STATE OF FLORIDA
DEPARTMENT OF HEALTH

BILL'S NURSERY, INC.

Petitioner,

v. DOAH Case No.:

FLORIDA DEPARTMENT OF HEALTH

Respondent.
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PETITION FOR ADMINISTRATIVE HEARING

Pursuant to sections 120.569 and 120.57, Florida Statutes, Rule 28-106.201, Florida Administrative Code, U.S. CONST. amend. XIV and FLA. CONST. art. I, § 9, Bill's Nursery, Inc. ("Bill's") hereby respectfully files this Petition for an administrative hearing to contest the Department of Health's denial of Bill's request for registration as a Medical Marijuana Treatment Center ("MMTC"). As grounds for this Petition, Bill's states as follows:

I. The Parties

1. The affected agency is the Florida Department of Health, 4052 Bald Cypress Way, Tallahassee, Florida 32399.

2. The name and address of the petitioner is Bill's Nursery, Inc., 30210 SW 205th Avenue, Homestead, FL 33030. For purposes of this proceeding, contact information for Bill's shall be that of undersigned counsel.

II. Notice of Agency Action

3. This Petition is timely filed. The Department's denial of Bill's request for MMTC registration was issued on July 13, 2018, and pursuant to the attached notice of rights Bill's had 21 days to file its petition challenging the Department's decision.[1]

III. Background Facts

4. Bill's is a registered plant nursery owned and operated by a family of United States military veterans. Bill's has been serving customers in the state of Florida since 1976.

5. On or about July 8, 2015, Bill's timely submitted two (2) applications to the Department seeking licensure as a Dispensing Organization ("DO") pursuant to section 381.986, Florida Statutes (2014), along with the initial application fee of $60,063 for each (totaling $120,126). One of Bill's applications sought licensure in the Northeast Region (the "NE Region App.") and the other application sought licensure in the Southeast Region (the "SE Region App.") (collectively, the "Applications").

6. The Applications were deemed complete by the Department and purportedly evaluated and "scored" pursuant to the provisions of Rule 64-4.002, Florida Administrative Code utilizing the scorecard incorporated by reference therein.

7. Rule 64-4.002(5)(b), Fla. Admin. Code required the Department to utilize scorecards from three reviewers to generate an aggregate score for each such D.O. application submitted in July 2015. Specifically, this provision stated:

> Each reviewer will independently review each application and score using Form DH8007-OCU-2/2015, 'Scorecard for Low-THC Cannabis Dispensing Organization Selection.' Scorecards from each reviewer will be combined to generate an aggregate score for each application. The Applicant with the highest aggregate score in

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[1] The Department's July 13, 2018 denial letter is attached hereto as **Exhibit A**.

each dispensing region shall be selected as the region's Dispensing Organization.

Rule 64-4.002(5)(b), Fla. Admin. Code.

8. The Department's process for "scoring" the applications and its method for generating an aggregate "score" was not described in the Rule and was not readily apparent from the scorecards.

9. On November 23, 2015 the Department issued letters to Bill's advising that both of its Applications for licensure had been denied (collectively, the "2015 Denial Letters").[2]

10. The 2015 Denial Letters both state that Bill's Applications were "substantively reviewed, evaluated, and scored by a panel of evaluators according to the requirements of Section 381.986, Florida Statutes and Chapter 64-4, of the Florida Administrative Code." The Denial Letters further state that "[a]s Bill's Nursery, Inc. was not the highest scored applicant in the [name of region] region, your application for the [name of region] region is denied."

11. When the Department denied Bill's Applications in November 2015, it did not provide Bill's with the "scores" it purportedly received for its Applications. Instead, Bill's was informed only that that it was not the highest scored applicant in its regions and therefore would not receive a license.

12. At the time Bill's received the 2015 Denial Letters, Bill's had no reason to question the truth of the Department's representation that it was not the highest scored applicant. Consequently, Bill's did not challenge the denials of its Applications, *i.e.*, a decision based solely on who was "the best."

