got a lot of intervention motions now -- and I don't know if I've got everybody's -- but let's take that up first -- or motions to consolidate, basically, and interventions.

So I've got one. Mr. Somerville, you filed, Alabama Always's --

MR. SOMERVILLE: Yes, Your Honor.

THE COURT: -- to consolidate.

And Theratrue. Mr. Brom.

MR. BROM: Yes, sir.

THE COURT: Yellowhammer.

MR. DUNGAN: Yes, sir.

THE COURT: Patrick.

Jemmstone. Mr. Green.

And is this a duplicate for Alabama Always or are y'all just wanting to be in twice, or is that --

MR. SOMERVILLE: We filed it in both cases, so --

THE COURT: And then -- is it Trulieve?

MR. BLOOM: It's Trulieve, Your Honor.

THE COURT: Trulieve. I'm sorry. And that's intervention and -- anyway, we've got Insa Alabama.

MR. RAGSDALE: That's us, Your Honor.

THE COURT: All right. And 3 Notch Roots.

MR. ESSIG: Right here, Your Honor.

THE COURT: Okay. And Theratrue. This is -- I'm into the amend, alter, vacate.

Let's see. Have I got anybody else?

Let's see. Specialty Medical Products.

MR. MILLS: That's us, Judge. We've moved to intervene on the other side.

THE COURT: Thank you, Mr. Mills.

Is there anybody else?

MR. MAIN: Your Honor, Saxon Main on behalf of Verano Alabama. We have not filed anything yet. We're trying to figure out exactly which route we're going to go, but we should be -- as much as we've resisted joining the party, we should be joining the party.

THE COURT: Let me ask you this, Mr. Main. What's happened to y'all's case about the --

MR. MAIN: They haven't reversed it yet.

THE COURT: Well, they've still got some time before the year is up.

Is it pending?

MR. MAIN: Our brief is due on the 28th, Your Honor. There was a procedural question that they had, but we have a letter brief due by the 3rd with the Court of Civil Appeals, and then our -- presumably, our briefing schedule will resume.

THE COURT: And, see, I think the legal questions that Verano is asking could clear a lot of -- a lot of the issues that I see, the general question of, if there's an issuance, can the commission claw it back,

which I found they could. And you're saying I'm wrong.

MR. DUNGAN: You mean an award.

MR. WEBSTER: An award.

THE COURT: An award, not the issuance, because we've got -- it's not like being pregnant -- it's either so there's an award and there's an issuance. So we've got that still pending. And there's lot of y'all that are claiming that issue. I think it's a live issue with Verano's thing.

All right. Any other interventions that --

MR. DUNGAN: Judge, I believe Pure by Sirmon Farms should be on your list of motions to consolidate. I didn't hear that one.

THE COURT: Let's see.

MR. DUNGAN: It's cultivators.

THE COURT: Yes, I see the -- I see your injunction. I've got Sirmon Farms. I've got several TROs and injunctions. And you're wanting to intervene.

MR. DUNGAN: Consolidate.

THE COURT: Consolidate. We've got a couple of intervenors and consolidations with

what we're calling the master case or up and down 231.

Is there anybody else?

All right. Let me just ask is there any opposition to allowing the interventions and consolidations?

(No response)

THE COURT: Okay. I will grant those. And if you filed one and you're not in the party or you haven't done it -- now, Mr. Main, I don't know what your --

MR. MAIN: We'll get you something soon, Your Honor.

THE COURT: You plan on doing it or --

MR. MAIN: Waiting on final instructions from the client.

THE COURT: Okay. Okay.

All right. Now, then, we have -- so that's what we've got.

Then I've got several requests for a temporary restraining order. And before we go through who all is here, just from a time line, Mr. Webster, Mr. Jackson, where are we on -- all the licenses have been awarded?

MR. JACKSON: Awarded.

THE COURT: But there have not been any issued?

MR. JACKSON: Correct.

THE COURT: Is there a timetable that the commission is looking at about when the license -- they expect the issuance of the licenses that are going to be --

MR. JACKSON: Yes, sir, there is.

THE COURT: All right. What is it?

MR. JACKSON: So, leave aside the integrated facilities, everybody else is tomorrow.

THE COURT: Okay.

MR. JACKSON: Integrated facilities, January 9th.

THE COURT: Okay. So all the licenses except for the -- there's going to be five for the integrated facilities are scheduled for January 9th, right?

MR. JACKSON: For integrated, yes, sir.

THE COURT: Okay. Now, so, having said that, I think I've got a TRO on things that aren't integrated facilities. We've got cultivators --

MR. DUNGAN: Yes, sir. And dispensaries.

THE COURT: So that would be Sirmon Farms.

MR. DUNGAN: And Yellowhammer Medical Dispensary.

THE COURT: All right. Yellowhammer Dispensary and Sirmon is a cultivator?

MR. DUNGAN: Yes, sir.

THE COURT: Is there anybody else that's a nonintegrated license?

MR. DUNGAN: Anybody?

THE COURT: Yes, sir.

MR. SCHILLECI: I'm here on CCS of Alabama, LLC, dispensary awarding.

THE COURT: Have you filed something, Mr. Schilleci?

MR. SCHILLECI: We intervened in the original Alabama Always case, which we believe --

THE COURT: And y'all are a dispensary?

MR. SCHILLECI: A dispensary, yes, Your Honor.

THE COURT: And you didn't get an

award?

MR. SCHILLECI: We did receive an award. We intervened on behalf of the AMCC.

THE COURT: Okay. So you're on behalf -- you're not wanting me to restrain them, are you?

MR. SCHILLECI: Not at all, Your Honor.

THE COURT: And so -- but Yellowhammer and Sirmon --

MR. DUNGAN: And, Judge, I can clarify. For the dispensary licenses, we would be okay if that stay was limited to only those companies who were awarded the third time but were not previously awarded. In other words, we would be okay with -- for the commission to go forward with issuance on the dispensary licenses for three-time awardees, which I believe there are two.

MR. SCHILLECI: Correct.

THE COURT: Well, how many are there?

MR. DUNGAN: Four.

THE COURT: So two you don't have any objection to?

MR. DUNGAN: That's correct.

THE COURT: Who are those two for the record?

MR. DUNGAN: CCS of Alabama and RJK Holdings, I believe.

THE COURT: And so in the -- okay. Well, but you want me to hold up on this third -- this third time is a charm deal?

MR. DUNGAN: I would kind of like to hear from the commission, because I believe in prior conversations with the commission's counsel, they had contemplated staying some -- staying the issuance of some licenses pending the investigative hearing process. But we haven't really heard anything from them about that today or leading up to today.

We know they have a meeting this afternoon. You know, the agenda is pretty vague. It just says consideration of items related to investigative hearings; but their time line says, you know, consideration of imposing stay on issuance of some or all awarded licenses. So it contemplated that, but we don't know what they're going to do this afternoon.

THE COURT: Well, maybe they don't

know either.

MR. JACKSON: That would be accurate, Your Honor.

THE COURT: Just saying it's being considered.

MR. DUNGAN: I just know that as it has been represented to this Court in the past, you know, usually, when the commission's counsel makes a recommendation to the commission, the commission goes along with it.

So I'm curious as to what the counsel's recommendation will be to the commission today regarding the -- a stay on the issuance of some or all licenses pending the investigative hearing process, since that is clearly something that's been contemplated.

THE COURT: They may or may not know.

Mr. Jackson, can you --

MR. JACKSON: Judge, without violating the attorney/client relationship, I think I can accurately state that the commission -- the commission's lawyers have not made a recommendation. It's a commission decision. Without -- how do I couch this without violating attorney/client relationship?

We have -- we've given advice to the commission on various scenarios of issuing a stay, not issuing a stay.

THE COURT: Yes. And that meeting --

MR. JACKSON: It's their decision. We don't know what they're going to do.

THE COURT: And that meeting is this afternoon?

MR. JACKSON: That's correct, one o'clock.

THE COURT: And so is it anticipated that at this afternoon's meeting it's a possibility that the licenses for the nonintegrated could be issued?

MR. JACKSON: No, they won't be issued in today's meeting. They will be issued by the commission tomorrow.

THE COURT: At tomorrow --

MR. JACKSON: That time line is already in effect from the awards that were done fourteen days ago. They will issue tomorrow without commission action. It doesn't take any additional commission action to go ahead and --

THE COURT: So the commission could

stay or --

MR. JACKSON: They could, yes.

MR. DUNGAN: And, that's right, Judge, as they're referencing, the actual issuance of a license is purely ministerial. It doesn't require any additional action from the commission because the discretionary function has already been exhausted.

THE COURT: It's a time function from the time it was awarded before issuance?

MR. JACKSON: That's right.

THE COURT: And so it's up to the commission. And I think the commission could stay it or not.

All right. So we've got two licenses, potentially, that weren't awarded that are challenging on that issue, right?

MR. DUNGAN: And, Your Honor, I believe there's actually six dispensary applicants who have requested investigative hearing. I can only speak for one of them, but --

THE COURT: Well, that's something that the commission -- that y'all are entitled to do is ask for an investigative hearing.

MR. JACKSON: Right.

MR. DUNGAN: But if there are no remaining licenses, then what's the purpose of the investigative hearing? I think that's the point.

THE COURT: Well, I think they might find that somebody's might have been issued in error or something. I mean, the commission can do whatever they want to with it.

MR. DUNGAN: But then they wouldn't be able to -- once the license is issued, right, then they wouldn't be able to then revoke without having some grounds for doing that.

MR. JACKSON: But an investigative hearing may reveal what those grounds are. We don't know. We don't have that clairvoyance.

THE COURT: Right.

Okay. So for these two that weren't awarded -- let's see -- Yellowhammer Dispensary and your other client --

MR. DUNGAN: Pure by Sirmon Farms is a cultivator.

THE COURT: Okay. Tell me about the cultivator licenses.

MR. DUNGAN: Other motion on -- for

cultivator license was purely based on our complaint/petition for review for the two prior revocation actions of the commission of that license previously awarded to Pure, which was the highest overall score, tied with CCS of Alabama and definitely the highest in the cultivator category, who were essentially penalized by the commissioners for opting not to participate in the optional presentations that were made part of the emergency rule.

And, you know, it was reiterated over and over by the commission these presentations were optional during the meetings, in court, in the rules itself that claims it's optional. But it was on the very morning of the day when the cultivators were supposed to present that the commission's lawyers presented this settlement agreement to the commission to discard with the scoring.

This is something that Pure by Sirmon Farms didn't know about. And your order on that didn't even come down until two days after the cultivator presentations were going on.

THE COURT: We had the public hearing on that. Everybody knew that's what was coming

down.

MR. DUNGAN: I'm sorry?

THE COURT: I mean, everybody knew that day when we had the hearing.

MR. DUNGAN: Well, there wasn't a hearing. There was a mediation. And Pure by Sirmon Farms --

THE COURT: And I put something on the record from the mediation -- after the mediation.

MR. DUNGAN: Sure.

THE COURT: I read the order into the record. And it was in writing.

MR. DUNGAN: What I'm suggesting, though, is Pure by Sirmon Farms was never a party to this lawsuit. They were not -- they were preparing for their presentation.

THE COURT: I'm just saying it was -- we didn't get the final order, but I read the agreement on the order in open court, open to the public, and it was reported. That was something that was known.

MR. DUNGAN: The point was that even for the cultivators, since they had to go present on day one, the time for them to make a

decision as to whether or not to present this optional presentation had already lapsed by the time this settlement agreement was ratified by the commission and out there.

So that -- had my client known that the scores were going to be completely thrown out and these presentations were going to be, essentially, the only criteria used by the commission to award or deny licenses, they certainly would have come talk to them for twenty minutes.

