STATE OF FLORIDA
DEPARTMENT OF HEALTH

TREE KING-TREE FARM, INC.,

Petitioner,

vs. CASE NO. _____

FLORIDA DEPARTMENT OF HEALTH,

Respondent.
_____/

PETITION FOR FORMAL ADMINISTRATIVE HEARING AND ADMINISTRATIVE DETERMINATION OF UNADOPTED RULE

Pursuant to sections 120.56(4), 120.569 and 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code ("F.A.C."), Tree King-Tree Farm, Inc., ("Tree King") hereby petitions for formal administrative proceedings to contest the Department of Health's ("Department's") denial of Tree King's request for registration as a Medical Marijuana Treatment Center ("MMTC") and to challenge the Scoring Methodology relied upon by the Department in evaluating Tree King's request as an unadopted rule. In support, Tree King states:

Parties

1. The name and address of the affected agency is the Florida Department of Health ("Department"), 4052 Bald Cypress Way, Tallahassee, FL 33030.

2. The Petitioner's name and address are Tree King-Tree Farm, Inc. ("Tree King"), 4903 State Road 54, New Port Richey, Florida, 34652. For service purposes, the contact information provided below for Petitioner's legal counsel should be used.

Notice of Proposed Agency Action

3. Tree King received notice of the Department's proposed action via electronic transmission of the letter attached as Exhibit "A" hereto, on July 31, 2018. As stated in the "Notice of Rights" attached to the Department's letter, Tree King had 21 days to file a petition challenging the Department's proposed action pursuant to sections 120.569 and 120.57, Florida Statutes. Accordingly, this petition is timely.

Description of Agency Statement

4. Also at issue is the Department's Scoring Methodology, comprised of several statements of general applicability concerning calculation of the difference between the aggregate scores of applicants and what constitutes "one point" as contemplated by section 381.986(8)(a)2.a., Florida Statutes.

Factual Background

5. Tree King has continuously operated as a registered nursery in the State of Florida for more than thirty years, and possesses a valid certification from the Florida Department of Agriculture and Consumer Services for the cultivation of more than 400,000 plants.

6. On July 8, 2015, Tree King submitted a timely application for approval as a "dispensing organization" ("DO") pursuant to section 381.986, Florida Statutes.

7. By letter dated November 23, 2015, the Department advised Tree King that its application was denied. The letter further stated that Tree King's application "has been 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" and that the application was denied because Tree King "was not the highest scored applicant in the Northwest Region[.]"

8. At the time of the Department's evaluation of Tree King's application in 2015, Rule 64-4.002(5)(b), F.A.C., required the Department to utilize scorecards from three reviewers to generate an aggregate score for each DO application submitted. Specifically, this provision stated:

> Each reviewer will independently review each application and score using Form DH8007-0CU-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 each dispensing region shall be selected as the region's Dispensing Organization.

9. Tree King petitioned for an administrative hearing regarding the Department's 2015 denial of its DO application, but voluntarily dismissed the petition before the matter proceeded to hearing. *See* DOAH Case No. 15-007278.

10. 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") 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 ....
> * * *
> 2. The department shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters:
> 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). Thus, pursuant to the 2017 statute, the Department was required to issue an MMTC license to every prior DO applicant that met the following four (4) criteria: (a) their application was reviewed, evaluated, and scored by the Department; (b) they had a final ranking within on (1) point of the highest final ranking in their region; (c) they meet the requirements of section 381.986, Florida Statutes; and (d) they can provide documentation of operational capacity within 30 days.

11. On September 28, 2017, the Department adopted rule 64ER17-3, which purported to implement the newly enacted 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. 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.

12. 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" challenging the validity of Rule 64ER17-3(1)(b), (c) and (d) ("Rule Challenge"). The Rule Challenge was assigned DOAH Case No. 17-5801RE.

13. On November 1, 2017, the Department published Emergency Rule 64ER17-7. Rule 64ER17-7 superseded Rule 64ER17-3, which was the subject of Nature's Way's

pending Rule Challenge. 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.

14. 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" in DOAH Case No. 17-5801RE. 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.

