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STATE OF FLORIDA
DEPARTMENT OF HEALTH

TROPIFLORA, LLC

Petitioner,

vs.

CASE NO.: _____

FLORIDA DEPARTMENT OF HEALTH,
an executive branch agency of
the State of Florida

PETITION FOR FORMAL ADMINISTRATIVE HEARING

Pursuant to Sections 120.569 and 120.57(1), Florida Statutes, and rule 28-106.201, Florida Administrative Code, TropiFlora, LLC (“TropiFlora”) requests a formal administrative hearing to contest the initial decision by the Department of Health (“Department”) to deny TropiFlora’s August 3, 2018, request for registration as a Medical Marijuana Treatment Center (“MMTC”). TropiFlora supports this petition with the following information:

I. Parties

1. The agency affected is the Florida Department of Health, 4052 Bald Cypress Way, Tallahassee, Florida 32399. The Department is the state agency vested with regulatory authority over Florida’s medical marijuana program. *See* Art. 10, § 29, Fla. Const.; § 381.986, Fla. Stat. (2017). Its duties include licensing Florida businesses to cultivate, process and dispense medical marijuana to qualified patients. *See* § 381.986(8), Fla. Stat. (2017).

2. The name and address of the petitioner is TropiFlora, LLC, 3530 Tallevast Road, Sarasota, Florida 34243. For purposes of this proceeding, contact information for TropiFlora shall be that of its undersigned counsel.

II. Notice of Agency Action

3. TropiFlora received a copy of the Department's denial of its request for MMTC registration on August 8, 2018, and pursuant to the attached notice of rights had 21 days to file its petition challenging the Department's decision. A copy of the Department's August 8, 2018, denial letter is attached as **Exhibit A**.

III. Background Facts

4. TropiFlora is a nursery located in Sarasota, Florida that applied to the Department in 2015 for licensure as a Dispensing Organization ("DO") in the Southwest Region. TropiFlora timely submitted its application pursuant to section 381.986, Florida Statutes (2014) (the "2014 Statute"). TropiFlora's application contained all mandatory information and documentation, including the provision of certified financial, but was unlawfully denied by the Department prior to being submitted to the three (3) reviewers for "scoring¹."

5. Section 381.986(5)(b), Florida Statutes (2014) provided the general statutory criteria that a 2015 applicant was required to demonstrate in order to gain approval as a DO. Among these general requirements the applicant must have demonstrated the "financial ability to maintain operations for the duration of the 2-year approval cycle, including the provision of certified financials to the department." § 381.986(5)(b)5., Fla. Stat. (2014). Applicants must also have demonstrated that "all owners and managers have been fingerprinted and have successfully passed a level 2 background screening" § 381.986(5)(b)6., Fla. Stat. (2014).

¹ Whether the Department actually "scored" applicants, as required by rule, as opposed to merely "ranking" them has been the subject of significant debate. *See, e.g.*, Informational Order on the Multi-Criteria Evaluation of Applications for Approval to Operate as a Dispensing Organization, issued on September 8, 2016, by Administrative Law Judge John G. Van Laningham in DOAH Case Numbers: 15-7270 and 15-7272, wherein Judge Van Laningham found that "the Department's scoring of the applicants was, in any event, clearly erroneous, arbitrary, capricious, or an abuse of discretion. *See also*, Recommended Order issued on June 15, 2018, by Administrative Law Judge John G. Van Laningham in DOAH Case Number: 18-0721.

Other requirements included the applicant's technical ability, infrastructure, personnel, and accountability for the cultivation, production, and distribution of medical marijuana. *See* § 381.986(5)(b)1.-7., Fla. Stat. (2014).

6. Rule 64-4.002, Florida Administrative Code (the "Rule"), which was adopted by the Department to implement section 381.986, Fla. Stat. (2014), sets forth the "Initial Application Requirements for Dispensing Organizations" for the 2015 DO application process. Section (2) of this Rule tracks the language of the above referenced statute and expands on it by providing a list of items designed to indicate the applicant's ability to meet each statutory criterion and aid the Department in selecting applicants. Rule 64-4.002, Fla. Admin. Code.