But instead of being the highest-scored and highest-ranked applicants, they were simply left off, and, essentially, penalized by the commission for not doing what the commission repeatedly said was optional.

THE COURT: How many cultivator licenses are there?

MR. DUNGAN: There are twelve to go around. There are eleven applicants. I concede that there are always going to be, at least in this license offering, enough cultivator licenses to go around.

THE COURT: So I'm lost. So --

MR. DUNGAN: My point is that we filed

our motion on the grounds that the Alabama Administrative Procedures Act does provide a stay of the enforcement of their revocation.

THE COURT: You lost me. You lost me. Y'all were one of eleven?

MR. DUNGAN: Eligible applicants, I believe.

THE COURT: For twelve spots?

MR. DUNGAN: That's right.

THE COURT: And you didn't get an award?

MR. DUNGAN: That's correct.

THE COURT: Is there any administrative appeal or remedy?

MR. DUNGAN: We are pursuing that, yes, through the investigative hearing process.

THE COURT: Is that yes, Mr. --

MR. JACKSON: Yes, sir, they've requested an investigative hearing.

MR. DUNGAN: That's right.

THE COURT: And so it's not like they're shut out and they're gone from being awarded to you just didn't get an award?

MR. DUNGAN: That's right.

MR. JACKSON: Judge, in terms of being

penalized, there are two -- two similarly situated applicants that also did not make presentations that were awarded based on their applications, so --

MR. DUNGAN: Which ones were those?

MR. JACKSON: Which ones are those?

MR. ADAY: I Am Farms.

MR. DUNGAN: I Am Farms had to be awarded a license so that they can meet the minimum minority license category.

THE COURT: It could have been somebody else.

MR. DUNGAN: There weren't any others to chose from.

THE COURT: They got it. Okay. They got it.

MR. JACKSON: And who was the other one?

MR. ADAY: For secure transporter, International Communication.

MR. DUNGAN: That's a different category. We're talking cultivators.

THE COURT: But they didn't --

MR. DUNGAN: There's another cultivator, Blackberry Farms, the same thing,

had been a two-time awardee, scores towards the top of the list, makes a business decision not to participate in these optional presentations.

The commission's lawyers and chair and -- remind the commission at the beginning of every single one of these presentation meetings that they are optional. They are not required. And everybody that doesn't present is still subject to award of a license.

Blackberry Farms, same thing, both of them --

THE COURT: Let me ask you this. Rather than holding up the award and the issuance of licenses with these other folks, there's still going to be available, if you go through the process --

MR. DUNGAN: We concede that, Your Honor. We filed our motion for cultivator license based on the provisions of the procedures act that say that you get a stay as a matter of a right when the effect of an agency's action is to revoke a license from someone improperly. And our position --

THE COURT: And my finding was they haven't revoked the license.

MR. DUNGAN: Judge, I don't believe you've made a finding on that.

THE COURT: Well, on -- my Verano ruling is kind of --

MR. DUNGAN: I understand we might be jumping ahead, but I do think it's important to point out that Verano was never consolidated into this case. Verano was strictly related to the June 12th awards that were rescinded, i.e., revoked on August 10th.

And, you know, there's factual differences between the first revocation and the second revocation. So, you know, that may be the law of this bench, but it's not the law of this case. And it's on appeal.

And there are six or seven parties that have filed petitions for review on that issue as to whether or not the October 26th revocation action by the commission was appropriate. So there are some differences there. And we really need to get those issues worked through this trial stage and so that we can get them consolidated with the Verano appeal sooner rather than later.

THE COURT: And I think that basic

question in Verano will probably control what I do.

MR. DUNGAN: Sure. And I think there is a narrow opportunity, though, because there was some case law cited by the commission in the Verano matter regarding the tabulation errors and the mistake.

But, you know, they don't have the same excuse to rely on for what they did on October 26th. So there is a scenario out there where the Court of Civil Appeals could say, yes, commission, you were right about the June 12 awards, but you're wrong about August 10.

That possibility is out there. And if we just let Verano go up on its own, we may not get that answer. So it's important to have all of those claims decided preferably in one --

THE COURT: And there were different issues in the October thing involving the Open Meetings Act and -- now -- but getting to your request for temporary restraining order --

MR. DUNGAN: For the cultivator.

THE COURT: -- for the cultivator, I'm concerned if there's -- if you've got a point where you exhaust it -- I don't think you've

exhausted the administrative remedies for that.

MR. DUNGAN: Right. Our request there is based on the procedures act provisions regarding unlawful revocations. So we are protecting our record and for --

THE COURT: For that issue on the October issuance?

MR. DUNGAN: That's right, the October revocation, yes.

THE COURT: Well, unless I get convinced otherwise, I'm going to deny your TRO. We'll preserve that other issue that I think that everybody else is joining is on as far as that goes. Your case is not dismissed, but the TRO is denied at this time.

MR. DUNGAN: Thank you, Your Honor.

THE COURT: Now, as far as the dispensaries, we've got -- you're the only one that's filed a TRO on the dispensary?

MR. DUNGAN: That's my understanding.

THE COURT: Okay. But there were two that were left out?

MR. DUNGAN: Yes, there were two that were left out.

THE COURT: And who is the other one?

MR. DUNGAN: Statewide Property Holdings.

THE COURT: They haven't filed anything? Does anybody know? Does anybody know anything?

MR. DUNGAN: My understanding is that they are seeking counsel, but all the counsel in Alabama is in this room.

FROM THE AUDIENCE: They are seeking counsel. I can confirm that.

THE COURT: Well, I mean, those licenses, unless the commission stays it, are going to be issued --

MR. DUNGAN: Tomorrow.

THE COURT: -- Friday. Friday.

MR. JACKSON: That's right.

THE COURT: Okay. And those are -- so we've got -- so your request for the dispensary is for me to put a hold on the issuance of two of the licenses?

MR. DUNGAN: Yes, sir.

THE COURT: No objection to the other two?

MR. DUNGAN: Yes, sir.

THE COURT: And, of course, you agree

with that, Mr. Schilleci?

MR. SCHILLECI: Yes, Your Honor.

THE COURT: Okay. What's the commission's position on that?

MR. JACKSON: We won't agree with two and two, split it up, no.

THE COURT: I'm trying to figure out -- so if I stay -- why should I stay the issuance on this one?

MR. DUNGAN: Judge, there are obviously six dispensaries that have requested an investigative hearing. I only care about one of them, Yellowhammer, high scorer, two-time award winner.

The second time the commission met to award licenses when they just wrote down their top four instead of ranking them one to a million, Yellowhammer was the only unanimous applicant of the dispensary applicants.

You get to this third round with the emergency rule, which I'm sure you understand we'll hear at some point this morning from others, there are problems with the emergency rule. There are problems with this ranking system that the commission used in the third

round.

Yellowhammer actually had seven of the eleven commissioners who were present rank them in their top four. Not only is that enough votes to get a license, it's more votes than another company, Capitol Medical, actually received. Capital Medical only passed six to five.

Yellowhammer had seven commissioners rank them in the top four, never got a vote because this ranking system that was used by the commission enabled some commissioners, as we all know now, to manipulate the system and tank certain applicants that they perceived to be a threat to their applicant of choice.

THE COURT: How is that something that's unlawful? If it's politics involved --

MR. DUNGAN: That's got to be played out. There never was supposed to be politics involved in this process. That was the intent of the Alabama Legislature.

THE COURT: So the intent of the Alabama Legislature is not to have politics involved?

MR. RAGSDALE: They didn't know what

they were doing.

MR. DUNGAN: Apparently not. It certainly says that in the act -- well, not verbatim.

THE COURT: Well -- so -- but because, I mean, there's a system in place that if somebody for whatever reason had some concern that another commissioner didn't have, is there anything wrong with that commissioner using his or her discretion and expressing their desire to have somebody rank ahead of somebody else?

MR. DUNGAN: The problem is that it's in violation of the commission's own rules. The rules require that a component of the review be under blind condition. The rules require an impartial numerical ranking process be used. None of that was done.

THE COURT: How do you have it blind if you're naming somebody?

MR. DUNGAN: That's for the commission to figure out. Once they agree to throw the component of their program out that met that criteria in the rules, which was the USA scoring, once they agreed to throw all of that out, they had to figure out another way to

comply with their own rule about that. They just didn't.

THE COURT: How did they do it?

MR. DUNGAN: They used this procedure in the emergency rule that initially was intended by the commission to simply be a nomination order aggregator, but, then fast forward a month later when you throw the scores out, this nomination order becomes the only scores we have. That's all we have. And they violate the rules because they weren't done under blind conditions, and they weren't impartial.

THE COURT: Well, what actually happened? They had nominations and then votes?

MR. DUNGAN: They filled out a sheet, a tally sheet, for --

MR. BROM: Can I show you this, Judge?

THE COURT: Sure.

MR. BROM: This is the commissioners' ranks. That's the only copy I brought, Judge. I may have to take that back from you.

THE COURT: Okay.

MR. DUNGAN: Wide discrepancies across the board. It's arbitrary.

THE COURT: Well, I think some people like chocolate and some people like vanilla.

MR. DUNGAN: But that's not what the act and the rules prescribe. There are certain criteria that the commission is supposed to use to evaluate applications.

THE COURT: So this gets to what we've got for the next step in Mr. Green's complaint about the flaw in the procedure. So that's -- you're claiming --

MR. DUNGAN: We -- go ahead. I'm sorry.

THE COURT: I mean, but, what you're asking is that I order them not to issue these licenses until this gets cleared up?

MR. DUNGAN: That's right, because if they're -- if we're right about any of this, and then you start trying to claw back licenses that have already been issued; and you've got companies that have already, you know, started retrofitting their dispensary buildings, and, you know, hiring people, I mean, that's going to cause a much more -- I mean, the status quo needs to be maintained until these things are resolved.

THE COURT: Okay. Now, so, the premise of this is, like I said, the same issue that everybody jumped in on?

MR. GREEN: That's right.

THE COURT: Well, okay, let me -- Mr. Green, tell me why you don't have an administrative remedy to what you're complaining about.

MR. GREEN: Well, we don't have an administrative remedy because if they go forward issuing five integrated licenses, there are no more integrated licenses to give out. So we go through an investigative hearing and we have nothing left. There's no way to unwind things.

You're right. You're lighting on the fundamental problem that we've pointed out, which is, their regulations from day one have required that there be scoring of applications, number one; that some of that scoring be in the blind, number two; that the scoring use impartial numerical criteria, number three; that the scoring evaluate applications on the statutory and regulatory criteria.

All of those four things, they are bound

up in regulations .10 and .11, particularly .10 paragraphs one and two.

I know Your Honor has an extensive history with this and so you will recall that back in the late summer and early fall, after the initial enjoining of the August 10th licenses, parties began discussions about what could be done to resolve ten meg issues and all sorts of other issues.

And so one of the things that was asserted vigorously by several applicants' counsel was you've got to throw out the South Alabama scores -- not my client, by the way, never -- but several applicants threw that out and hammered that issue that the South Alabama sores had to be thrown out.

The South Alabama scores, as Mr. Dungan just pointed out correctly, was the way in which -- for all of the faults that might otherwise exist, it was the way in which the commission complied with all of those criteria and all of those regulations in their own regulations, in their own rules that there be some scoring in the blind; that the scoring be of the applications; that the scoring be using

the statutory and regulatory criteria; that the scoring be using an impartial numerical process, all of those things, that's -- you have a scoring system, an artifice in place to do that.

In the aftermath of -- in conjunction with all those discussions, while those discussions were going on and while some applicants were hammering that issue, I can tell you as an officer of this court -- and others can tell you -- we had discussions with commission counsel about the fact that we understood that the commission had an interest in preserving the South Alabama scores because they needed them in order to comply with their preexisting regulations just like we're talking about.

