

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

CASE NO.:

Bill's Nursery, Inc., a Florida Corporation, and
Michael Bowen, an individual,

Plaintiffs,

v.

The FLORIDA DEPARTMENT OF HEALTH,
an agency of the state of Florida; CELESTE
PHILIP, Florida's Surgeon General, in her
official capacity; and Christian Bax, Director of
the Office of Medical Marijuana Use, in his
official capacity.

Defendants.

_____ /

COMPLAINT

This is in action brought by Plaintiffs against Florida's Department of Health and certain Florida officials that seeks to remedy numerous violations of Florida's Constitutional Medical Marijuana Amendment and Medical Use of Marijuana Act. The Plaintiffs in this case are Bill's Nursery Inc., an intended applicant for a license to cultivate, process and dispense medical marijuana pursuant to Florida law, and Michael Bowen, an individual who relies on medical marijuana to prevent and treat his epileptic seizures. Under Florida law, Defendants are required to license sufficient medicinal marijuana treatment centers ("MMTCs") to ensure that sick patients have access to this medication. The Florida legislature specifically required the Department of Health to license ten additional MMTCs by October 3, 2017. Despite these clear constitutional and statutory directives, Defendants have failed to act as required by law. Specifically, as of November 20 2017, they have licensed only six of the ten MMTCs required by October 3, 2017. Indeed, the

Defendants have halted all efforts to comply with the requirement, including refusing to accept and consider applications for the additional four licenses (reaching a total of ten additional MMTCs). These violations form the basis of this complaint for writ of mandamus, declaratory relief and permanent mandatory injunction.

JURISDICTION

1. Jurisdiction in this Court is proper under Art. 5 § 5 and Art. 10 § 29 of the Florida Constitution, § 86.011, Fla. Stat., and Rule 1.630, Florida Rules of Civil Procedure, because this is a civil action for writ of mandamus, injunctive and declaratory relief arising from the Florida Department of Health's violations of the Florida Constitution, Art. 10 § 29, and 381.986, Fla. Stat.

2. All conditions precedent to this action have been met, sustained, or waived by the actions of Defendant as alleged herein.

VENUE

3. Venue is proper in this Court pursuant to Laws 2017, c. 2017-232, §14 that provides for venue in Leon County, and pursuant to § 47.011 Fla. Stat. as Defendants reside there.

PARTIES

4. Plaintiff, Bill's Nursery Inc. ("Bill's") is a Florida corporation with its principal place of business in Miami-Dade County, Florida. Bill's is a plant nursery that applied for a license to become a Medicinal Marijuana Dispensing Organization in 2015. The Florida Department of Health ("DOH") denied Bill's application using a scoring method later found to be arbitrary and capricious by administrative law judge, John Van Laningham in Plants of Ruskin et. al., v. Department of Health Case. No. 17-0116, 2017 WL 2333315, at *1. Bill's is prepared to and intends to reapply for a license to become a Medical Marijuana Treatment Center ("MMTC") under Florida Constitution Art. 10 § 29 and §381.986 Fla. Stat.

5. Plaintiff, Michael Bowen is a Florida citizen that suffers from epilepsy and requires medicinal marijuana to prevent his seizures. Without adequate access to this medication, his life is at risk.

6. Defendant, The Florida DOH is an executive agency of the State of Florida. The Florida Constitution charges the DOH with the duty “to promulgate regulations in a timely fashion” that “ensure the availability . . . of medical marijuana” and that provide “procedures for the registration of MMTC” Fla. Const. Art. 10, § 29.

7. Defendant, Dr. Celeste Philip, in her official capacity as Florida’s Surgeon General, is the head of the DOH. See Fla. Stat. § 20.43.

8. Defendant, Mr. Christian Bax in his official capacity, is the Director of the DOH’s Office of Medical Marijuana Use (“OMMU”). Pursuant to Fla. Stat. § 385.212, the OMMU “shall administer and enforce s. 381.986.”

GENERAL ALLEGATIONS

Florida Law

9. In recent years, Florida has amended its Constitution and passed various other laws to provide safe access to medicinal marijuana.

Compassionate Medical Cannabis Act of 2014

10. In 2014, the Compassionate Medical Cannabis Act was signed into law. This act ordered the DOH to issue five Dispensing Organization licenses for the cultivation and distribution of low tetrahydrocannabinol (“THC”) medicinal marijuana for patients suffering from cancer or seizures.