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[2] The denial letter regarding Bill's Northeast Region Application is attached hereto as **Exhibit B** and the letter regarding Bill's Southeast Region Application is attached hereto as **Exhibit C**.

13. Subsequently, during the 2017 Special Session, the Florida Legislature amended section 381.986, Florida Statutes to require the Department to license additional medical marijuana treatment centers ("MMTCs")[3] by August 1, 2017. Specifically, the Department was directed to award some of the new licenses to prior DO applicants who met certain specified criteria. The relevant language of the amended statute provides:

> (8) MEDICAL MARIJUANA TREATMENT CENTERS
>
> (a) The department shall license medical marijuana treatment centers to ensure reasonable statewide accessibility and availability as necessary for qualified patients. . . .
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> * * *
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> 2. The department shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters:
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> a. **As soon as practicable, but no later than August 1, 2017, the department shall license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014; which** had one or more judicial challenges pending as of January 1, 2017, or **had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes, 2014**; which meets the requirements of this section; and which provides documentation to the department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center.

Fla. Stat. § 381.986 (2017) (emphasis added).

14. Thus, pursuant to the above referenced statute, the Department was required to issue an MMTC license to **every** prior DO applicant that met the following four (4) criteria: (a)

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[3] The name of the license was changed from Dispensing Organization to Medical Marijuana Treatment Center through this legislation.

their application was reviewed, evaluated, and scored by the Department; (b) they had a final ranking within 1 point of the highest final ranking in their region; (c) they meet the requirements of section 381.986; and (d) they can provide documentation of operational capacity within 30 days.

15. On September 28, 2017, the Department adopted rule 64ER17-3, which purported to implement section 381.986(8)(a)2.a., Florida Statutes. Rule 64ER17-3(b) defined "Final Ranking" as an applicant's aggregate score for a given region as provided in a Department-prepared analysis of the aggregate scores.[4]

16. Rule 64ER17-3 also outlined the method by which the Department determined which of the 2015 DO applicants had "scores" that were within "one point" of the regional licensee. In particular, Rule 64ER17-3(1)(d) defined "one point" to mean one integer (*i.e.*, whole, non-rounded number) carried out to four decimal points (*i.e.*, 1.0000) that is determined by subtracting an applicant's final ranking from the highest final ranking in the region for which the applicant applied.

17. On October 19, 2017, Nature's Way Nursery of Miami, Inc. ("Nature's Way") filed a Petition to Challenge Existing Rule 64ER17-3 and Agency Statement Defined as a Rule (the "Rule Challenge"), challenging the validity of Rule 64ER17-3(1)(b), (c) and (d). Specifically, Nature's Way argued that the challenged provisions constituted an invalid exercise of delegated authority because they were vague, arbitrary and capricious and exceeded the Department's grant of rulemaking authority.

18. On November 1, 2017, the Department published Emergency Rule 64ER17-7. Rule 64ER17-7 superseded Rule 64ER17-3, which was the subject of the aforementioned Rule

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[4] Rule 64ER17-3 refers to the Department-prepared analysis as the "November 2015 Aggregate Score Card."

Challenge Petition. Rule 64ER17-7(1)(d) modified former Rule 64ER17-3 by including an additional methodology for determining which of the 2015 DO applicants had scores that were within "one point" of the regional licensee. Specifically, the department added that an applicant was "within one point" if one whole number remained after subtracting an applicant's final ranking from the highest final ranking in its region.

19. On or about November 2, 2017, Nature's Way filed an Amended Petition to Determine the Invalidity of Existing Rule 64ER17-7 and Agency Statement Defined as Rule (the "Amended Rule Challenge"). The Amended Rule Challenge Petition alleged that certain provisions of Rule 64ER17-7 constituted an invalid exercise of delegated authority pursuant to section 120.52(8), Florida Statutes because they were vague, arbitrary and capricious, exceeded the Department's grant of rulemaking authority, and modified or contravened the specific provisions of law implemented.

