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MARYLAND HEMP COALITION, INC., et al.	*	**IN THE**
	*	**CIRCUIT COURT**
Plaintiffs		
v.	*	**FOR**
GOVERNOR WES MOORE, et al.	*	**WASHINGTON COUNTY**
Defendants	*	**Case No. C-21-CV-23-000348**

* * * * * * * * * * *

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

This court should deny Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction ("Motion") because Plaintiffs do not, and cannot, satisfy any of the four factors required to obtain preliminary injunctive relief under Maryland law. Plaintiffs seek an order from this Court prohibiting Defendants from enforcing § 36-1102 of the Alcoholic Beverages and Cannabis Article, which establishes a series of public health requirements for the sale of intoxicating cannabinoids, "against any person who was already in the business of selling hemp derived products prior to July 1, 2023." *See* Proposed Order to Motion. In doing so, Plaintiffs concede that they brought this action past the effective date of the law they seek to enjoin, making it untimely. Plaintiffs filed this action more than three weeks after the date on which Plaintiffs assert the law took effect and nearly three months after the date on which the law did take effect. Thus, Plaintiffs cannot demonstrate that they meet the requirements of proving immediate, irreparable harm absent an injunction.

Further, Plaintiffs do not satisfy their burden of demonstrating that all four relevant factors, or any of the factors, warrant injunctive relief. First, Plaintiffs do not demonstrate a likelihood of success on the merits of their claims. Plaintiffs claim that the Cannabis Reform Act (the "Act") creates an unconstitutional monopoly in violation of Article 41 of the Maryland Declaration of Rights lacks merit as Plaintiffs conflate a purported restraint on competition and commerce with a well-regulated marketplace for intoxicating products with robust competition between licensees. Plaintiffs inconsistently allege that the General Assembly created a monopoly in the cannabis market and then admit that 300 businesses have the opportunity to compete in this market. Given the public interest in protecting the public health through such regulation, the government has valid justification in setting reasonable limits on the number of available cannabis licenses or a lottery system for issuing such licenses without violating the Maryland Constitution. Plaintiffs' claim that the Act violates their equal protection rights, as provided for in Article 24 of the Maryland Declaration of Rights, fails because the regulation of intoxicating products and the design of a licensing system intended to redress harms to communities disproportionately impacted by cannabis prohibition rationally relate to legitimate State interests. Finally, Plaintiffs offer no argument for why their takings claim would succeed on the merits, nor could they given that the Act merely restricts the sale of certain products and does not amount to deprivation of the entirety of their business.

Second, Plaintiffs acknowledge that they sell products nearly identical to those manufactured and sold by Maryland's licensed cannabis businesses and erroneously suggest that an individual consumer suffers a legally cognizable injury by claiming that he does not prefer to be "required to buy these products at a state licensed store." Compl.

¶¶ 6, 8. In balancing the harms, Plaintiffs plead that their business interests will suffer if they are no longer able to sell hemp-derived intoxicating products but fail to offer any evidence regarding the extent to which, if at all, their businesses rely on the sale of intoxicating products to survive.

Third, Plaintiffs fail to establish that they will suffer irreparable injury where the hemp farmers maintain a clear pathway to sell hemp into the regulated market, hemp processors are still free to manufacture non-psychoactive products such as CBD, and hemp retailers are still permitted to sell a wide range of products other than psychoactive intoxicants.

Finally, Plaintiffs willfully refuse to recognize the plain harm to the public health in the continued distribution of manufactured intoxicants without any legal requirements governing sanitary manufacturing conditions, reliable testing for contaminants, accurate labeling of potency and purity, and child-proof packaging for products resembling candy. Plaintiffs' dogged determination to ignore the valid public interest in creating a safe and well-regulated marketplace in which individuals can access laboratory-tested, accurately labeled, contaminant-free cannabis products grown, processed, and distributed through licensed businesses undermines the credibility of each assertion they have put to paper.