11. The DOH promulgated regulations delineating an application process which resulted in approximately twenty-two plant nurseries submitting applications. The DOH awarded seven Dispensing Organization licenses.

Right to Try Act of 2016

12. In 2016, the Florida Legislature expanded Florida citizens' right to medicinal marijuana by passing the Right to Try Act, which allowed patients suffering from terminal illnesses access to "full potency" medical marijuana.

Constitutional Amendment to Allow Medical Marijuana

13. On November 8, 2016, Florida voters passed The Florida Medical Marijuana Legalization Initiative ("Amendment 2") with an overwhelming super-majority of 71% of the vote, which created Article 10, section 29 of the Florida Constitution. Amendment 2 expanded the list of eligible patients beyond those authorized in the Right to Try Act. The amendment provided that low-THC and full-potency medical marijuana would now be available to a larger group of patients suffering from specified "Debilitating Medical Conditions," like Multiple Sclerosis, Epilepsy, Crohn's Disease, and AIDS.

14. Pursuant to this amendment, Florida's constitution requires the DOH to issue regulations that provide for the licensing of MMTCs to ensure "the availability and safe use of medical marijuana by qualifying patients." Fla. Const. Art. X, § 29. The Constitution imposes hard deadlines:

- a. By July 3, 2017, the DOH must promulgate regulations that provide for "[p]rocedures for the registration of MMTCs that include procedures for the issuance . . . of registration" Id.
 - b. By October 3, 2017, the DOH "shall begin . . . registering MMTC" Id.
15. Furthermore, the Constitution provides that "[i]f the Department does not issue regulations, or if the Department does not begin . . . registering MMTCs within the time limits set

in this section, any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department’s constitutional duties.” Id.

Medical Use of Marijuana Act

16. In 2017, the Florida Legislature amended § 381.986, Fla. Stat., to implement Amendment 2.

17. The law directs the DOH to license ten additional MMTCs by October 3, 2017 in order to ensure sufficient supply to meet the medical needs of Florida patients. See Fla. Stat. 381.986(8)2.a.-c.

18. Fla. Stat. § 381.986 dictates how some of those ten licenses should be awarded.

- a. First, the DOH was ordered to give a license to any applicant who had applied under the 2014 regime, was denied a license, and had either (i) an administrative or judicial challenge pending as of January 1, 2017, or (ii) had a final ranking within one point of the highest final ranking in its region under the 2014 regime.
- b. Second, the DOH was ordered to give one of the additional ten (10) licenses to an applicant that was both (i) a class member of Pigford v. Glickman or In Re Black Farmers Litigation, and (ii) who was also a member of the Black Farmers and Agriculturalists Association - Florida Chapter (“Black Farmer Provision”).
- c. Finally, the DOH was ordered that for two of these ten licenses, the DOH shall give a preference to applicants who would be converting their farming from molasses/citrus to medicinal marijuana.

19. Pursuant to this statute, the DOH has notified six applicants that they will receive a license by virtue of pending litigation and/or as being within one point of the highest final ranking

in its region. Specifically, Plants of Ruskin, 3 Boys Farm, Loops Nursery, Treadwell Nursery, Sun Bulb Nursery, and Keith St. Germain Nursery Farms received licenses.

DOH's Violation of Florida Law

20. Having allocated six of the ten MMTC licenses required, The DOH is obligated to issue four more MMTC licenses by October 3, 2017. But it has not done so.

21. More egregiously, the DOH has no intention of complying with this mandate in the near future.

22. On October 24, 2017, at a hearing before the Florida Senate Health Committee, Christian Bax unequivocally informed the Committee that the DOH would not issue the additional licenses until pending litigation over the constitutionality of the Black Farmer Provision is resolved:

Chairwoman Senator Dana D. Young: “Are you saying that you are willing to hold off on issuing any further licenses as required by statute because you have litigation filed? Is that what you’re saying that you’re going to wait until this litigation is resolved ... before you issue any additional licenses.”

Director Bax: “Yes.”

23. Director Bax and DOH General Counsel could not articulate a single justifiable reason why they have ignored the clear legislative mandate to issue ten licenses by October 3, 2017. The following exchange between Vice Chair Senator Kathleen Passidomo and, Ms. Nichole Geary, the DOH’s General Counsel, is illustrative:

Vice Chairwoman Passidomo: “We passed a law that had a certain date for a state agency to comply with . . . what is the downside, what . . . valid reasons could you have for ignoring a directive, a statutory directive . . . [?] I mean almost every time we pass a law somebody files a lawsuit, and we still continue to pursue it . . . what could happen to the state of Florida if these lawsuits that are holding you up, come to fruition . . . [?]”