20. On June 15, 2018, Administrative Law Judge, John G. Van Laningham ("ALJ Van Laningham") issued two orders in *Nature's Way Nursery of Miami, Inc. v. Florida Department of Health*, DOAH Case Nos. 18-0721, 17-5801RE. The first invalidated the Department's rule and the second recommended Nature's Way receive a license.

21. Specifically, in the Rule Challenge (DOAH Case No. 17-5801RE) ALJ Van Laningham entered an extensive Final Order (the "Final Order")[5] finding that:

> 1. Emergency Rule 64ER17-7(1)(b)-(d) constitutes an invalid exercise of delegated legislative authority[] [and]

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5 The Final Order is attached hereto as **Exhibit D**.

2. The Scoring Methodology comprising several statement of general applicability as described in detail hereinabove constitutes an unadopted rule in violation of section 120.54(1)(a).

22. In so doing, ALJ Van Laningham explained that pursuant to Fla. Admin. Code R. 64-4.002(5)(a), the DO Application Reviewers "were supposed to score the applicants in a way that quantified the differences between them, rather than with superlatives such as 'more qualified' and 'most qualified' (or numbers that merely represented superlative adjectives)," but didn't.[6] Instead, under the ranking policy adopted by the Department, using ordinal numbers, the Reviewers simply "ranked" the various criteria in the DO Applications, which failed to capture critical interval data.

23. ALJ Van Laningham held this "Scoring Methodology" was fatally flawed. "The Department's unfortunate decision to code the Reviewers' qualitative judgments regarding positions in rank orders with symbols that look like quantitative judgments regarding amounts of quality led inexorably to extremely misleading results."[7] Specifically, "[t]he so-called 'rank scores' give the false impression of interval data, tricking the consumer (and evidently the Department, too) into believing that the distance between scores is certain and the same; that, in other words, an applicant with a 'rank score' of 4 is 2 points better than an applicant with a 'rank score' of 2."[8] ALJ Van Laningham went as far to say that "[i]f this deception had been intentional (and, to be clear, there is no evidence it was), **we could fairly call it fraud**. Even without bad

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6 Final Order ¶ 13.

7 Final Order ¶ 28.

8 *Id.*

intent, the decision to code positions in ranked series with 'scores' expressed as 'points' was **a colossal blunder that turned the scoring process into a dumpster fire**."[9]

24. The Department's "rank scores" merely symbolized the applicants' positions in sets of ordered applications. And, "it cannot truthfully be claimed that the interval between, say, Second Best and Third Best is the same as that between Third Best and Fourth Best, as there exists no basis in fact for such a claim."[10] Thus, "[t]he Department committed a gross conceptual error when it decided to treat ordinal data as interval data" during the scoring process.[11]

25. Moreover, "there is no way to fix this problem retroactively; no formula exists for converting or translating non-metric data such as rankings (which, for the most part, cannot meaningfully be manipulated mathematically) into quantitative data." Quite simply, "the defect in the Department's 'scoring' process has deprived us of essential information, namely, actual measurements."[12]

26. "The several policies that together constitute the Scoring Methodology were used to determine the substantial interests of every nursery that applied for a DO license in 2015. The Department cannot, and does not, dispute this." In fact, the Department has admitted that "[t]he 2015 Scoring Methodology allowed the Department to determine which applicants from a one-time batch were entitled to receive the five exclusive DO licenses in 2015." Thus, "the Department

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9 *Id.* ¶ 28 (emphasis added).

10 *Id.* ¶ 29.

11 *Id.* ¶ 68.