At the conclusion of those discussions, the commission then promulgated the emergency rule.

The emergency rule contemplated that the South Alabama scores were going to continue to be used but that the commission was going to provide applicant with general scoring information about the way in which the scores were developed and all of that and then provide

each applicants with its own particular scoring results so that in these interview processes, these presentations, applicants could talk about their scores in an intelligent way; and, of course, would, also, as part of that emergency rule, handle the processing of ten meg data so that could also be explained in the presentations.

So fast forward to right on the heels of the presentations and the mediation that resulted from the filing of some motions by Alabama Always, the commission then does an about-face and agrees voluntarily to jettison, to abandon entirely the South Alabama scores.

Candidly, that came as a shock to me. And my client never had a claim being litigated about scoring from the beginning, but all the more reason it came as a shock to me.

And the reason it came to a shock to me and a lot of other people is we knew that the commission, by jettisoning the Alabama scores -- the South Alabama scores was going to have to come up with a way of complying with regulations .10 and .11 that still require blind scoring, scoring, scoring based on

statutory regulatory criteria, all that stuff.

The emergency rule didn't speak to that. In fact, the emergency rule assumed that the South Alabama scores were going to stay in place.

So when they throw the scores out voluntarily --

THE COURT: Let me stop you here. I remember -- and Mr. Somerville is about to jump up.

MR. SOMERVILLE: I would like to respond to some of what Wilson -- Mr. Green just said at the appropriate time.

THE COURT: I will at the time. But I'm just -- so the South Alabama scores, I remember there were -- we had a hearing. And there was -- it appeared to the Court there were huge inconsistencies that were pointed out by the scoring of South Alabama or whatever happened.

MR. GREEN: That's right.

THE COURT: I don't know if -- whatever it was, there was some reason, if I remember, like, you had the exact same security plan that got scored up high --

MR. GREEN: A 90 and a 40.

THE COURT: -- the same plan scored low. And I think that led the commission -- and it was pointed out about the problems --

MR. SOMERVILLE: Your Honor, it was also that the South Alabama scoring system, the scoring guide, did not effectuate the clear statutory mandates, for example, the sixty-day cultivation requirement.

THE COURT: And that was --

MR. SOMERVILLE: And so in our -- in Alabama Always's story from day one --

THE COURT: Alabama Always always has said.

MR. SOMERVILLE: Alabama Always has always said that the commission needs to apply the clear statutory criteria.

And our issue with the scores during those discussions was that they did not effectuate that.

THE COURT: I'm just trying to say that there were -- and we had a mediated thing, and the Court approved it. I found there were some inconsistencies from what I saw. And I could see where the commission would want to

take another --

MR. GREEN: I understand.

THE COURT: -- look other than South Alabama scores.

What you're saying, so I understand your argument, you're not saying you agreed with all of the South Alabama scoring but there needed to be a scoring.

MR. GREEN: That's right. The issue is this. It's an issue of a process leading to a reliable result. The process is you've got to have scoring based on objective criteria -- on an impartial numerical process, et cetera, et cetera.

That's in their rules. It's been in their rules from day one. The emergency rules didn't do anything to alter that. So when they throw out the South Alabama scores as a matter of process leading to a reliable subjective result, they've got to come up with a scoring system that satisfies all those requirements.

They can't just rely on what is set forth in their emergency rule, which is not a scoring process. It's a way -- it's a ranking system that is used to determine order of voting.

That's not a score.

THE COURT: And the rankings were done by the commissioners?

MR. GREEN: That's right.

THE COURT: And the rankings -- when you have rankings like this, you always have the Romanian judge that you see in the Olympics.

MR. SOMERVILLE: Except that in this case -- in the Olympics, they at least throw out the outlier scores. They don't count the Romanian judge on this side or the Canadian judge on this side, okay? They take the scores -- they throw out the outliers.

THE COURT: But that's not provided in the regs.

MR. SOMERVILLE: That's not provided for here. And also --

THE COURT: And I don't know if it -- you know, it might be a wise thing to do, but I don't know if it's a necessary thing.

MR. GREEN: Well, what is necessary, though, Your Honor, is for them to comply with their rules. And that's what we're dealing with here.

THE COURT: Okay. How did they not comply with their rules, because they didn't have a scoring system?

MR. GREEN: They did not use any scoring system. Ultimately, they jettisoned the scoring system that satisfied those requirements, however impaired it was -- and it was shown to the Court it was -- it was nevertheless a scoring system that satisfied the procedural requirements set forth in their own regulations.

So it's incumbent on them to come up with a scoring system if they're going to jettison South Alabama, because nobody -- everybody in the room knows that it wasn't reliable. But it's up to them to come up with a scoring system because the commissioners are supposed to be using that along with everything else they're evaluating in determining ranking, not just, as I call it in my pleading, a spit ball ranking system. That's not what's called for.

MR. SOMERVILLE: I'd like to add, Your Honor, to his point, there is no indication in anything they have done yet in any of these votes, whether it's on June 12th, August 10th,

December 6th, December 12th, that they applied these statutory criteria for whatever license category they are issuing them.

And there's also no indication they've told any applicant why they didn't get a license or why they got a license. There is nothing.

THE COURT: Do they have to do that?

MR. SOMERVILLE: I think they do under the Administrative Procedure Act. They've got to -- under Section 41-22-12, they have to provide you with a notice stating the matters asserted, what the statute is.

They want us to walk into this investigative hearing process with no idea why we weren't granted a license, somebody just didn't like us. Did they -- did somebody have the wrong tie on that day? We don't know.

And so the investigative hearing process -- we've got to figure out what it is we did wrong where we didn't get a license. There's nothing that's told us why we didn't get a license. There's no indication that they've ever for any category applied the very clear statutory mandates to any of this. And

that's the over-riding problem that I think everybody is talking about is that there is no notice of anything.

MR. GREEN: I do want to -- before I yield the floor, I want to say this for the record. I know Your Honor has been through the ringer in this for the last six months. And I absolutely understand as an officer of this court that the last thing Your Honor wants to do is to stop a process that has been the subject of constant litigation and constant struggle and struggle taking place right before your eyes. And I fully respect that.

And I would submit to the Court that the evaluation that has to take place here is to what degree is it apparent that there is a significant legal infirmity in what has happened over the last -- on December 12th, to what extent does Your Honor believe -- as we fully believe -- that this is not a close call.

This is not what we were dealing with a couple of months ago when Mr. Mills and Mr. Somerville were arguing is it a rule, is it not a rule; those kind of things that perhaps are subject to some debate. They did not

comply with regulations .10 and .11.

There's no way they can stand up here and argue they did. The ranking system is not a score. It's not scoring that's in the blind. It's not scoring based on impartial numerical criteria. That's just not even a close call.

And the only argument, the only -- I'm sure the commission will have something to say about this -- but the only argument of record right now is an argument made by Trulieve who's come in here and said, oh, well, the emergency rule just canned all of that, canned .10 and .11, jettisoned it, completely set it on fire. That's not right.

There's nothing in the emergency rule that says that, number one. Number two, the emergency rule in fact contemplated that the South Alabama scores were going to continue to be used, so that's just a nonstarter.

So my point is I know Your Honor is -- and I respect it fully -- it's hard to want to stop a process like this. And I don't make these arguments lightly, but this one is not a close call legally. I did want to say that for the record.

THE COURT: Before I ask the commission to respond, does anybody else want to --

Mr. Ragsdale.

MR. RAGSDALE: Your Honor, we obviously join in the vast majority -- not the part where he sucked up to you -- but the rest of it.

MR. FOX: Your Honor, part of my client does join in that.

MR. RAGSDALE: Well, okay.

But, Your Honor, my client -- you may have noticed, I moved on the other side of the room.

THE COURT: Right.

MR. RAGSDALE: Right? We went through this process. Insa of Alabama complied with every rule they gave us, every one. And in August, we get voted number one. We're so excited.

And then they decide in order to keep Mr. Somerville from talking anymore -- and it didn't work -- to jettison the only objective standards that were in and required by their rules.

You know, I think it's important.

Previously -- and I think Wilson makes this point -- previously, there were arguments about this is how they should do it. This is how it ought to be done. This is how it's fair. In this case, it's their own rules they violated.

It's their own rules that require the objective criteria that Wilson has talked about in terms of scoring. And they made the decision, rightfully or wrongfully, to jettison those. But that's not really our argument. The argument is they had to replace it with something that met their own rules.

This isn't is debate about whether the South Alabama scores were accurate or complete or inconsistent -- they may have been all of those things -- but the point was the rules adopted by their own organization require objectivity, and with good reason, because without those objective rules, it becomes a political popularity contest. And that becomes arbitrary and capricious by its very definition.

And so we join in with the request for an injunction and a request that they -- the commission -- be required to comply with their

own rules in this instance, because Insa has complied with those rules at every step, and it cost us in the end.

THE COURT: Is there anybody else?

MR. ESSIG: Judge, the only thing I want to add is, on behalf of 3 Notch Roots, we've raised the First Amendment issue regarding your order and regarding the settlement agreement. And I know that issue was raised at the hearing.

And, Judge, forgive me for this, but I want to quote from Bill Espy, a comment he made at the end. And, Judge, there was discussion about whether or not the settlement agreement was going to keep people from talking about scores at the presentation. And I think the Court's statement was that it wouldn't. But I think Mr. Espy got this right. And he says: I don't know how you can get up and talk about a score that know one is supposed to -- so no one on the commission is supposed to talk about your score or do anything about your score, then you're going to get up and say your score? I don't think you can do that. I think that would violate the order.

And, Judge, I think the point on the First Amendment is because the commission -- and this issue really become ripe in the way they handled the awards -- because the commission discarded the scores, what that meant was, you could go in there and you could articulate in your presentation -- for example, my client. My client is the largest seller of medical cannabis in the world. They are publicly traded in Canada. They have gotten licenses throughout the country. They've gotten licenses internationally.

Their application materials that they submitted to the commission were, in many instances, a template of what they've done in other places. One of the areas where they got an F in one of the rounds of scoring was in their security plan, a security plan that has been used to award licenses everywhere, a security plan that's used day in, day out.

One of the things my client would have liked to have done had they not gotten new scoring and would like to do going forward is go into the commission and say, let me explain to you why the F you gave me or why the F I

received by the third-party scorers is wrong. Let me give you the objective criteria that would demonstrate to you that that F should be an A. And let me demonstrate to you how if we get the points for the A that we should have gotten, we get two hundred more points. We move into the top three. You should award us a license.

Now, certainly, right now, there's nothing that prevents us from saying that. There's nothing that prevents us from going to the investigative hearing and saying it. But as Mr. Espy pointed out, they can't consider that. They can't consider that.

If during their deliberations while they're awarding licenses, had my client made that argument and had a commissioner said on the record, you know, I heard 3 Notch Roots' argument about their plan and how they should have been scored higher, I like that argument. Based on that argument, I'm going to rank them second.

Had they done that, that would have been a commissioner considering the scores. That would have been a violation of your order.

That would have been a violation of the settlement agreement.

I'll wrap up here in a minute, and I think it's the only point I want to make in addition to Mr. Green, because we agree a hundred percent. I agree with all these arguments. They're all in our papers. But the point is, is that the petition clause of the First Amendment does not just give you the right to go and say whatever you want to to the government. It gives you the right to have a redress of grievances. That's what the First Amendment to the Constitution says. That's what Alabama's Constitution says.

When the governing body you're going to go make those arguments to decides beforehand we're not going to consider those arguments, and we're not going to take those arguments into account when we're awarding licenses, that is a violation of the petition clause. It is essentially a restraint on your speech.