7. For example, the Department suggested that the 14 items listed under Rule 64-4.002(2)(f) are indicative of an applicant's financial ability, one of the statutory criterion, as contemplated under the 2014 Statute. One of the 14 requested items was "Certified Financials issue within the immediately preceding 12 months."

8. Other criteria, however, were not accompanied by any items or factors. For example, there were no additional items listed for determining whether the applicant's owners successfully passed a level 2 background screening; the reasoning is intuitive. *See* Rule 64-4.002(2)(g); *see also* Rule 64-4.002(2)(b) (requiring each applicant to provide documentary proof that it is certified to cultivate more than 400,000 plants, and that the applicant operated a nursery in the state for at least 30 years).

9. Incorporated by reference into the Rule was Form DH8006-OCU-2/2015 (the "Application Form") used during the 2015 DO application process. A copy of the Application Form is attached as **Exhibit B**. The Application Form is divided in four parts. It states that "Part II requires the Applicant to document its compliance with requirements *mandated by the [2014]*

Statute. See Exhibit B at 1 (emphasis added). The Application Form further states that “Part III requires the Applicant to provide the OCU with all items listed in the Rule”—the same items referenced above in Paragraph 6. *Id.* These requested items, the Application Form notes, were “designed to guide OCU in its determination of the most qualified Applicants.” *Id.* Consistent with this declaration, which the Department emphasized directly in its Application Form, was that “[e]ach individual item listed in the Rule and the Application is not mandatory but is designed to elicit information from the Applicant that will assist the OCU in making its selection.” *Id.* (emphasis in original).

10. The mandatory information requested in Part II of the application included the information or criteria referenced in Paragraph 8 above (*e.g.*, level 2 background screening). The Department warned that the failure to submit the mandatory information requested in Part II of the Application Form “will result in the application being denied prior to any scoring” See Exhibit B at 3. No such warning was contained in Part III of the application. In fact, the only items requested in Part III were those listed under certain criteria in the Rule, all of which were deemed “not mandatory.” Included in the items requested in Part III were the items referenced in Paragraph 7 above—*i.e.*, the 14 items indicative of an Applicant’s financial stability.

11. TropiFlora was not selected for licensure. A copy of the Department’s letter, dated November 23, 2015, denying TropiFlora’s application is attached as **Exhibit C**. In fact, the Department denied TropiFlora’s application prior to submitting it for scoring on the ground that TropiFlora failed to submit proper certified financial statements, therefore concluding that TropiFlora “failed to meet the mandatory requirements of section 381.986(5)(b), Florida Statutes.”

12. The Department's purported deficiency with TropiFlora's application was that the certified financials submitted were not those of the applicant itself—i.e. of TropiFlora, LLC. However, nowhere in the Statute, Rule or the Application form did it require that the certified financials be of the actual Nursery/Applicant. In fact, in preparation for the second round of applications, the Department posted the following information on its website pertaining to the submission of certified financials:

Please note that an applicant's certified financials must be **audited**. Compiled or reviewed financial statements will not be accepted. Additionally, certified financials **must be for the applicant itself**. Certified financials submitted for a parent organization, subsidiary, sister company, partner organization, consulting company, or any other individual, entity, or organization other than the applicant itself are insufficient to meet the certified financial requirement. Failure to submit audited certified financials for the applicant is a failure to meet the requirements for licensure.

*See attached **Exhibit D** (Department's requirements for new, MMTC applicants) (Emphasis in original); see also Form DH8013-OMMU-08/2017 (Application for Medical Marijuana Treatment Center Registration).*

13. On or about December 10, 2015, TropiFlora timely filed a Petition for Formal Administrative Hearing challenging the Department's unlawful denial of TropiFlora's application. At all times since December 10, 2015, TropiFlora has had one or more administrative or judicial challenges pending in regard to the Department's unlawful denial of its application.

14. During the 2017 Special Session, the Florida Legislature amended Section 381.986, Florida Statutes, and established a licensing protocol for the licensing of new medical

marijuana treatment centers (“MMTC”) by October 3, 2017.² By August 1, 2017, the Department was directed to award some of the new licenses to prior applicants who met certain statutory criteria. The relevant language of the new statute states:

(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 registered in the medical marijuana use registry and who are issued a physician certification under this section.