Ms. Geary: “. . . At the moment the problem is twofold. One is an operational problem . . . it is difficult . . . to pull the Pigford class litigant completely out. But that piece aside, the department could potentially maneuver through that. At the moment there is a pending motion . . . to stay the department’s award of the license. We don’t know how the judge is

going to view that right? . . . If he'll look at it as enjoining the department from moving forward as a whole, or if he will look at it in a more discrete narrow sense in terms of just the Pigford class.”

Vice Chairwoman Passidomo: “Presuming you just continue to follow the law, which is to go through the process of granting these licenses. What’s the downside? I mean... There’s a timeframe here. . . . October 3 is coming on. People are going to file suit saying you didn’t comply with the law, so what would happen to the state if you continued, or if you did the process. What would be the downside?”

Ms. Geary: It’s difficult to articulate at the moment because . . . we don’t know what the judge is going to do with the temporary restraining order request, right? . . . So we could be in a situation where the restraining order is issued mid-application process which would put both the applicants and the department at a disadvantage both from a financial perspective . . . where we may pay additional cost We also may be in a difficult posture in terms of section 120.60. The department has a certain amount of time upon which it must act once it receives an application”

Vice Chairwoman Passidomo: “. . . Well the applicant, that’s a business decision. Whether or not they want to file the application knowing that there is some litigation out there. That is a business decision. From a state’s perspective, you know you face that every day. . . So there doesn’t seem to be, you’re just talking about additional administrative costs or time constraint costs . . . That doesn’t seem like a downside to me.”

24. As properly expressed by Chairwoman Young, the DOH, an executive agency, is purporting to improperly exercise the injunctive powers of the judicial branch of government to absolve itself from its obligation to follow the laws of this State:

Chairwoman Young: “Doesn’t it seem a bit complacent for you to simply throw your hands up and say oh we cannot issue, we’ve been sued, oh no. You all get sued all the time. . . . You have a duty under our state laws to issue these licenses regardless of whether some plaintiff files a lawsuit.”

Director Bax: “. . . The problem is that, you know, there is a branch of government that is not represented in this room right now. And they have a say over whether or not something is procedurally correct, administratively correct, or constitutionally correct. . . .”

Chairwoman Young: “Isn’t the job of the judiciary to interpret the law, and your job is to execute the law. To carry out the law?”

Director Bax: “Yes ma’am it is.”

25. The law is clear. The DOH was to license ten MMTCs by October 3, 2017. The DOH's disregard for this legislative command violates Florida law.

26. The DOH's purported justification for this flagrant violation, that there *may* be some increased cost *if* an injunction is granted at a later date, or that it *may* be placed in the position of being unable to comply with another statute *if* the Court enters an injunction, is ridiculous.

Harm to Florida Citizens and Businesses

27. Amendment 2 and its implementing legislation were adopted to provide safe and consistent access to potentially lifesaving medication to patients suffering from debilitating medical conditions.

28. By setting deadlines, the legislature recognized that the speedy licensure of sufficient MMTCs was necessary to ensure a properly functioning marketplace.

29. But the marketplace currently has little more than half of the participants that the Florida legislature determined necessary to ensure adequate supply.

30. The DOH's failure to issue licenses and open the application process violates the constitutional and statutory rights of Florida citizens and businesses.

31. It also directly affects the ability of patients to treat their ailments.

32. Research has shown that different cannabis strains have different health effects depending on lineage, genetics, terpene profile, ratios of cannabinoids, and use of cutting agents. Just like other medications, the variant of medicinal marijuana that works for one patient may not work for another.

33. Each MMTC carries different rotating strains and uses different cutting agents. The more MMTCs, the more strains and cutting agent varieties available to patients. The DOH's failure to license all ten of the required MMTCs has therefore limited the available strains on the market, and diminished patients' ability to find strains that work for them.

34. The DOH failure is also harming competition in the marketplace by delaying the entrance of new businesses, like Plaintiff Bill's, into the market and thereby strengthening the monopoly hold the current seven MMTCs have on the market. This problem will only be exacerbated with the passage of time as the DOH continues to refuse to comply with its legal obligations.