And what I would say here, Judge, is it's more egregious here in this case because what they're saying they will not consider, no matter how well you say it or no matter how

well you articulate it, what they're obligated not to consider is something that's in their rules.

That's the problem with this piece, and that's why it violates the First Amendment.

THE COURT: Well, I think the First Amendment issue -- I thought I was clear I wasn't restricting what anybody could say.

MR. ESSIG: Yes, sir.

THE COURT: And you could argue. And you've got a -- we're dealing with semantics when you say what the intent was by disregarding the scores. I think you could argue that. But they weren't going to be bound by it, I think everybody understood, because of some allegations of problems with those scores.

MR. ESSIG: Sure.

THE COURT: What I'm hearing from your basic argument is, although we might have all agreed that the South Alabama scores for whatever reason were flawed and weren't to be used, the rules and the regulations require some scoring.

MR. ESSIG: That's correct.

THE COURT: And you're saying that the

ranking the commissioners gave didn't take the place of that.

MR. ESSIG: That's correct, Judge.

MR. GREEN: It's not a score that's based on the statutory and regulatory criteria using an impartial numerical process --

THE COURT: Right.

MR. GREEN: All that stuff. It's been in their rules from day one.

MR. SOMERVILLE: I'd like to add something to all that.

So when we were having those negotiations in September, October, whatever, we made some suggestions that they take the statutory criteria that are clear -- if you look at -- I'm going to read you a couple.

This is the criteria for the cultivator license, Alabama Code Section 20-2A-62. And it says these criteria are applicable to cultivators, and, by extension, integrated facilities.

And there are other criteria like this that apply to dispensaries, that apply to processors, that apply to transporters, all that kind of stuff, and there are a few others.

But this is pretty simple. And you can imagine how it would be pretty easy to devise a set of criteria -- scoring criteria that would satisfy these requirements. One, demonstrate the ability to secure and maintain cultivation facilities; two, demonstrate the ability to obtain and use an inventory control and tracking system as required under Section 20-2A-60; three, demonstrate the ability to commence the cultivation of cannabis --

THE COURT: Slow down just a little bit. Mary is writing it down. Just slow down.

MR. SOMERVILLE: -- within sixty days of application approval notification; four, demonstrate the ability to destroy unused or waste cannabis in accordance with rules adopted by the department -- and that's not the commission. It's the ag department -- demonstrate the financial stability to provide proper testing of individual lots and batches; D, a licensed cultivator shall comply with all the following in accordance with rules adopted by the department.

We haven't talked much here previously about the ag department rules, but they are

pretty clear and also provide bases for scoring and analysis.

All facilities shall be protected by a monitored security alarm system, be enclosed and remain locked at all times. All individuals entering and exiting the facilities shall be monitored by video surveillance and keypad or access card entry.

There are a couple of others ones, but the point is these criteria are not that extensive. They come directly from the statute. There are some other ones that are in the regulations issued by the commission. There are others in the regulations issued by the Department of Agriculture. And that's what we suggested in the fall that they substitute the scoring system. That was just never done. But it has to be done in order for them to comply.

These criteria have to be complied with in order for this process to move on.

MR. ESSIG: Judge, one more point, and I'll be brief.

I think one of the questions that you asked at the start of Mr. Green's argument was, you know, can commissioners just decide, you

know, I like your tie better than somebody else's tie. And I suppose in the head of an individual commissioner, when it gets time to vote, whether they're considering scores or not, I suppose that is true.

But the reason that the rules call for both an objective blind process and a subjective process which allows the commissioners to use their discretion is that when you get to the point that we are now, when you get to the point of awards where you've got to go through the investigative hearing process; and then if you don't win there, potentially come back to court and demonstrate that the commission has been arbitrary and capricious, without objective factors to point to, you have nothing to talk about.

If it is purely a speculative process, which is not impartial -- which is exactly what occurred when they awarded licenses in every category in December -- when we all go to investigative hearings, if we do that, we really don't have much to say.

They can't consider the scores. We can talk about the scores until we're blue in the

face, but it's not going to win us any points, and it can't be something they can use to issue or award a license. And other than that, it's really just maybe a repeat of the presentation.

And then we get through the end of that process, and we have to come back to court to demonstrate some level of arbitrary and capriciousness. We've got nothing but the commission's subjective intent at the time that they created this ranking system, as Mr. Green pointed out, which was no scoring.

So, just generally, when we look at the framework of the rules -- again, there's a subjective component and there's an objective component. And without the objective component, there is no way for us to argue and represent our clients in a way that keeps them honest.

THE COURT: Anybody? I'm going to get y'all in a second. Anybody else from the folks as to why I should grant a TRO?

What we're going to do is we're going to take a five-minute break, and then I'm going to hear from the commission. Okay.

(Short recess)

THE COURT: Okay. Mr. Jackson.

MR. JACKSON: Judge, they talked a long time, so I'm not sure where to start, but I'm going to start with this.

This is a classic heads-I-win, tails-you-lose situation. They made a strategic decision, apparently, to see what happened at the commission meeting on the awards, and now that they were unsuccessful. Now they're running to court.

Mr. Green actually helped me draft the order that you entered following the settlement agreement. This, I'm shocked, I'm shocked, it's like Casablanca where the police officer is shocked about the gambling in the rear room.

THE COURT: They had the usual suspects.

MR. JACKSON: Exactly.

So nothing was said. You know, when the settlement was announced, when we hammered out the order, when you entered the order, nothing was said about a new scoring system needs to be put in place of USA, nothing about that whatsoever. And not until -- and they made that strategic decision. They could have filed

a motion for a TRO the day after you entered your order, any day between then and when the commission took action, but they didn't. They sat. They sat, and they hoped that they were going to convince the commission to give them a license -- an award -- and that didn't happen.

And now they've got the fall-back of we'll just throw everything we can throw at the judge and see what sticks. That's where we are. So I want to point that out at the beginning.

The next thing I want to point out is this is just the same argument about scoring coming back full circle. You will remember very well that -- all the argument about scoring on the front end was how horrible it was and that the commission is using it as the end-all be-all. That's what the licenses are going to be awarded upon based upon scoring, nothing but the scoring.

We kept telling you, no, Judge, they've got discretion to accept whatever part of the scoring they want. It's just an informational piece.

And now they're coming around, now they want a different scoring system. And they want

this different scoring system, not to be a component, but, again, to be the end-all be-all and that the commission is bound by whatever this new scoring system is. So it's just the same arguments regurgitated on the back end now that they've lost.

Now, getting into more of the heart of the latest pronouncement by the commission on how the thing was going to proceed was the emergency rule, which, by the way, during the public comment period, no objection, no attempt whatsoever to enjoin that at all going forward. And that is the latest pronouncement of the commission.

The emergency rule starts with notwithstanding any other provision of these rules, talking about all the rules, the original rules they are talking about, .10 and .11, this is what is going to happen.

And I think it's paragraph five of that talks about, basically, the USA scoring and the fact that applicants can comment on that and say why my score should be, you know, better than what they're showing, blah, blah, blah, all that stuff.

And I think it's paragraph six that talks about the ranking that the commission is going to do totally separate, you know, from the scores.

We did enter into the settlement agreement. The settlement agreement stated that a scoring system would not be used. So that paragraph five was enjoined. Paragraph five is based upon .10 and. 11.

I mean, he's right that the emergency rule 5 said we're still going to consider -- the commission can still use as information the USA scoring. Y'all in letter brief or presentation or whatever can make whatever you want to of the scoring to the commission. That was all enjoined, taken away.

What that left of the emergency rule was the ranking system that the commission used. And they went to the letter. They did exactly as the rule says -- as the emergency rule says. And that's what it was, a ranking system. It's not a scoring system. They think that their ranking was the end-all be-all.

I think it was Specialty, an integrated facility, I believe they were twenty-ninth or

thirtieth, but they got an award. So, just like we told you on the front end, now we're telling you on the back end, this whole idea of scoring is not a be-all end-all. All it ever was was an informational piece, a component of what the commission would consider.

Now, there's an assumption on their part -- and they're really good about making bad assumptions -- there's an assumption on their part that because there was not this scoring system, right -- this impartial scoring system, whatever -- that the commission did not take into account any of the statutory factors.

Justin Aday is the in-house attorney for the commission. And before each one of these meetings, first, for the nonintegrated, then for the integrated, briefed the commission on where we were and how things were going to proceed and emphasized that y'all need to consider the statutory factors. In everything you do, at the end of the day, the end-all be-all is the statutory factors and that y'all need to take these into consideration when you're doing your rankings to take up.

So this assumption that the commission

somehow because they didn't have a scoring system did not take into account the statutory criteria, the statutory factors, is nothing but pure speculation, especially in light of the fact that Justin briefed them on both occasions.

To my first point, integrated facility people watched that whole process for the nonintegrated people, the presentations, what the commission did in terms of ranking, how they took up applicants. And there was time in between dealing with the nonintegrated folks and the integrated folks for them to come back into court, saying, Judge, we just saw a train wreck and before the train wreck happens again, we want you to enjoin it.

MR. SOMERVILLE: We did.

MR. DUNGAN: We did.

MR. JACKSON: No, they didn't.

MR. SOMERVILLE: I did.

THE COURT: Wait, Mr. Somerville.

MR. JACKSON: Well, Jemmstone did.

The point being, again, they can't show any irreparable harm because they watched this process and they basically acquiesced in the

process.

The other thing that's missing is you haven't heard of them say any of these people that were awarded should not have because they didn't meet the statutory criteria. Now, that can be part of the investigative hearing.

Again, it shows no irreparable harm now. There's no reason for you to enjoin anything because they have an opportunity in the administrative hearing -- the investigative hearing to bring out whatever it is that they want to bring out. And so they've got that opportunity to do that.

The other thing that's missing -- and I think I did touch upon this -- they keep talking about this was supposed to be purely objective. No, it wasn't. The rules and the statute both say that the commission has discretion in making the awards. All they've got to do is consider the statutory criteria; otherwise, they've got discretion. And you haven't heard them say that any awardee was not qualified, was not suitable to get an award.

So there's no allegation or proof at this stage whatsoever that somebody -- licensee -- I

mean applicant A should not have gotten an award. They haven't said that. There's an absolute lack of proof or allegation of that.

The other thing I would note, Judge, is that your -- the settlement that we reached -- and the courts encourage settlements. I know Your Honor encouraged us to settle it, and we did -- the settlement agreement would not mean anything if the commission then had to do what they're talking about and be bound by that, because what that would do away with is their discretion.

So they can say whatever they want to say about it being it's supposed to be totally objective. No. It's totally discretionary is what it is. As long as they find that an applicant was a suitable applicant based upon the statutory criteria, they could go ahead and award.

Once they issued five in the integrated facility category, they couldn't issue any more. Simple. That's just a matter of fact.

(Brief interruption)

MR. JACKSON: I think I misspoke previously when I said paragraph five of the

emergency rule. I meant paragraph four.

What was left was paragraph six that talks about the ranking and the order that the applicants will be taken up.

But one thing I would note about this emergency rule in paragraph five, 5(c) says the commission remains the primary decision-maker with regard to licensing and each commissioner retains full discretion to act independently of the previously generated third-party scoring and evaluations in applying the statutory and regulatory criteria.

So it's total speculation on their part that the commission -- each individual commissioner and the commission as a whole did not make evaluations and determinations applying the statutory and regulatory criteria.

Judge, the other thing I would note is that back in August when we were here, Jemmstone filed this on August 23, 2023. It's document 230. And basically what Wilson Green put in his pleading was, assuming the Verano case results in an adjudication which recognizes the validity of the commission's actions in voiding the June 12 license award,

the commission will proceed to consider license applications in a series of open meetings to be conducted as follows. The procedures outlined below would apply to integrated facility applicants but could be adopted for other license types. And then it goes through a proposed plan of action, so to speak, a proposed procedure, which is exactly what the commission did when it met on both times, both with nonintegrated facilities and with the integrated facilities.