* * *

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 formers. 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.

§ 381.986(8)(a), Fla. Stat. (2017) (emphasis added).

15. Pursuant to the above referenced statute, there are four requirements for prior applicants seeking to be awarded one of the new MMTC licenses: (1) a prior, denied application which was reviewed, evaluated, and “scored” by the Department; (2) litigation or a final ranking

² The name of the license was changed from “Dispensing Organization” to “Medical Marijuana Treatment Center” through this legislation.

within one point of the regional licensee; (3) compliance with the current law; and (4) documentation of operational capacity within 30 days of registration.

16. On August 3, 2018, TropiFlora submitted to the Department a request for registration as an MMTC. Therein, TropiFlora advised the Department that TropiFlora meets all statutory criteria to be awarded an MMTC license, including its prior application, one or more administrative or judicial challenges pending as of January 1, 2017, readiness to commence operations and an assurance that its operations are in compliance with the new law. A copy of the letter is attached as **Exhibit E**. TropiFlora further advised the Department that because it meets the requirement section 381.986(8)(a)2.a., Florida Statutes (2017), TropiFlora would have already received an MMTC license if not for the Department wrongfully denying TropiFlora's application prior to submitting it for scoring.

17. TropiFlora also noted in its August 2, 2018, Letter the fact that the Department submitted San Felasco Nurseries, Inc.'s application for scoring despite the fact that one of San Felasco's owners and/or managers failed to pass a level 2 background screening—a mandatory requirement under the 2014 Statute, Rule, and Application Form, the failure of which should have resulted in San Felasco's application being denied prior to any scoring. *See* Exhibit B at 3. While the Department decided to score San Felasco, it discriminatorily decided not to score TropiFlora, who submitted all mandatory information, erroneously basing its decision on the ground that TropiFlora apparently did not provide certified financial statements to the Department's undisclosed liking.

18. On August 8, 2018, the Department issued its denial of TropiFlora's request for MMTC registration, concluding that TropiFlora "did not have a pending challenge to the denial

of its licensure as of January 1, 2017, and did not have a final score within one point of the highest scoring applicant in its region.” See Exhibit A.

IV. Substantial Interests

19. TropiFlora submitted an application in July 2015 that, pursuant to section 381.986(8)(a)2.a., Florida Statutes, entitles it to registration as a MMTC. The Department’s denial of TropiFlora’s request for registration adversely impacts TropiFlora’s substantial interests because it denies TropiFlora the opportunity to operate a MMTC under section 381.986(8)(a)2.a., Florida Statutes.

20. TropiFlora is likewise substantially affected by the Department’s erroneous decision to deny TropiFlora’s 2015 application prior to it being scored because such denial was contrary to the rules and statutes governing the initial application process for licensure, and therefore constitutes an abuse of discretion. Because the Department’s denial of TropiFlora request for MMTC registration is based, in part, on the Department’s unlawful refusal to score TropiFlora’s 2015 application, TropiFlora is substantially affected by the Department’s decision to deny TropiFlora’s application at the preliminary review phase, prior to TropiFlora’s application being scored.

V. Disputed Issues of Material Fact

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

a. Whether the Department’s denial of TropiFlora’s request for licensure as an MMTC pursuant to section 381.986(8)(a)2.a., Florida Statutes (2017) was proper and in accordance with the applicable law and rules;

b. Whether the provision of certified financials, or any other purported deficiencies in TropiFlora's 2015 application, constituted proper grounds to deny TropiFlora's application prior to submitting it for scoring;

c. Whether the Department properly denied TropiFlora's application submitted in July 2015, prior to even submitting the application for scoring;

d. Whether the Department correctly determined that the "certified financials" included with TropiFlora's application were non-compliant with the Department's rules, the Application Form which was incorporated therein, or Section 381.986, Florida Statutes (2014);

e. Whether the Department should have submitted TropiFlora's application for scoring; and

f. Whether the Department's actually "scored" any of the applications submitted in 2015.