15. On January 17, 2018, Nature's Way filed a "Petition for Formal Administrative Hearing and Administrative Determination Regarding Unadopted Rules." Pursuant to Section 120.57, Florida Statutes, the petition challenged the Department's proposed denial of Nature Way's request for registration as an MMTC pursuant to section 381.986(8), Florida Statutes ("Section 120.57 Challenge"). The petition also alleged that the Department's Scoring Methodology, comprised of several statements of general applicability, constitutes an unadopted rule in violation of section 12.54, Florida Statutes ("Unadopted Rule Challenge"). When the petition was forwarded to the Division of Administrative Hearings, the Division assigned separate case numbers to the Section 120.57 Challenge (DOAH Case No. 18-0721) and the Unadopted Rule Challenge (DOAH Case No. 180720RU).

16. On June 15, 2018, Administrative Law Judge ("ALJ") John G. Van Laningham issued two orders in the administrative proceedings brought by Nature's Way: (1) a Final Order in DOAH Case Nos. 17-5801RE and 18-0721RU, which invalidated the Department's 64ER17-7(1)(b)-(d) and found that the Department's Scoring Methodology constitutes an unadopted rule; and (2) a Recommended Order in DOAH Case No. 18-0721, which recommended that the Department issue a final order approving Nature's Way's application for registration as an MMTC.

17. In the Final Order entered in DOAH Case Nos. 17-5801RE and 18-0721RU, ALJ Van Laningham explained that pursuant to Rule 64-4.002(5)(a), F.A.C., 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 they did not do so. Final Order, at ¶13. 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.

18. As ALJ Van Laningham explained, 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. The 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. If this deception had been intentional (and, to be clear, there is no evidence it was), we could fairly call it fraud. Even without bad intent, the decision to code positions in ranked series with 'scores' expressed as 'points' was colossal blunder that turned the scoring process into a dumpster fire.

Id., at ¶ 28. See also, Recommended Order in DOAH Case No.18-0721, at ¶ 30.

19. As ALJ Van Laningham further explained, "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." Final Order in DOAH Case Nos 17-5801RE and 18-0720RU, at ¶ 29. Thus, "[t]he Department committed a gross conceptual error when it decided to treat ordinal data as interval data." Id., at ¶ 68. 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." Id.

20. In his Recommended Order in Nature's Way's Section 120.57 Challenge (DOAH Case No. 18-7021), ALJ Van Laningham found that the only way forward to determine whether Nature's Way was within met the "One Point Condition" of section 381.986 was "to deduce a reasonable approximation of the unknowable interval data by adjusting the ordinal data as best anyone can." Recommended Order, at ¶ 98. He did this by calculating Nature Way's "aggregate score set," which reflects Nature's Way's highest possible and lowest possible aggregate scores. He then overlaid Nature's Way's aggregate score-set against a "proximity box," which reflects highest-ranked applicant's aggregate score-set reduced by one-point on both the high and low ends. Ultimately, ALJ Van Laningham concluded that Nature's Way met the One Point Condition of section 381.986 because values within the range of its aggregate score-set fell within the proximity box. Accordingly, he recommended that the Department approve Nature's Way's MMTC registration request. See id., at ¶¶ 123-133.

21. Tree King is similarly situated to Nature's Way insofar as values within Tree King's aggregate score-set fall within in the "proximity box" when the methodology

endorsed by ALJ Van Laningham is utilized to compare Tree King's scoring with the highest-ranked DO applicant for the Northwest Region, particularly when other errors in the the Department's scoring are corrected.

22. By letter dated July 26, 2018, Tree King submitted a request to the Department for registration as an MMTC pursuant section 381.986(8)(a)2.a., Florida Statutes (2017). The letter informed the Department that Tree King met all statutory criteria to be awarded a license including its 2015 application, ranking within one point of the highest-ranked qualified applicant, readiness to commence operations, and an assurance that its operations will be in compliance with section 381.986(8)(a)2.a. The letter also advised that one of the applicants for the Northwest Region evaluated by the Department, Aqua Foliage, Inc. ("AFI"), did not meet the requirement of being a 30-year nursery and, therefore, should not have been considered. See In re: Licensure of the Low THC Cannabis Dispensing Organization for the Southwest Region, DOAH Case Nos. Case Nos. 15-7270 and 15-7272 ("Order Granting Ruskin's Motion in Limine" issued Sept. 12, 2016) (concluding that "AFI is not a bona fide applicant whose merits can be considered in the comparative review of competing qualified applicants"). Additionally, Tree King's letter advised that Tree King's situation as an applicant is so similar in scope and scale to Nature's Way based on the findings and conclusions of law in the Recommended Order issued in Nature's Way Nursery of Miami v. Florida Department of Health, DOAH Case No 18-0721 (June 15, 2018).