As Plaintiffs fail to establish even one of the four elements necessary to demonstrate an entitlement to injunctive relief, Plaintiffs do not satisfy their burden to receive the injunctive relief sought.

FACTUAL BACKGROUND

A. The Parties

Plaintiff Maryland Hemp Coalition, Inc. is a 501I(6) Maryland non-profit coalition formed for the benefit of hemp farmers. Compl. ¶ 1. Plaintiff South Mountain Microfarm, LLC, is an entity that grows hemp, manufactures hemp products, and distributes those products through wholesale and retail channels. *Id.* ¶ 4. Plaintiff A Healing Leaf is an entity that used to grow hemp at some unspecified time in the past and previously applied for a medical cannabis grower's license in Maryland. *Id.* ¶ 11. Plaintiff Vicky Orem is an individual who previously applied for a medical cannabis business license and still wishes to obtain a license but believes she is unlikely to obtain one through the lottery required by statute. *Id.* ¶ 10. Plaintiffs J. Wyand, Inc. dba Simple Pleasures, Four to Six, LLC dba Cherry Blossom Hemp ("Four to Six"), and Cannon Apothecary, LLC dba Cannon Ball Dispensary ("Cannon Apothecary") are all retail sellers of hemp-derived products. *Id.* ¶¶ 3, 5, 7. Plaintiff Derek Spruill is an individual who owns Four to Six and a consumer of hemp-derived products who "does not want to be forced" to buy his products from a state-licensed dispensary. *Id.* ¶ 6. Mr. Spruill also believes he should receive a license but believes he is unlikely to obtain one through the lottery. *Id.*

Defendant Wes Moore is the Governor of Maryland. *Id.* ¶ 12. Defendant Maryland Cannabis Administration ("MCA") is the administrative body authorized to enforce Maryland's cannabis program. *Id.* Defendant William Tilburg is the Acting Director of MCA, and defendant Andrew Garrison is the Chief of Policy and Legislative Affairs of MCA. Defendant Maryland Alcohol, Tobacco and Cannabis Commission

("ATCC") is the administrative body authorized to enforce § 36-1102 of the Alcoholic Beverages and Cannabis Article. *Id*. Defendant Jeffrey Kelly is the Executive Director of ATCC. *Id.*

Defendants Robert H. Poole, Barbara Wahl, Elizabeth Buck, Eric Morrissette, and Alan I. Silverstein are ATCC Commissioners. Defendants C. Obi Onyewu, MD, Brian P. Lopez, Philip Cogan, RPh, Mark Martin, PhD, MHA,[1] Tereance Moore, PMP, SHRM-CP, Gina Scarinzi, Konrad Dawson, MD, Megan Dingus, MSN, Elizabeth Q Hines, MD, Charles P. LoDico, MS, PhD, Saundra O. Washington, and Scott Welsh are former members of the Maryland Medical Cannabis Commission ("MMCC"). Apart from Mr. Lopez, whose membership on the MMCC ended in 2021, their MMCC memberships ended on May 3, 2023, upon the Governor signing the Act.

B. The Act

Plaintiffs challenge newly enacted emergency legislation adopted by the General Assembly after years of studying cannabis and cannabis regulation and signed into law on May 3, 2023. The Act is a comprehensive piece of legislation establishing the MCA as the regulatory authority governing the licensed cannabis market. Md. Code Ann., Alc. Bev. §§ 36-201, 36-202. The Act also expanded the enforcement authority granted to the Field Enforcement Division in the Office of the Executive Director of the Alcohol, Tobacco, and Cannabis Commission ("Field Enforcement Division") to include express authority to act against unlicensed cannabis operators and unregulated cannabis products.

[1] Dr. Martin previously served on the MMCC as the designee of the Secretary of Health.

Id. § 1-313(b)(2)(ii). The enforcement authority held by ATCC's commissioners is minimal; their role is to educate the public, ensure conspicuous labels on certain alcoholic beverages, and to conduct studies. *Id*. § 1-307(b)-(c). ATCC enforcement responsibility lies primarily with the Field Enforcement Division.