COUNT I

(Mandamus – Fla. Stat. § 381.986)

35. Plaintiffs adopt and reallege paragraphs 1 through 34 and incorporate them in this count.

36. Florida Statute § 381.986 requires the DOH to “license medical marijuana treatment centers to ensure reasonable statewide accessibility and availability as necessary . . .” Id. at § 381.986(8)(a).

37. The statute leaves no room for discretion and is written in clearly mandatory terms: “[a]s soon as practicable, *but no later than October 3, 2017*, the department *shall* license applicants that meet the requirements of this section in sufficient numbers *to result in 10 total licenses issued under this subparagraph*” Id. at § 381.986(8)(a)(2)(c) (emphasis added). See also 381.986(8)(a)(2) (“[t]he department *shall* license as medical marijuana treatment centers 10 applicants that meet the requirements of this section”) (emphasis added).

38. Thus, Plaintiffs have a clear, certain, and indisputable legal right to have the DOH perform its ministerial and nondiscretionary statutory duty to issue these ten MMTC licenses by October 3, 2017.

39. The DOH has failed to perform this public duty despite adequate request, and has in fact, halted its efforts to comply with its duty.

40. Plaintiffs have no other adequate remedy or legal method for obtaining relief.

WHEREFORE, Plaintiffs request this Court issue an alternative writ in mandamus pursuant to Fla. R. Civ. Pro. 1.630(d)(2) together with such other relief as this Court deems just and proper.

COUNT II

(Mandamus - Fla. Const. Art. 10, § 29)

41. Plaintiffs adopt and reallege paragraphs 1 through 34 and incorporate them in this count.

42. Fla. Const. Art. 10, § 29 requires the DOH to promulgate “no later than six (6) months after the effective date of this section [p]rocedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety.”

43. It is “[t]he purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients. It is the duty of the Department to promulgate regulations in a timely fashion.” Id.

44. If the Department does not issue regulations, or if the Department does not begin . . . registering MMTCs within the time limits set in this section, any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department’s constitutional duties.” Id.

45. Thus, the Constitution demands that the DOH will timely register sufficient MMTCs to meet the public need by October 3, 2017.

46. But, the DOH has failed to comply with its constitutional obligations. Although it previously registered some MMTCs, it has stopped the process of registering the additional number of MMTCs that are needed to ensure availability for qualifying patients.

47. In other words, the DOH has halted all efforts to register the number of MMTCs required by law and that would ensure the availability and safe use of medical marijuana by qualifying patients, as determined by the Florida legislature.

48. Plaintiffs have a clear, certain, and indisputable legal right to have the DOH perform its nondiscretionary constitutional duty to accept applications and register MMTCs within the time limits set by the Florida constitution.

49. The DOH has failed to perform its nondiscretionary constitutional duties within the time limits, and it has halted its efforts to comply with its duties.

50. Plaintiffs have reasonably and properly requested that the DOH comply with its constitutional mandate, but the DOH has failed and refused to comply with Plaintiff's request.

51. Plaintiffs have no other adequate remedy or legal method for obtaining relief.

WHEREFORE, Plaintiffs request this Court issue an alternative writ in mandamus pursuant to Fla. Const. art. X, § 29 and Fla. R. Civ. Pro. 1.630(d)(2) together with such other relief as this Court deems just and proper.

COUNT III

(Mandatory Injunction – Fla. Stat. § 381.986)

52. Plaintiffs adopt and reallege paragraphs 1 through 34 and 36 through 37 as though set forth herein.

53. This is an action for injunctive relief to enforce Florida Statute § 381.986.

54. Plaintiffs have a clear legal right for ten MMTC licenses to have been issued.

55. The DOH's failure to comply with Florida's statutory requirement to issue these ten licenses by October 3, 2017 will continue to cause irreparable harm to Plaintiffs absent injunctive relief.

56. There is no adequate remedy at law.

WHEREFORE, Plaintiffs request this Court enter mandatory injunctive relief compelling Defendants to comply with their statutory duty to issue ten licenses to MMTCs, together with other relief this Court deems just and proper.

COUNT IV

(Mandatory Injunction - Fla. Const. art. X, § 29)

57. Plaintiffs adopt and reallege paragraphs 1 through 34 and 42 through 44, as though set forth herein.

58. This is an action for injunctive relief to enforce Article X, § 29 of the Florida Constitution.

59. The DOH has failed to issue sufficient licenses to MMTCs to ensure the availability and safe use of medical marijuana as required by Article 10, § 29 of Florida's Constitution.