So it's somewhat disingenuous now for Mr. Green to come before the Court and say, oh, that was all wrong. What I really meant to say is that there should be a new scoring system that they should develop before they meet again and make awards.

The other thing that's left out that I continue to bring up and remind the Court of is what we're talking about here is a privilege. It's not a property right. It is a privilege. And the commission has discretion to award these privileges -- these privilege licenses as they see fit, with or without scoring.

Even if there was a substitute scoring

system, the commission doesn't have to follow it. It's not the end-all be-all they want it to be. They want to evaluate it to be, that's it, I was number one; I should get a license. That's not all the commission has to take into account, but that's what they're trying to get the Court to buy into.

Judge, the answer here is not to stop this process, it's to allow it to go on. The ones that wanted to have requested investigative hearings. Those investigative hearings should proceed in due course.

We don't know what's going to come out in investigative hearings. We don't know what's going to happen. Nobody has got that clairvoyance. They can't assume the worst, so to speak, for their client. All that would be is an assumption. All it would be would be speculation at this point.

What they're trying to really do is to avoid that process, avoid an appeal, and they want you to stop the process now. They simply have not made the showing to show that they are entitled to a TRO at this time.

We do think, Judge, this Verano issue is

in pleadings of at least four of these people, Southeast, Pure by Sirmon, Theratrue, Yellowhammer. We think that's low-hanging fruit.

We think it's very easy for the Court relying upon what the Court did in the Verano case to deny the relief sought by those four in their filings, that they can in fact go up on appeal and try to get consolidated with Verano. That seems to us to be low-hanging fruit and something that the Court should do.

THE COURT: And I'll say I'm inclined to do that, but I want to hear why I should.

MR. BROM: May I just --

MR. ESSIG: You go ahead.

MR. BROM: I'll just say this one thing about that. There are factual differences in the Verano situation and the revocation that occurred on October 26th. We have our filings pending. There are no responses filed yet -- they're not due -- but we don't have any responses yet, so until we can even have that discussion of their response, a hearing to see what -- and appropriately build a record, it certainly

would be inappropriate for the Court to be making any determination before we even have a filing.

THE COURT: That's what I was going to say. I'll let you put whatever you want on the record. I'm letting y'all know I'm inclined to go with what I ruled previously, and y'all can point out, I guess, at another time.

MR. BROM: Yes, sir.

Your Honor, I would also just point this out that Mr. Green has correctly stated this since the very beginning where he -- I don't know if people have been listening to him, but he has been whispering in the corners, the Verano problem.

This is the very reason why at this point today we really have no other options other than a stay of further proceedings because the Verano problem -- and I'm just summarizing that meaning all of these legal issues -- regardless of how these legal issues ultimately get resolved, I don't think anybody can legitimately say that these are all baseless, without merit arguments.

These arguments have to be resolved. And

what we have been doing here so far has been digging the hole deeper. We just keep kicking the can down the road, and we keep ignoring the Verano problem, which is all the legal challenges that have to get resolved.

What on Earth are we going to do if we start issuing integrated facility licenses, six months from now, an appeal court says that was wrong, are we going to start tearing down buildings? Are we going to start calling back licenses? I mean, are we going to make criminals out of the people who now have a facility full of cannabis without a license? I mean, these issues have to be resolved.

And I understand the commission wants to just ignore them and just issue licenses, but if we don't do the responsible thing, which is hit the pause button, address these legal issues definitively so that we can move forward, all we're doing is delaying the inevitable, which is we're going to be back here every six months doing the same thing over and over and over.

We've got to stop the merry-go-round and just say we're hitting the pause button. We're

going to address these legal issues. We're going to let the appeals go up. And then, once we're done, then we can move forward.

Until then, we're just wasting our time, Your Honor.

MR. DUNGAN: And I --

MR. MILLS: Hold on, Judge. Can we finish our argument, because I'm waiting for Mr. Jackson to get through.

MR. JACKSON: Yes, I mean, I kind of got cut off, too.

THE COURT: And I think -- I don't --

MR. BROM: My apologies.

THE COURT: I don't want to belittle that. That's an issue I'm going to get to at the end about -- because that's why I asked Mr. Main where we were on the appeal.

MR. JACKSON: So, Judge, what the commission wants -- what the commission wants is product out to the people that need it. That's what the commission wants.

Verano asked for a stay at Civil Appeals, and they said -- they told them no.

Okay. That's what the commission wants, to issue the licenses, to get them up and

operational, to get the product out.

The needs of the public outweigh any needs these people that are seeking a privilege license have, and that's paramount, the needs of the public.

And that militates towards staying anything and issuing a TRO. Let things progress.

THE COURT: Mr. Mills.

MR. MAIN: Your Honor, just so we have a clean record. On behalf of Verano Alabama, we did not request a stay in the Court of Civil Appeals. That was another litigant in the master case.

MR. MILLS: Judge, Wallace Mills for Specialty Alabama.

Plaintiffs are coming to court today asking for equitable relief, but they come with unclean hands.

They come with unclean hands because they knew about the process that the commission was going to use, if not during the mediation in this court, because it was a part -- some of these things were part of the mediated agreement -- then certainly on October the 12th

when the commission adopted that rule.

Now, that's ten weeks ago, all right? They didn't come in here complaining about it. They participated in the process, okay, that they now say that they want relief from.

Not only did they participate, they allowed the commission to invest in the process. They allowed all of the applicants to invest in the process, okay?

So now they want you to grant them equitable relief in a process that they materially participated in. They didn't bring it when they should have, okay, so that gives them unclean hands.

Second of all, if their argument is that that the commission didn't follow their rule, they still have to exhaust their administrative remedies.

The Administrative Procedures Act gives one exception to the exhaustion of administrative remedies; and, that is, if you're arguing as we argued earlier in this case and was argued that the government entity is using a rule that it didn't put out for public comment and pass appropriately;

otherwise, you've got to exhaust your administrative remedies.

Now, I'm a little bit of a simpleton sometimes, but I do know that the Court in evaluating --

THE COURT: You don't want the Court to take notice of that?

MR. MILLS: You may if you like.

MR. RAGSDALE: No objection.

MR. MILLS: So I do know that the Court has to look at the plain language of the rule or statute when interpreting it, okay? So they're complaining mostly when they're talking about this blind scoring process and they've got to replace it and all of that, so Rule 3-10 says at least a portion of the review shall be conducted under blind conditions, and they have to be ranked or averaged using an impartial numerical process.

Well, they did that. We've been in here and talked ad nauseam about that process. They sent it down to South Alabama. That was a blind process. They were numerical values assigned and all that.

The problem is -- and the lynch pin in

their argument -- is this. They say, well, now you've got to replace it with something else. Well, no, you don't because the rule -- the plain language of the rule says any independent consultant selected by the commission will provide recommendations for the commission to consider, but the commission shall not be bound by that recommendation, and the decision as to the final approval or rejection of license shall remain the province of the commission at all times.

So, in the very next sentence, where it says you've got to have this scoring process and part of it has got to be blind, it says, but they're not bound by it.

So when they came in here in the mediation and agreed for you to enter an order saying they're not going to consider the scores, they complied with the rule. The rule doesn't require them to replace that with another scoring system. It absolutely does not.

So the plain language of this rule the commission has met on each point. They have done each part of this. So they've not violated the rule.

All right. Now, the emergency rule, paragraph five, that language that talks about how they're going to -- they can still rely on the scores, that's permissive. That language is permissive. It says they may -- I believe may or something. It doesn't say they have to. I mean, that would defeat the point of having the rule and having these presentations and all that. So it's permissive.

They didn't violate that rule either. There's nothing in that rule that says they have to replace it with a whole other scoring and numerical system. They don't.

Even if they did replace it with a numerical system, according to 3-10 they wouldn't have to follow it. And they have now complied with their statute.

I guess -- you know, I don't know that it needs to be addressed, but this First Amendment issue. You know, it occurs to me that people go and protest out in front of government buildings all the time asking government entities to do things that maybe the government entity can't do. It might be illegal for them to do.

They say, well, we couldn't say to the commission, hey, we had a great score; or, hey, let me explain our bad score, because they couldn't consider it. Well, the protesters on the sidewalk can still say what they want to say even if the government agency inside the building can't do what it is they're asking them to do. That is not a violation of free speech. It happens all the time.

That's all. Thank you, Judge.

THE COURT: Anybody else? Mr. Webster, do you want to add anything?

MR. WEBSTER: No, sir, Your Honor.

MR. GARRETT: I actually would like to say something, Judge, if I may.

THE COURT: Mr. Garrett.

MR. GARRETT: I practiced law with a guy that went to Harvard Law School, believe it or not, and he got out of the practice of law. And I said, Upchurch, why did you do that? And he said practicing law is like killing mosquitoes with sledge hammers.

The Legislature said the people need treatment. Flowerwood has been given three licenses. It's time to land the plane.

Thank you.

THE COURT: You're putting your sledge hammer down?

All right. Mr. Jackson.

MR. JACKSON: Judge, I do want to address one thing that Mr. Somerville raised.

He said something about we don't know why people got licenses. We don't know why we were denied. We weren't told, blah, blah, blah. You asked the question did they have to do that. And he said yes.

What he's basing that upon is his contention -- he's made this contention before we got here today -- is that this is a contested case. And so, on the front end, all those niceties, so to speak, all the bells and whistles of a contested case have to be present before the commission can award.

But the statute, the AAPA, makes it clear when you have a multi-stage proceeding like this is with an investigative hearing on the back end that the governmental agency can provide that on the back end with the findings of fact and the reasons and all that kind of stuff.

So I just wanted to point out to the Court -- I just wanted to address to the Court that argument, that this is not -- our position is that this was not a contested case on the front end up to the awards; and that on the back end, it will now be a contested case with the right of the other parties to intervene and all of that.

THE COURT: I was asking -- let me ask. That's a part of the administrative remedy that would be available to them?

MR. JACKSON: Right.

THE COURT: Okay. Mr. Somerville.

MR. SOMERVILLE: May I address that, Your Honor?

THE COURT: Sure.

MR. SOMERVILLE: He's talking about the final order, that's, I think, 41-22-15. 41-22-12 says that they have to give us notice of whatever they're contending beforehand, issue charges, explain why somebody didn't get a license, whatever it is.

We're going into this thing totally blind, and that does violate the Administrative Procedures Act.

Another thing he said, he made -- he keeps -- and part of it is based on this right/privilege distinction he keeps making. If I can figure out how to work this video game console I have here -- Section 41-22-19 of the Alabama Code, which is part of the AAPA, says the provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension or renewal of a license.

If you read down to the comment accompanying the section, they quote case law that says: We need not enter into a discussion whether the practice of law is a right or a privilege. Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons.

That's the rationale behind the Administrative Procedure Act. And whatever else you say, the AAPA is applicable to the proceeding that we're about to enter into, okay, and there's no way they can comply with the requirement of a notice in advance of the

hearing because nobody knows -- even the commissioners don't know -- why we were granted or denied licenses. There's no way to go back and recreate that.

We will be -- that happened at a specific instant in time that cannot be recreated. Maybe they didn't like my tie. I was wearing a different one that day. But there's no possible way for anybody to go back and figure out why my client didn't get a license, why Wallace's got a license this time -- he was probably wearing that suit, but, I mean, I don't know. But there's nothing, no findings. There was no deliberation.