C. Cannabis sativa L. plant and its cannabinoids and isomers

Cannabis sativa L. is the plant species commonly referred to as cannabis, marijuana, or hemp. Cannabis and hemp both yield from the same plant and have commonly been distinguished by the concentration of delta-9 tetrahydrocannabinol ("THC") present in the plant. Delta-9 THC is a psychoactive cannabinoid most associated with intoxication. Cannabidiol ("CBD") is another naturally occurring cannabinoid found in both cannabis and hemp varieties of Cannabis sativa L.; however, CBD alone is non-psychoactive and is the only cannabinoid approved for medical use by the Food and Drug Administration.[2]

Additionally, there are a number of isomers of delta-9 THC that are also psychoactive and have a significant effect on mental processes.[3] Delta-8 THC is nearly identical to delta-9 THC, with the only difference being the placement of a carbon double-bond.[4] While delta-8 THC is naturally occurring in Cannabis sativa L., it is not naturally

[2] https://www.fda.gov/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms.
[3] An isomer is defined as a compound with the same formula but with a difference in the arrangement of the atoms.
[4] Similarly, delta-10 THC is another isomer of delta-9 THC and it too has psychoactive effects when ingested.

occurring in high concentrations and is therefore commonly produced as a derivative of CBD.[5]

The law has been slow to recognize the significance of these isomers and instead originally focused on those cannabinoids most present in the plant material rather than those cannabinoids most popular in processed concentrates and derivatives. In 2018, Congress passed the federal Agriculture and Nutrition Improvement Act ("2018 Farm Bill"), which allowed for the cultivation of hemp and defined hemp as the Cannabis sativa L. plant that contains less than 0.3% delta-9 THC on a dry weight basis. The 2018 Farm Bill does not set out different definitions for hemp flower, or plant material, and hemp-derived concentrated products.

D. The General Assembly's Consideration of Hemp Regulation in 2022

In 2022, the General Assembly considered several bills regarding unregulated delta-8 THC products. House Bill 1078[6] and Senate Bill 788[7] (cross-filed) initially proposed to regulate delta-8 THC as cannabis. After amendment, the bills established that no delta-8 THC or delta-10 THC products could be sold to individuals under the age of 21 and required that the MMCC conduct a study in consultation with the Maryland Department of Agriculture and representatives from Plaintiff Maryland Hemp Coalition, the U.S.

[5] https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-thc.
[6] https://mgaleg.maryland.gov/2022RS/bills/hb/hb1078E.pdf.
[7] https://mgaleg.maryland.gov/2022RS/bills/sb/sb0788E.pdf.

Cannabis Council, and the Maryland Health Alternatives Association in order to make recommendations on the regulation of THC other than delta–9 THC as well as manufactured products containing delta–8 THC and delta–10 THC.[8]

MMCC worked in consultation with stakeholders to conduct this study and submitted a legislative report entitled Hemp-Derived Non-Delta-9-Tetrahydrocannabinol Products ("Legislative Report") to the General Assembly in December of 2022.[9] Attached hereto and incorporated herein as Exhibit 1 is a true and correct copy of the Legislative Report. The Legislative Report is comprehensive in scope and includes multiple written statements from the Maryland Hemp Coalition. *Id*. Among other things, the Legislative Report noted that among several hemp-derived edible products purchased within the State and tested by independent testing laboratories, none of the products had a potency within 10% of the potency stated on the product's label or COA, and all of these products purported to have a delta-8-THC content of greater than 10 mg per serving (the maximum permitted under the cannabis regulations). *Id.* At 12-13. The General Assembly had this information in hand before it proceeded to consider policy changes to regulation in 2023.

E. The General Assembly's Consideration of Hemp Regulation in 2023

After the overwhelming passage of Question 4 on the November 2022 ballot, Article

[8] *Id.*

[9] The Legislative Report on Hemp-Derived Products is available on the MCA website, at https://mmcc.maryland.gov/Pages/Adult-Use-Cannabis-Implementation.aspx. The Court may take judicial notice of such information presented on a Stage agency's website. *See, e.g., 120 West Fayette St., LLLP v. Baltimore*, 426 Md. 14, 21 n.5, 43 A.3d 355 (2012).