22. TropiFlora 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.

VI. Statement of Ultimate Facts

23. The following facts and law support an award of a MMTC registration to TropiFlora.

24. The Department's denial of TropiFlora's request for MMTC registration is founded solely on the Department's improper failure to score TropiFlora's application, or conversely, its denial of TropiFlora's application prior to submitting it for scoring. Specifically, the Department had no discretion to refuse to score TropiFlora's application based on its own rules, including the Application Form incorporated by reference therein, which regarded certified

financials as a non-mandatory item designed to assist the Department in selecting the most qualified applicants. To this end, the Department's refusal to score TropiFlora's application is and was unreasonable, arbitrary, capricious, and otherwise erroneous for the following reasons:

- **The applicable statute, rule, and Application Form required the Department to score TropiFlora's application.** The Department had no lawful basis for its decision to refuse to score the application submitted by TropiFlora in 2015. The Application Form, which was incorporated by reference into the Rule, and which constitutes a declaration of the Department's interpretation of its own Rule, expressly states that the certified financials were just one among several items requested to show that the applicant has the financial ability to cultivate, process, and dispense medical marijuana. Thus, TropiFlora was, at the very least, entitled to have its application scored by the Department. Had the Department done so, the weight or value the reviewers then decided to assign to the purported deficiency in TropiFlora's certified financial in determining the final score was within their discretion. TropiFlora was at least entitled to that evaluation, and the Department wrongfully abused its discretion in depriving TropiFlora of the opportunity owed it by law.
- **TropiFlora's application contained certified financials.** Contrary to the Department's stated reason for denying the application submitted by TropiFlora in 2015, TropiFlora's Application in fact did include "Certified Financials issued within the immediately preceding 12 months" in accordance with Rule 64-4.002(2)(f)1.

- **TropiFlora qualifies for an MMTC license under the 2017 statute.** But-for the Department’s unlawful refusal to “score” or “rank” the application submitted by TropiFlora in 2015, TropiFlora would be entitled to an MMTC license under section 381.986(8(a)2.a., Florida Statutes (2017). Notwithstanding the Department’s erroneous and unlawful decision to deny TropiFlora’s application, TropiFlora meets all of the necessary requirements of section 381.986(8(a)2.a., Florida Statutes, and it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as an MMTC, as required by law.
- **The Department applied its own rules in an arbitrary and discriminatory manner.** The Department’s decision to submit San Felasco’s application for scoring despite San Felasco’s failure to comply with the mandatory level 2 background screening requirement illustrates the arbitrary and discriminatory manner in which the Department denied TropiFlora’s application, which *did* contain certified financials that the Department arbitrarily regarded as fatally insufficient.

25. Ultimately, the Department abused its discretion when it failed to score TropiFlora’s application. The applicable laws, and especially the Department’s own rules and Application Form, required a different result—that TropiFlora’s application be scored, just as San Felasco’s was scored. The Department’s unlawful refusal to score TropiFlora’s application has prevented TropiFlora from obtaining an MMTC license, which it would otherwise be entitled to under section 381.986(8(a)2.a., Florida Statutes (2017) for having met all of the statute’s requirement to become an MMTC licensee. Lastly, the Department’s unlawful refusal to “score”

TropiFlora's 2015 application has also prevented TropiFlora from obtaining an MMTC license as either the highest scoring applicant in its region, or as an applicant with a final score within one point of the highest scoring applicant in its region.

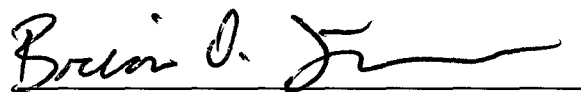
VII. Statutes and Rules

26. The statutes and rules that support the relief requested by TropiFlora in this proceeding are: sections 120.52, 120.54, 120.569, 120.57, and 381.986, Florida Statutes; and Rule 64-4.002, Florida Administrative Code. The application of the relevant facts to these statutes and rules has been discussed in previous sections of this Petition.

VIII. Relief Requested

27. For the reasons expressed, TropiFlora 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 TropiFlora's request for registration as an MMTC and granting such further relief as may be deemed appropriate or necessary.

Respectfully submitted,



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