And getting back to the college football play-off analogy that Mr. Jackson made last time, the people on the college football play-off committee knew that their decision to choose -- was it Alabama over Florida State?

MR. RAGSDALE: Yes, it was Alabama.

MR. SOMERVILLE: That was a kind of a -- anyway, they, unlike the commission, had an explanation ready to go why they chose Alabama over Florida State, why they chose Texas over Florida State. And the commission is not going

to tell us why they chose Alabama -- why did they not chose Alabama Always over Florida State, okay?

And the point is that we're going into this investigative hearing process, the process is irremediably flawed for the reason that we don't know why we didn't get a license. We are going to be punching at shadows. There's no -- not even a semblance of due process.

And we keep doing this. We have argued from day one that the commissioners need to make their decision based on the statutory criteria. That was in our first complaint. It's in our second complaint, third complaint, fourth complaint and fifth complaint.

Every time -- whether it's a violation of the Open Meetings Act or the Administrative Procedures Act, or whatever, they get a do-over. Okay. It's like fishing with a catch and release program. Okay. Catch a fish, throw it back; and the fish keeps jumping back in the boat, okay? This is going to continue happening until this Court does something about it.

They accused us of not complaining about

this arbitrary and capricious ranking program. Okay. We didn't figure out until after they started engaging in the process with the lower -- with the dispensaries and stuff like that, but we went ahead and filed something in this court because we thought it was going to be an unfair process. And it turned out to be as unfair as we thought it was going to be.

We didn't wait around. We asked this Court for relief. The Court said it was premature. That's fine. Here we are again.

I want to -- something that sort of caught my ear. I heard Mr. Jackson say that Mr. Aday has been having meetings with commissioners about what they need to consider in the licensure process. I have not heard those discussions in public. I suspect based on what I just heard there may have been private conversations about that. We submit that that is likely a violation of the Open Meetings Act, and we need to --

THE COURT: It could be an attorney/client privilege.

MR. JACKSON: The fact of the matter is it was at the beginning of the hearings

before they took any actions when Mr. Aday briefed them in public. There's a court reporter record of it.

MR. SOMERVILLE: If that was the extent of it, then I withdraw that.

That's all.

MR. BROM: Your Honor, can I -- Steven Brom for Theratrue. I just want to address a couple of things that were brought up.

First, this representation that somehow we've just sort of sat back and didn't do anything, that's just procedurally not correct.

And I just -- our license wasn't revoked until October 26. We immediately undertook the actions that we were required to.

We filed a request for a hearing. I believe that was a twenty-one-day requirement. We filed a request for a hearing with the commission. We haven't received a response back from that.

I think they take the position they don't have to respond because they don't use the revocation. But, regardless, to protect our rights and to not sit on hands, as they falsely accuse us of, we went ahead and did it anyway.

We also filed a notice of appeal, which again, they haven't responded to. So we didn't sit on our hands.

And, as Your Honor very well knows, we also filed a separate petition for judicial review seeking declaratory relief and injunctive relief. All of this was done prior to the December 12th vote Alabama, as they very well know.

So the suggestion by Trulieve and the commission that we sat on our hands and did nothing, that's just false. That's just not supported in the record.

And this other representation, well, you should have filed a TRO to shut down the December 12th vote, based on what? I could hear them laughing at me doing that. They would say, Judge, the vote hasn't even occurred yet, and he's in here claiming harm. Don't we at least need to see what the vote is before he can come in here and claim harm.

Of course any suggestion or attempt to shut down the vote before it even took place, they would have said, Judge, that's speculative harm. They're going to have to let the process

play out.

And I think Mr. Somerville made that -- he attempted that. And Your Honor made the ruling it's premature. We're going to have to wait until this plays out. And now for them to suggest, well, you've waived it by you didn't act timely.

And the settlement agreement, as Your Honor very well knows, we objected on the record. It's noted in the -- all of our objections, arguments, they're all preserved, okay?

And throughout this process, we have done exactly what we were asked by the Court. The Court has asked all of us, please meet. We'll make some space available. Please meet. Y'all try to come up with some solutions here. We did that in accordance with the Court's instructions.

And now what I'm hearing from Trulieve and the commission that instead of complying with Your Honor's wishes, instead of meeting with the parties and giving everybody a fair opportunity to hopefully try and come up with a resolution, we should have been standing up

screaming, absolutely not. We're not going to participate in any of this, and we're objecting to anything; and I'm going to go file a TRO this afternoon, every step of the process, anyway, I think it goes without saying, that's inappropriate and absurd.

They keep saying we haven't exhausted our administrative remedies, I guess, being the investigative hearing process. But I think it's already been established they intend to issue licenses on January 9th.

This investigative hearing process, it can't even take place the earliest until February. They have some rules that they adopted that don't even take place until February, so they want us to seek an administrative remedy that is meaningless because the licenses will have already been issued.

Further, we don't even have rules. There used to be a form on their web site to seek an investigative hearing. That form, without explanation, it disappeared from the web site.

When certain parties like us contacted them and say how do we request an investigative

hearing, your form disappeared. We got the generic email back that said, well, you just email us at applications.

And then they also said -- I didn't get this particular email, but they sent it to others -- and we will also provide you with further information about how the process is going to work. To my knowledge, I haven't received that. To my knowledge, I don't think anybody has received this email about how this process is going to work.

So they want us to wait for an exhaustion of an administrative remedy. We don't even really know what that is yet. We don't have a process in place for it. And, oh, by the way, they will have already issued all five of the licenses and allow those parties to commence operations while we're just supposed to sit on the sidelines and wait.

I mean, wouldn't we really be doing exactly what they're now accusing us of, sitting on our hands and not doing anything.

So we don't file a TRO; we get attacked for sitting on our hands. We file a TRO; it's premature. Well, which is it?

THE COURT: Let me ask, did you want to put this in the record, mark this, this ranking?

MR. BROM: Might as well.

THE COURT: Why don't you --

MR. FOX: Your Honor, it's an exhibit to Mr. Green's complaint.

THE COURT: Okay. It's in the complaint?

MR. GREEN: Yes, it's Exhibit 3 to my complaint.

THE COURT: Okay. I just want to make sure it's in the record. And that's your only copy, so we'll give it back to you.

MR. BROM: I'll just make it clear for the record, Your Honor, what you're referring to is the integrated facility compiled application rankings as posted on the commission's web site.

THE COURT: Right, which is Jemmstone's 3.

Mr. Ragsdale.

MR. RAGSDALE: Your Honor, just to follow up a little bit on what my colleague said. Mr. Jackson puts it perfectly. We're

not allowed to assume that the worst would happen, right? Well, that's exactly what he's accusing us of having done. We should have assumed the worst back early. So, according to Mr. Jackson, we're both too early and too late. And it's got to be one or the other.

Now, I'm of the belief that it wouldn't have been a good idea for me to challenge the process when I was the number one awardee of the license. That seemed like a bad idea. My client advised against it.

Until you realize the process has worked out in the way that it has, I don't think you're an aggrieved party. And we now are an aggrieved party. We went from being number one to not even being in the top ten with no explanation, no change in anything other than other parties were allowed to make a presentation that also was not received in any fashion.

I think that the important criteria is the commission has to follow its own rules.

Mr. Jackson makes the point that it is ultimately discretionary with the commissioners; and that is true, but they put

in place rules to make sure that it was not arbitrary.

And there is a difference between discretionary and arbitrary. And in this instance, the rule they put into effect required the numerical scoring, the objective scoring, and, importantly, some blind element to it so that it was not a political contest. I know that happens in Montgomery from time to time, I've heard. But this commission, particularly because of its purpose -- and I laud Mr. Jackson for pointing out the public is waiting on this important medicine to get to them, but the State and the Legislature recognized that that process had to have some integrity to it, and it had to have some objectivity to it. And it couldn't be just the same good ol' boy system that, frankly, has ruled in the past; and I say that as a good ol' boy.

And in this instance, the commission adopted the rules but then decided to disregard them, and that cannot be -- the rule can't be, you must adopt a system but because it's discretionary, you can just ignore the system

completely, or, more importantly, abrogate it completely, make it go away.

So I think that that process, as Mr. Green said earlier, is a pretty easy legal issue. They did not follow their own rules. They can't do that and then hide behind the discretionary nature of the award.

The last thing I would say about the investigative hearings -- and I think this is critical -- Mr. Jackson makes the argument that nobody here has made an argument that one of the five awardees should be kicked out. And, ultimately, that's what the investigative hearing is going to have to boil down.

It's going to do no good for my client to go in and say I was worthy. I've got to prove that one of the five was less worthy. And in order to do that, we've got to know what was the criteria that they used that put me out of the top five and put somebody else in the top five. And, right now, we have no guidance on that at all. And according to them, they don't have to give it to us.

How do we make the argument that number three should have been number ten and that

number ten should have been number three if we have no standards, no objective criteria.

At least with the scores we could argue, look, we scored way above them on pick-a-subject. We can't do that now. We have no basis whatsoever. And the rules require that they provide those to us before the investigative hearing.

I think that cries out for us being afforded the opportunity to do discovery in this case. And we have filed a motion asking for us to be allowed to do discovery.

We believe -- and believe there is sufficient evidence to support that there were open meetings violations involved -- not the one Mr. Somerville referenced -- but the fact that some number of commissioners met before the actual meeting and comments were shared and decisions were talked about before it went on the record.

We would like the opportunity to do discovery to prove that, because we think, as this Court has recognized, that would cause a challenge to the integrity of the meeting as a whole if that happened. And we believe that it

did, and we believe we should be given an opportunity to prove it.

Your Honor, this process has been flawed, to say the least. Mistakes have been made.

THE COURT: How much discovery are we talking about? Are we talking the one deposition Mr. Espy wanted?

MR. RAGSDALE: I need more than the one deposition Mr. Espy wanted. We think we should have an opportunity to do expedited discovery, some limited number of depositions. You know, this is not going to be a case that's going to be document intensive. I don't think there were a ton of documents exchanged. But it is going to require the oral testimony of some of the folks involved. We can do that quickly. We can get it done on an expedited basis. But without that, we're left handcuffed to be able to prove how we were mistreated in this process.

Thank you, Your Honor.

MR. BROM: Your Honor, can I just say one last thing.

It's been stated repeatedly by license winners -- I know, because I used to make this

argument; it was a lot cozier on that side of the room -- but we have, you know, the public need for the product. Well, the Court has to weigh the public's need for due process and the Administrative Procedures Act. And if there are violations and there are issues that need to be resolved, and if rule-making was not done appropriately, there are procedural due process rights that have not been complied with, those are a factor, too. The public's need for medical marijuana -- cannabis -- would not override those concerns.

And, in fact, the State of Alabama has operated for over two hundred years without medical cannabis where we haven't operated it, so, I mean, not to go down this road, but we've been doing due process rights for a while. And we have to take those into consideration as well. And the public's need for medical cannabis doesn't override these due process rights.

THE COURT: Mr. Green.

MR. GREEN: Judge, just as a couple of final comments, I think, I'm not going to try to cover things that have been covered ably by

other counsel, but Mr. Jackson had much to say invoking my name, so I do feel the need to say a few things in response.

As Your Honor is aware, you asked me on a number of occasions in this case to be the scrivener, essentially, for the group. I've happily done that and will continue to happily do that.

I think it is Mr. -- my friend, Mr. Jackson -- and I say that sincerely -- called me disingenuous for saying something earlier. I think it's disingenuous for Mr. Jackson to try to use my status as a scrivener for everyone's benefit somehow against me as if I were some active participant in the drafting of the mediation order as a litigant. I wasn't. My client never raised a scoring issue ever, ever in this process. And so I think that needs to be made clear.