12 *Id.*

based its determination of *all* the 2015 applicants' substantial interests on the Scoring Methodology."[13]

27. In light of the Department's "colossal blunder," ALJ Van Laningham found that the only way forward was "to deduce a reasonable approximation of the unknowable interval data by adjusting the ordinal data as best anyone can."[14] Indeed, after replacing the "Department's hopelessly flawed aggregate scores" with a reasonable approximation of the actual, but unknowable, interval data, ALJ Van Laningham entered a Recommended Order in DOAH Case No. 18-0721 recommending, *inter alia*, that the Department enter a final order issuing an MMTC license to Nature's Way, a DO applicant similarly situated to Bill's.[15]

28. These deductions and mathematical calculations along with due process and fundamental fairness require the same outcome for Bill's.

29. On June 21, 2018, Bill's submitted a request for registration as an MMTC to the Department. Therein, Bill's advised the Department that pursuant to ALJ Van Laningham's Final and Recommended Orders, Bill's is entitled to and qualified for registration as an MMTC.[16]

30. On July 13, 2018, the Department denied Bill's request for MMTC registration concluding, without any justification or rationale, that Bill's "did not have a final score within one point of the highest scoring applicant in its region."[17]

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13 *Id.* ¶ 173 (italics in original).

14 Exhibit E. ¶¶ 30, 98.

15 This Recommended Order is attached hereto as **Exhibit E.**

16 Bill's June 21, 2018 request for registration is attached hereto as **Exhibit F.**

17 The July 13, 2018 letter is attached hereto as **Exhibit G.**

31. The Department's denial of Bill's request for registration is based on its invalid and unadopted rule Scoring Methodology, *i.e.*, its means of calculating aggregate scores for the 2015 DO applicants that ALJ Van Laningham found to be invalid, arbitrary and capricious. It is also based on invalid Rule 64ER17(b)-(d) found by ALJ Van Laningham to be an invalid exercise of delegated legislative authority.

IV. Substantial Interests

32. Bill's submitted two applications in July 2015 that, pursuant to section 381.986(8)(a)2.a., Florida Statutes, entitle it to registration as a MMTC. The Department's denial of Bill's request for registration adversely impacts Bill's substantial interests because it denies Bill's the opportunity to operate an MMTC under section 381.986(8)(a)2.a., Florida Statutes.

33. Bill's is likewise substantially affected by the Department's non-rule policy for calculating aggregate scores for the 2015 DO applications. As stated above, the Department has not adopted any rule as to how it calculates aggregate scores for purposes of section 381.986(8)(a)2.a. Because the Department's denial of Bill's request for registration is based, in part, on the final rank (or aggregate score) assigned to Bill's two 2015 DO Applications, Bill's is substantially affected by the Department's unadopted rule(s) that govern the Department's method for generating aggregate scores.

34. Bill's is likewise substantially affected by the Department's continued adherence to its non-rule policy for calculating aggregate scores for the 2015 DO applications inasmuch as it has been found to be a "dumpster file" that has been roundly rejected as, among other things, arbitrary, capricious and responsible for generating fraudulent scores. This is tantamount to a clear denial of due process and equal protection to Bill's and is fundamentally unfair.

35. Furthermore, Bill's is substantially affected by the Department's reliance on and application of an invalid rule to determine whether Bill's is "within one point" of the licensees in its regions.

IV. Disputed Issues of Material Fact

36. Disputed issues of material fact include, but are not limited to the following:

a. Whether the aggregate scores calculated by the Department are facts that must be proven true as quantities so that the "within-one point" issue can be decided though formal proceedings.

b. Whether the Department relied on an invalid rule in denying Bill's request for registration as a MMTC;

c. Whether the Department relied on non-rule policy when it denied Bill's request for registration as an MMTC;

d. Whether the Department properly calculated the final reported *scores* to be awarded to the DO applications submitted in July 2015 by Bill's and other applicants in the Northeast and Southeast regions;

e. Whether the Department correctly calculated Bill's scores as not being within "one point" of "the highest final ranking" in either the Northeast or the Southeast regions, as required by section 381.986(8)(a)2.a., Florida Statutes;

f. Whether the Department's method for generating aggregate scores is an agency statement of general applicability that violates section 120.54(1)(a), Florida Statutes.

g. Whether a scoring methodology that has been found to be arbitrary, capricious and responsible for generating essentially fraudulent scores can be relied upon by the Department to deny Bill's request for registration as an MMTC.