60. Further, the DOH has halted all efforts to comply with its duty to issue timely regulations relating to the registration of further MMTCs necessary to ensure the availability and safe use of medical marijuana, as required by Article 10, § 29 of Florida's Constitution.

61. Plaintiffs have a clear legal, and constitutional, right to have additional licenses be issued and to have the DOH continue the application process.

62. The DOH's failure to comply with its clear constitutional mandate, has violated the requirements of the Florida Constitution, and will continue to cause Plaintiffs irreparable harm absent the injunctive relief authorized by the Constitution.

63. There is no adequate remedy at law.

WHEREFORE, Plaintiffs are entitled to mandatory injunctive relief compelling the defendant DOH to comply with its constitutional duty to (1) finalize the regulatory regime necessary for the granting of additional licenses, (2) immediately begin accepting applications for additional MMTCs, and (3) award additional licenses necessary to ensure the availability and safe

use of medical marijuana, as required by Article 10, § 29 of Florida's Constitution, together with any other relief this Court deems just and proper.

COUNT V

(Declaratory Judgment - Fla. Stat. § 381.986)

64. Plaintiffs adopt and reallege paragraphs 1 through 34 and incorporate them in this count.

65. There is bona fide, actual, present, practical need for the declaration to resolve a bona fide dispute between Plaintiffs and the DOH regarding the DOH's duties and obligations under Fla. Stat. §381.986.

66. The declaration deals with a present and ascertained state of facts regarding the DOH's duty and obligation to comply with its statutory mandate under Fla. Stat. § 381.986.

67. Plaintiffs' rights are dependent upon the law applicable to the facts.

68. Plaintiff Bill's is an applicant for a license to operate a medical marijuana treatment center, and as such, it has, or reasonably may have an actual and present interest in the subject matter of this declaration.

69. Plaintiff Bowen is a patient who requires access to medicinal marijuana to prevent and treat epileptic seizures, and as such, he has an actual and present interest in ensuring an adequate supply of medicinal marijuana in the marketplace as determined by the Florida legislature.

70. The antagonistic and adverse interests are all before the Court by proper process.

71. The relief sought is not merely giving of legal advice by the courts or the answer to questions propounded by curiosity.

72. The DOH's refusal to accept applications and issue licenses pursuant to § 381.986 has created a bona fide conflict giving rise to a present, practical need for a declaration concerning the DOH's mandatory obligations under Fla. Stat. § 381.986.

WHEREFORE, Plaintiffs seek an order from this Court declaring that (i) the DOH is in violation of Florida Statutes, and that (ii) the DOH must re-open the application process and issue at least four more MMTC licenses forthwith, together with any other relief this Court finds just and proper.

COUNT VI

(Declaratory Judgment – Fla. Const. Art. 10, § 29)

73. Plaintiffs adopt and reallege paragraphs 1 through 34 and incorporate them in this count.

74. There is bona fide, actual, present, practical need for the declaration to resolve a bona fide dispute between Plaintiffs and the DOH regarding the DOH's duties and obligations under Florida Constitution, Art. 10, § 29.

75. The declaration deals with a present and ascertained state of facts regarding the DOH's duty and obligation to comply with its constitutional mandate under Fla. Const. Art. 10, § 29.

76. Plaintiff's rights are dependent upon the law applicable to the facts.

77. Plaintiff Bill's is an applicant for a license to operate a medical marijuana treatment center, and as such, it has, or reasonably may have an actual and present interest in the subject matter of this declaration.

78. Plaintiff Bowen is a patient who requires access to medicinal marijuana to prevent and treat epileptic seizures, and as such, he has an actual and present interest in ensuring an

adequate supply of medicinal marijuana in the marketplace as determined by the Florida legislature.

79. The antagonistic and adverse interests are all before the Court by proper process.

80. The relief sought is not merely giving of legal advice by the courts or the answer to questions propounded by curiosity.

81. The DOH's refusal to accept applications and issue licenses pursuant to Fla. Const. Art. 10, § 29 has created a bona fide conflict giving rise to a present, practical need for a declaration concerning the DOH's mandatory obligations under Fla. Const. art. X, § 29.

WHEREFORE, Plaintiffs seek an order from this Court declaring that (i) the DOH is in violation of the Florida Constitution, and that (ii) the DOH must re-open the application process and issue at least four more MMTC licenses forthwith, together with any other relief this Court finds just and proper.

PLAINTIFFS DEMAND TRIAL BY JURY FOR ALL ISSUES TRIABLE BY RIGHT.

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