Number two --

THE COURT: I never took it any way --

MR. GREEN: Nor did I. Nor did I. But I want it to be very clear on the record that I was simply acting as a scrivener and trying to help everybody get that order put in

place. And I have never on behalf of my client taken a position --

THE COURT: I will say -- I will say, Mr. Green, for the record, I've asked you -- I've told you what I wanted the orders to say.

MR. GREEN: Absolutely. Absolutely.

But I think that's important because I heard a lot from commission counsel about people making the strategic decision to see what happened and never -- never taking positions and basically trying to create the impression that they got blind-sided when they threw the scores out. And that's just a falsehood. That is not true.

As I say, it came as a shock to me when they threw the scores out voluntarily because they knew, I knew, everyone in this room knew, they had a set of regulations that had existed from day one drafted by Mr. Jackson's partner sitting next to him in this courtroom right now -- another friend of mine for thirty years from law school -- and they knew what their rules provided. They knew they had to follow those rules.

And to hear them now say, well, we really

don't have to follow the rules because the commission has the discretion to essentially take those scores and throw them out, what kind of process is that?

I understand that the commission can use its judgment and its discretion; but as Mr. Ragsdale rightly said, using one's discretion in making judgment calls is very different from not having the information at all at your disposal to consider or not consider.

The rules, mandatory as they have been, from day one, require that they do just that, that they score with objective data. So when they threw the South Alabama scores out, the obligation was on them to score and to score in the blind in the part and to score using statutory and objective criteria.

Now, the only thing I've heard in response to that, the only thing -- I was very curious to see what commission counsel would say, because, as we said, it's not close, dead to rights on the fact that they did not do this. And what I heard is what I thought I would hear, which is that the emergency rule just

takes all that and rips it out. That's what he's saying. That's what he's saying, notwithstanding anything else, notwithstanding any other provision of the commission's rules.

But read the rest of that rule. There's no reference to .10 or .11, no reference to .10 or .11. .10 or .11 wasn't affected at all by these rules, which means that when they decided to voluntarily throw the scores out, nothing in the emergency rule says you could just take your permanent rule and throw it out. They can't do that.

And so, as a legal issue, it's not a close case. As a practical reality, and given all of the Strum and Drang we've all gone through in all of this, you know, I understand the reluctance to not want to -- not want to get engaged, but the legal issue isn't close. This process is dead.

Thank you.

MR. BROM: Your Honor, are we going to ask him to define that for the rest of us?

MR. ESSIG: I think Mary is going to have to define it or use her spell checker.

Judge, one last thing, and then I --

hopefully, I'm wrapping it up for our side. A couple things I want to address that Mr. Mills raised.

First of all, if you look at our complaint, we do have a claim that the way that the commission decided to discard the scores and the way the settlement agreement and the order was done, we do have a claim that that is a new rule that violates the Administrative Procedures Act.

Mr. Jackson actually made that argument himself when he stood up and said when that settlement agreement was reached -- which, by the way, we objected, which, by the way, somehow bound seventy applicants that weren't even in this courtroom or part of that litigation -- now, my count may be wrong -- but he said it eliminated an entire paragraph from the emergency rule. That is a new rule, not subject to public comment, not subject to any sort of procedure under the Administrative Procedures Act. We do have a claim for that in our complaint.

The second issue I want to raise -- and you may be tired of hearing it, Judge -- is the

First Amendment claim. With all due respect to Mr. Mills, my client is not somebody standing on the street with a sign walking around making some argument about abortion or firearms or whatever else.

My client is a company who has expended millions of dollars coming into the state of Alabama. And once they were an applicant that was deemed submitted, they have a right under the statute -- they have a right under their rules that my client has complied with every step of the way to have an objective blind scoring process considered by the commission.

And it is a violation of their First Amendment rights if these commissioners cannot hear an argument they are statutorily and administratively obligated to hear. That is a First Amendment violation. It's not like an ordinary situation.

MR. BLOOM: William Bloom on behalf of Trulieve Alabama. I feel like Beetlejuice. If my name is said three times, I appear.

I think there's a bit of a misnomer occurring right now, vis-a-vis, irreparable harm. And that is frankly because plaintiffs

have been throwing so many arguments in the stew, notice and time to seek a TRO is becoming a bit confused.

So, as I understand it, there are essentially three big problems we'll call them. The first is the Verano problem, as we'll call it. That arose earlier in the process. That has been litigated. And, obviously, folks are on notice of that very early on, relatively speaking, in this process.

The second problem is the emergency rule, shall we say. Folks were on notice of that in October. And I will concede that Alabama Always did seek a TRO vis-a-vis the ranking procedure. However, they are the only ones to do so. And I would note they were the only ones to do so, despite the fact that, as we discussed previously, an entire iteration of that process occurred before the integrated proceedings began.

But, more importantly, though, when it comes to the throwing out of the third-party scores, that was known in late November. No one sought a TRO based on that happening. No one sought to stop that from occurring until

after the fact. And I can't read anyone's mind, but I have a sinking suspicion it was because folks thought it would benefit them.

I take issue with one thing Mr. Jackson said. It's not heads-I-win, tails-you-lose. It's heads-I-win, tails-it's-illegal.

There can simply be no irreparable harm when folks sit on their hands. And when you parse out the timing of when notice occurred for all the events that are being alleged at issue here, there was plenty of notice and plenty of opportunity to seek a TRO.

There was plenty of opportunity to object, as we've seen today, for throwing out the USA scores. That didn't happen until now because it hasn't benefited folks. And fair enough to litigate it.

But on the equities, there simply cannot be a TRO, which is what we're deciding today, as I understand it, based on that, based on folks sitting on their hands, based on folks hoping it would work out for them; and when it didn't, running to court.

That's all I have.

MR. DUNGAN: Your Honor, may I respond

to that briefly. Patrick Dungan for Southeast Cannabis Company this time.

I just want to make sure it's known to Mr. Bloom, because I'm sure it's been quite a heavy lift to go back and read nearly six hundred document numbers worth of materials that's been filed in this consolidated matter over the last six-plus months, not to mention all of the various other ancillary matters that were filed and consolidated and intervenors, but Southeast Cannabis Company has been here since August 18th on behalf of the commission hoping and begging and pleading the commission to stand in here and defend itself, which it never did until today.

Southeast Cannabis Company, on October 4th, filed a petition for writ of mandamus, a cross-complaint for equitable and declaratory relief. We asked this court to enjoin the commission, A, from taking any action to void or rescind or revoke the licenses that they issued on August 10th.

We also asked this court to enjoin the commission from adopting or imposing -- adopting or imposing any new rules that would

be retrospectively applied to this applicant pool.

So we didn't sit on our hands. We saw what they wanted to do. We didn't think they should do it. We asked this Court to tell them they couldn't do it. The Court said I think it's premature. Let's just see what they're going to do because you might win a third time, no harm, no foul.

That's kind of been the theme of this entire litigation is -- and that's -- as Mr. Brom mentioned earlier, that's why we weren't throwing TROs.

THE COURT: I don't think the timing on the TRO is off. I think that was the message that all of y'all had was to wait and see. And I don't think that now.

And I may -- I'm looking at -- I think we resolved the timing for the -- the other licenses dealing with integrated licenses and that's -- the 9th of January is the timing for that to go take place.

Now, so, I want to -- and do you want to add something else? I just --

MR. DUNGAN: Well, that was it. Other

than just also adding for the record that we -- Southeast Cannabis Company did also object on the record to the mediation -- to the settlement agreement.

THE COURT: What I see -- Mr. Green, I asked you during the break to come up with who all is asking for temporary restraining orders.

MR. GREEN: I --

THE COURT: Just make sure we have it.

MR. GREEN: Yes. Would you like me to read it?

THE COURT: Read it on the record.

MR. GREEN: The ones that I have are, my client, Jemmstone, which is document 2 in CV-2023-901800. Southeast Cannabis is document 540 in the master case. Yellowhammer Dispensaries is document 537 in the master case. Pure by Sirmon Farms, LLC, is document 11 in 2023-901802. Yellowhammer Dispensaries again, document 13 in 2023-901798; 3 Notch Roots, LLC, document 3 in 2023-901801; Alabama Always, document 40 in CV-2023-901727; Insa, document 559 via intervention in the master case; and Theratrue is document 520 in the master case as well.

MR. BROM: Your Honor, can I ask a basic procedural question? Theratrue -- we filed our original action separately as a new action. We then -- which is CV-2023-901653. We then subsequently filed a motion to consolidate with the Alabama Always master case, 231.

Since that time, I have been filing solely in the Alabama Always case and not in the original case.

THE COURT: That was something we realized today. And that's fine.

MR. BROM: Is that what you want us to do?

THE COURT: Yes. I'm trying to get everything consolidated into the master case so that we can all identify the documents we're talking about, so it's -- the commission has got a meeting, right?

MR. WEBSTER: In thirty minutes.

THE COURT: I want to just kind of go through something in my head. One, what we call the Verano issue. Okay. It's -- and somebody tell me if I'm wrong, but the law in this case right now is that the commission can

do that. I know y'all want to say it's different than the first time, than Verano's.

MR. DUNGAN: Well, Your Honor, I don't believe that's the law in this case yet. I don't believe there has been a ruling in this case yet on that issue. Verano was separate and --

THE COURT: The separate Verano case but not in this case.

MR. DUNGAN: That's right.

MR. BROM: And it would be premature at this time because no such filings addressing that issue have occurred.

THE COURT: Okay. But what I'm thinking out loud if I was to grant a temporary restraining order to restrain the commission from issuing licenses, I would have to make a different decision in the master case than I did in the Verano case.

And then I'm not sure if I'm going to wait on the Court to say, well, you might get reversed. I don't know if that's grounds enough to say a likelihood to be successful on appeal.

But I know y'all say you've got some other

issues you want to look at, so that's just my thought on that for a TRO.

And then I think, okay, if today I grant a temporary restraining order, it's only good for ten days. We don't have anything that's going to happen as far as the issuance of the license until the 9th of January. So if I were to issue an order today, it would expire before that time.

I know that --

Yes, Mr. Somerville.

MR. SOMERVILLE: Your Honor, I think the ten-day limitation is mandatory only when the TRO is entered without notice to the other side, by the rule.

THE COURT: But I also hear that there's a possibility some discovery that might lead to some clarifications of some issues.

And then we don't know what the commission is going to do today about what they decide. And is this -- is it purely administrative about the 9th? Is it something that the commission could say we're going to wait before we issue licenses?

MR. JACKSON: I believe it's purely

administrative at this point.

MR. ADAY: It's based on the timing of when they were awarded.

THE COURT: Nothing the commission -- unless they suspended --

MR. ADAY: Unless they stay the issuance.

THE COURT: You know, and I don't know if I were to stay if I would be early to issue something today. I may see what the commission does or doesn't do.

I'm just sharing with you my thoughts.

MR. DUNGAN: Judge, may I make a brief comment about the dispensary category.

We don't really have time, unfortunately, with a one o'clock meeting today and issuance tomorrow.

THE COURT: Well, I understand that. And I think on the dispensary, in my head, I've already said I'll deny the TRO because I think you've got an administrative remedy.

MR. DUNGAN: Even if all four licenses issue?

THE COURT: Yes. No, I'm getting it confused with the --

MR. DUNGAN: Cultivators.

THE COURT: -- the cultivators. The cultivator. The dispensaries is the other one, yes.

MR. DUNGAN: Okay.

THE COURT: So, really, that's Tuesday?

MR. DUNGAN: It's tomorrow.

THE COURT: Oh, tomorrow.

All right. Well, I'm inclined to let the commission meet and see what they say this afternoon before I enter any kind of order one way or the other. But you're dealing with a 24-hour -- we've got ten or twelve days on the integrated licenses.