37. Bill's reserves the right to raise additional disputed issues of material fact and law that may be identified in the future through discovery in this case.

V. Statement of Ultimate Facts

38. The following facts and law support an award of a MMTC registration to Bill's.

39. The Department's denial of Bill's request for MMTC registration is founded solely on the Department's calculation of Bill's scores relative to "the highest scoring applicant[s]" in the Northeast and Southeast regions. Specifically, the Department erroneously calculated the "scores" as not being within "one point." The Department's calculation (which is based, in whole or in part, on invalid and unadopted rules) is unreasonable, arbitrary, capricious, and otherwise erroneous for the following reasons:

- The aggregate scores calculated by the Department are facts that must be proven true as quantities so that the "within-one point" issue can be decided, however, defects in the Department's "scoring" process have deprived everyone of essential information, namely, actual measurements.
- The Department committed a gross conceptual error when it decided to treat ordinal data as interval data during the scoring process and there is no real way to fix this problem retroactively as no formula exists for converting or translating non-metric data, such as rankings (which, for the most part, cannot meaningfully be manipulated mathematically), into quantitative data.

- Due to the flagrant defects in the Department's analytical process, the aggregate scores which the Department generated are hopelessly infected with systematic error, even if the mathematical calculations behind the flawed scores are computationally correct.
- Any attempt to translate ordinals in a reasonable approximation of interval data is bound to involve a tremendous amount of inherent uncertainty because there is no mathematical operation in existence that can turn a number which signifies *where* in order something is, into one that counts *how much* of that thing we have.
- Based on the available data, and expert mathematical computations performed, Bill's certainly could have been within one point of the winner in each region it applied in; a *significant* portion of its upper score range falls within one point of the winner's lower score range. In fact, it is absolutely *impossible* for the Department to prove Bill's was *not* within one point of the winner in its regions.
- Furthermore, while there is some uncertainty over what Bill's actual score would have been, had the Department not committed its colossal error or lit its dumpster fire, "[t]he Department, however, cannot be permitted to benefit from, or take advantage of, this uncertainty, because the uncertainty flows directly and solely from the Department's fundamental conceptual error, not from any lack or failure of proof attributable to" Bill's.

40. As stated above, the Department's means of calculating aggregate scores for the 2015 applications is relevant to interpreting section 381.986(8)(a)2.a., where the Legislature directed the Department to award a license to any applicant that "had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014." The

Department has not adopted any rules as to how it calculated aggregate scores from the multiple scores of individual reviewers.

41. Pursuant to ALJ Van Laningham's Final Order in *Nature's Way,* the Department's method for generating aggregate scores is an "agency statement of general applicability" that violates section 120.54(1)(a), Florida Statutes. Thus, the Department must discontinue reliance on the agency statement or any substantially similar statement. To the extent that the Department has attempted to validate or ratify its use of non-rule policy by incorporating the November 2015 Aggregate Score Card into Rule 64ER17-7, the Department's Rule constitutes an invalid exercise of its delegated legislative authority. *See* Final Order.

VI. Statutes and Rules

42. The statutes that support the relief requested by Bill's in this proceeding are: sections 120.52, 120.54, 120.56, 120.569, 120.57, and 381.986, Florida Statutes. The application of the relevant facts to these statutes has been discussed in previous sections of this Petition.

VII. Relief Requested

43. Based upon the foregoing, Bill's respectfully requests that its petition be granted and forwarded to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing and that, following the hearing, a recommended and final order be entered granting Bill's request for registration as a MMTC and granting such further relief as may be deemed appropriate or necessary.