23. On July 31, 2018, the Department denied Tree King's request for MMTC registration concluding, without any justification or rationale, that Tree King "did not have a final score within one point of the highest scoring applicant in its region."

Substantial Interests

24. If left to stand, the Department's proposed agency action will determine and have a direct and adverse impact upon Tree King's substantial interests. Had the Department properly analyzed the scoring from the 2015 evaluation, Tree King's request for MMTC registration would have been approved. If the Department's proposed action stands, Tree King will be deprived of the economic and professional benefits of MMTC registration. Accordingly, the Department's agency action will determine affect Tree King's substantial interests.

25. As ALJ Van Laningham has found: "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." Final Order in DOAH Case Nos. 17-5801RE and 18-0720RU, at ¶ 173. In fact, the Department has admitted that "[t]he 2015 Scoring Methodology allowed the Department to determine which applicants from a onetime batch were entitled to receive the five exclusive DO licenses in 2015." Id. Thus, "the Department based its determination of *all* the 2015 applicants' substantial interests on the Scoring Methodology." Id. (emphasis in original).

Disputed Issues of Material Fact

26. Disputed issues of material fact in this proceeding include, but are not necessarily limited to, those alleged above and the following:

a. Whether the Department properly calculated the final rankings for qualified DO applicants for the Northwest Region.

b. Whether the Department correctly calculated Tree King's score as not being within "one point" of the highest final ranking in the Northwest Region as required by section 381.986(8)(a)2.a., Florida Statutes (2017).

c. Whether the Department committed fundamental errors in calculating the final rankings of the qualified DO applicants for the Northwest Region.

d. Whether the Scoring Methodology utilized by the Department in reviewing Tree King's July 27, 2018, request for MMTC registration constitutes an unadopted rule.

e. Whether the Scoring Methodology utilized by the Department in reviewing Tree King's July 27, 2018, request for MMTC registration is arbitrary and capricious.

f. Whether the Department relied upon an invalid rule in reviewing Tree King's July 27, 2018, request for MMTC registration.

26. Tree King 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.

Ultimate Facts Requiring Reversal or Modification of the Department's Action

27. Ultimate facts requiring reversal or modification of the Department's proposed action include, but are not necessarily limited to, those alleged above and the following:

a. The Department committed fundamental errors in the scoring of the 2015 DO applications for the Northwest Region. As a result, the Department improperly calculated the final rankings for qualified applicants for the Northwest Region and thereby created uncertainty as to the final rankings. However, the Department cannot be permitted

to benefit from, or take advantage of, such uncertainty in deciding to deny Tree King's request for MMTC registration.

b. A proper evaluation of the applications submitted by qualified applicants demonstrates that the Tree King's score was within "one point" of the highest final ranking in the Northwest Region. Accordingly, Tree King is entitled to MMTC registration pursuant to section 381.986(8)(a)2.a., Florida Statutes (2017).

c. The Scoring Methodology utilized by the Department in reviewing Tree King's July 27, 2018, request for MMTC registration constitutes an unadopted rule in violation of Section 120.54(1)(a), Florida Statutes.

d. The Scoring Methodology utilized by the Department in reviewing Tree King's July 27, 2018, request for MMTC registration is arbitrary and capricious.

e. The Department relied upon an invalid rule in reviewing Tree King's July 27, 2018, request for MMTC registration.

Statutes Requiring Reversal or Modification of the Department's Proposed Action

28. The statutes that support the relief requested 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.

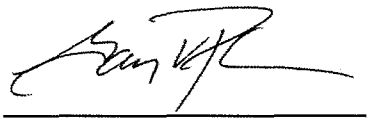
Request for Relief

WHEREFORE, Tree King 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 final order be entered determining the Department's Scoring Methodology to be an unadopted rule, that a recommended and final order be entered granting Tree King's request for

registration as a MMTC, and that such further relief as may be deemed appropriate or necessary be granted.

Respectfully submitted this 21st day of August, 2018.

HOPPING GREEN & SAMS, P.A.



Gary V. Perko (FBN 855898)
garyp@hgslaw.com
D. Kent Safriet (FBN 174939)
kents@hgslaw.com
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
Ph: (850) 222-7500
Fax: (850) 224-8551

Counsel for Tree King-Tree Farm, Inc.

EXHIBIT "A"