As far as this issue goes on the lawsuits filed, what kind of expedited discovery over the holidays would you want, Mr. Ragsdale?

MR. RAGSDALE: I'm tied up on New Year's Day.

THE COURT: About four o'clock.

MR. RAGSDALE: Just for a religious ceremony.

MR. FOX: And, hopefully, January 8th.

THE COURT: That evening. That

evening.

Well, Mr. Somerville has been wanting discovery for two years.

MR. RAGSDALE: I know. But this is a real request.

I mean, with the cooperation of the commission, which I fully anticipate, I think we could get that done in the next ten days. Now, that's optimistic and probably unrealistic, but, you know, that's the balance, Judge, between whether they're going to insist on going forward with issuing the licenses on the 9th or do they want to give us a more leisurely approach with discovery. But we'll get it done with whatever time frame you give us.

MR. GREEN: I can only speak for myself. I'm spoken for January 2 through 4th with an out-of-state court who will send people after me if I don't show up.

MR. RAGSDALE: Which is not a bad alternative.

MR. GREEN: Well, some people might want that. I understand.

THE COURT: Mr. Jackson.

MR. JACKSON: Judge, we have not even addressed the discovery.

THE COURT: I know. That's why I brought it up.

MR. JACKSON: Yes. And it's in the pleading, but it's in the pleading just in the conclusory fashion that Barry stated it in open court. We think there were some shenanigans going on, so we're entitled to discovery. There's no affidavits. There's no proof, just conclusory, speculative -- conclusory allegations. There's no factual support whatsoever as to who were the participants, what days they were, for us to even be able to respond to it.

It's a classic fishing expedition of let us do discovery to find out if there were shenanigans going on, and we'll bring it up.

Some litigant in this courtroom -- maybe not in public but during the proceedings said that the allegations --

(Brief interruption)

MR. JACKSON: I said some litigant here in this courtroom, perhaps not in public and before Your Honor, has made the statement

that allegations of an OMA violation is a last resort for losers.

Judge, our position is there needs to be a heck of a lot more specificity pled before Your Honor orders any kind of discovery whatsoever. Right now, all we've got is, you know, we heard it through the grapevine that a couple commissioners may have met outside of the open meeting, and that's a violation of the Open Meetings Act, which it wouldn't be, but --

THE COURT: I don't have an Open Meetings Act in front of me.

MR. JACKSON: Right.

The other thing I would say about that is they did a horrible job at it, because you've looked at these ranking sheets and the disparity of the scores is all over everywhere, so unless they were super-sophisticated, they did a pretty poor job.

So, my point being, there's got to be a lot more specificity pled before he's entitled to do any discovery whatsoever.

MR. RAGSDALE: We will be happy to supplement our request if that's helpful and use the standard that Mr. Jackson is

suggesting. I don't think I have to prove the facts in order to justify doing discovery to try to prove the facts. But I can certainly makes sufficient allegations.

I think, frankly, it's sufficient for me to say as an officer of the court that we think there is information that there was -- I don't know if shenanigans -- but certainly hi jinks.

MR. BROM: Your Honor, I'll just say this. I think, you know, for the integrated facilities, I watched, you know, all four days of the presentations and the vote. And I think it's fair to say that when it came time for the vote, when we're talking about millions of dollars of application costs, only five integrated facility licenses on something that's brand new in two hundred years we've never done that's been subject to lengthy litigation in every other state it's been tried, there was basically absolutely no discussion or deliberation. The vote took a matter of minutes. Next. Yea. Nay. No. Yes. Okay. Next.

There was no deliberation. If there was no deliberation on the record, where did it

occur?

I think that's a fair request to say we need to know some information. How did you vote, because you certainly didn't deliberate in an open setting. You didn't do anything but just call names and vote and move down the list.

THE COURT: I think the Montgomery question would be now that Tony's Pizza is closed you don't know where it happened.

MR. MILLS: Judge, I just want to point out it's not a violation of the Open Meetings Act for some of these commissioners to meet and discuss these things.

It's only a violation and improper deliberation if they have enough to make a quorum, okay, that's when it's a meeting. That's when it's got to be in public.

Now, certainly, there are some provisions that you didn't have serial meetings to avoid the statute. But just because some commissioners discussed this outside of a meeting does not make this an Open Meetings Act violation.

THE COURT: All right.

MR. BROM: Your Honor, I'll just say I don't think that that's correct. I think that any deliberation by the commissioners outside the meeting is a definition of a violation.

THE COURT: Well, there are some restrictions on that about what could constitute a serial meeting.

All right. Here's what I'm going to do as far as this afternoon goes. Let's see what the commission does this afternoon about the dispensary licenses.

We've got before -- January 9th before any other integrated license can be issued.

What I'd like is a proposed order from the folks that are asking for TROs and a proposed order from the commission; and, specifically, one having to do with the dispensaries by -- depending on what the commission does. And then I'll look at the integrated license folks.

And if there's anybody that wants to amend anything and ask for discovery, I'll see about that.

I'm still going back to what I call the -- y'all need to put something -- we need to have a hearing on what I'm calling the Verano issue,

saying it's distinctive, you know. I'm still inclined right now to say that they can.

MR. BROM: Your Honor, Mr. Webster had asked -- and I'm not sure of the deadline at this point. I filed an amended complaint/petition. Mr. Webster asked me the other day, he said, we've got all these filings. You just filed an amendment, can we have some time. I'm not sure what the date is now.

Do you know off the top of your head?

MR. WEBSTER: I think I asked you for two weeks. I think that's what I asked you for.

THE COURT: Yes, that issue needs to be resolved.

MR. WEBSTER: And I asked that for you as well.

MR. DUNGAN: Right. And --

THE COURT: Thinking out loud, if that's -- you know, if the Court -- I don't know if I can -- if I'm going to take into consideration that I might get reversed -- I mean that happens every time, you know. Everybody has a right to question that -- so I

don't know if that's -- unless there's something different and new, I'll wait on the folks on Dexter Avenue to tell me.

MR. DUNGAN: Yes. And I think, just quickly, so we're clear, there have been, I think, two additional complaints/petition for review filed with these exact same claims, exact same issues and there's potentially a third coming within the next week. But it's -- again, it's all the same legal arguments and same factual, so I don't believe it would tax the commission's lawyers that much. I think they'll most likely be able to file a single responsive pleading to them all and let us come down here and have our Pow wow and shoot it up however you want, sooner, rather than later, if possible.

MR. WEBSTER: Just to clarify, I asked for us to be allowed -- the time provided to file the amended complaint is ten days -- business days -- so it would actually be fifteen days from yesterday.

THE COURT: And I think that's reasonable, Mr. Webster.

MR. WEBSTER: Thank you.

THE COURT: But that's an issue that I'm sure y'all can report to the commission they can -- if that has anything to do with the actions they take and not take and see.

Okay. Anything else I need to mess up right now?

MR. RAGSDALE: You've done enough.

THE COURT: Thank you. Thank you for everybody being so patient.

(Court adjourned)

CERTIFICATE

STATE OF ALABAMA

COUNTY OF MONTGOMERY

I, Mary R. King, Official Court Reporter and Registered Merit Reporter for the 15th Judicial Circuit for the State of Alabama, Montgomery, Alabama, do hereby certify that I reported in machine shorthand the foregoing proceedings as stated in the caption hereof; that my shorthand notes were later transcribed by me or under my supervision, and that the foregoing pages contain a full, true and correct transcript of said proceedings and testimony set out herein; that I am neither kin nor of counsel to any parties in this proceeding, nor in any way interested in the results thereof.

Dated the 30th day of December, 2023.

/s/ MARY R. KING, CCR, RMR
OFFICIAL COURT REPORTER
LICENSE NO. 387
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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS LLC, CAPITOL MEDICAL, LLC, FFD ALABAMA HOLDINGS, LLC, FFD ALABAMA HOLDINGS, LLC ET AL, Plaintiffs, V. STATE OF ALABAMA MEDICAL CANNABIS COMMISSION, Defendant.	)	Case No.: CV-2023-000231.00

This Document Also Relates to the Following Actions:
Alabama Always, LLC v. AMCC, CV 2023-901727
Yellowhammer Medical Dispensaries, LLC v. AMCC, CV 2023-901798
Jemmstone Alabama, LLC v. AMCC, CV 2023-901800
3 Notch Roots, LLC v. AMCC, CV 2023-901801
Pure by Sirmon Farms, LLC v. AMCC, CV 2023-901802

ORDER

The Court held a hearing on January 24, 2024 to address a number of pending motions. As stated on the record during the hearing, it is hereby **ORDERED** as follows:

1. Trulieve Alabama, Inc.'s Motion for Protective Order (Doc. 668, as amended Doc. 691) is **DENIED**, except as otherwise provided below.

2. Trulieve's Motion to Stay the TRO (Doc. 774); the Commission's Motion for Reconsideration of Orders Allowing Discovery and for Protective Order (Doc. 682, as amended Doc. 824); and the Commission's Motion for

Reconsideration of the Court's Order Granting Plaintiff's Motion for Temporary Restraining Order and Opposition to Preliminary Injunction (Doc. 694) (as it applies to the TRO) are **DENIED**, except as otherwise provided below.

3. The Court has concluded that discovery will assist the Court in evaluating the propriety of preliminary injunctive relief, which is to be adjudicated at and following the February 28, 2024 hearing set in this matter. For that reason, the Court has, in its discretion, allowed limited discovery to be taken from the Commission.

a. As set out in the Joint Report to the Court (Doc. 795), while the Commission has preserved and reserved its right to assert its position that no discovery should be allowed, the parties have worked cooperatively to narrow the scope of written discovery requested from the Commission in the event the Court did allow discovery (as it has done). In the event disputes remain on written discovery after further discussions among counsel, the Court will take up any disputes as called upon.

b. The Commission argued that, if the Court were going to allow discovery, the scope of depositions of commissioners should be narrowed to exclude, in addition to other privileged communications, the Commissioners' mental thought processes

and deliberations on the basis that (1) the administrative process is ongoing and it is improper to allow discovery on the Commissioners' mental thought processes in the midst of administrative proceedings when the Commission has not made a final decision on licenses; and (2) the Commissioners' mental thought processes are protected from disclosure by what the Commission claims is the "deliberative process" privilege. As with all privilege questions, the Court cannot evaluate the appropriateness of the invocation of any such privilege (assuming that privilege exists and applies in this case) without context, specifically without reference to specific questions to be asked to a witness. The Commission's outstanding Motion for a Protective Order limiting depositions is therefore **DENIED**. In the event a deponent is asked questions in deposition which call for the disclosure of privileged information, regardless of the nature of the privilege being asserted, the questions of privilege will be handled as all such questions are handled in the normal course: on a question-by-question basis, with an interjected instruction not to answer, a marking of those questions for later submission to the Court, and (if necessary) briefing and argument before the Court on

the appropriateness of answers to the question(s) posed.

c. As previously ordered, the challenging Plaintiffs shall at this stage of the case be entitled to take six (6) depositions. Depositions shall each be limited to seven (7) hours in length, excluding breaks. Plaintiffs shall agree among themselves as to how to best use the allotted time.

d. As discussed by the parties on January 24, it is generally understood that, absent further order by the Court of Civil Appeals, the Commission will provide the responses to written discovery as agreed upon and will produce documents responsive to the written requests as agreed upon, so that depositions can be scheduled and can take place prior to the February 28, 2024 preliminary injunction hearing set by prior order. The Commission shall, by February 9, 2024, provide the responses to agreed-upon written discovery or object to any request not agreed upon, with the Court to take up any disputes as called upon.

DONE AND ORDERED this 30th day of January, 2024.

/s/ JAMES H ANDERSON
CIRCUIT JUDGE