XX was added to the Maryland Constitution.[10] Article XX recognizes the right of an individual who is at least 21 years old to use and possess cannabis and further directs the General Assembly to establish a regulatory framework in statute. Armed with ample resources developed through years of legislative workgroup meetings as well as numerous legislative reports including the Legislative Report, the General Assembly needed to establish a regulatory program through which to safely distribute cannabis to adults at least 21 years old while attempting to reinvest in those communities that had suffered the most through cannabis prohibition. The legislature introduced House Bill 556 and Senate Bill 516 as cross-filed emergency bills and presented expansive changes to the State's cannabis laws, among which were changes to the requirements for selling intoxicating cannabis products. More specifically, § 36-1102 provides:

> (b)(1) A person may not sell or distribute a product intended for human consumption or inhalation that contains more than 0.5 milligrams of tetrahydrocannabinol per serving or 2.5 milligrams of tetrahydrocannabinol per package unless the person is licensed under § 36-401 of this title and the product complies with the:
>
> (i) manufacturing standards established under § 36-203 of this title;
>
> (ii) laboratory testing standards established under § 36-203 of this title; and
>
> (iii) packaging and labeling standards established under § 36-203 of this title.
>
> (2) A person may not sell or distribute a product described under paragraph

[10] Article XX, § 1 of the Constitution of Maryland states: (a) Subject to subsection (b) of this section, on or after July 1, 2023, an individual in the State who is at least 21 years old may use and possess cannabis.
(b) The General Assembly shall, by law, provide for the use, distribution, possession, regulation, and taxation of cannabis within the State.

(1) of this subsection to an individual under the age of 21 years.

Md. Code Ann. Alc. Bev. § 36-1102(b).

After numerous hearings in each chamber, the bills passed on Saturday April 8, 2023, and Governor Moore signed them into law on May 3, 2023. As emergency legislation, the new laws took effect immediately except for those provisions authorizing adult use sales of cannabis, which instead became effective on July 1, 2023, consistent with the language in Article XX.

Since 2022, Plaintiffs advocated against the Act's approach to regulating the distribution of hemp-derived cannabinoids. Now, disappointed in the policy choices made by the General Assembly, Plaintiffs come before this Court after having violated the law since May 2023 and ask it to enjoin the State from enforcing a provision designed to reduce the public health risks associated with intoxicating hemp-derived products. Plaintiffs allege that, but for a business license, they would continue business as usual and yet they conspicuously fail to demonstrate that the products upon which they allege their businesses depend would meet any of the manufacturing standards, laboratory testing standards, or packaging and labeling standards patently enacted to protect the health and safety of consumers and other members of their households. If Plaintiffs are successful, they will elevate the financial risk associated with their business decisions over the health risks associated with unregulated intoxicants.

LEGAL STANDARD

A court must consider four factors in deciding whether to issue an interlocutory injunction:

1. The likelihood that the plaintiff will succeed on the merits;
2. The "balance of convenience" determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal;
3. Whether the plaintiff will suffer irreparable injury unless the injunction is granted; and
4. The public interest.

Fogle v. H & G Restaurant. Inc., 337 Md. 441, 455-56 (1995). These factors apply both to TROs and preliminary injunctions. *See, e.g., Fuller v. Republican Cent. Comm. of Carrol County*, 444 Md. 613, 635-36 (2015) (TRO); *Schade v. Maryland State Bd. of Elections*, 401 Md. 1, 36 (2007) (preliminary injunction). If the party seeking the relief fails to prove any one of the four elements, then the court must deny the injunction. *Fogle*, 337 Md. at 456.

A party seeking a TRO has the additional burden of demonstrating "specific facts shown by affidavit or other statement under oath" that "clearly" show that "immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction." Md. Rule 15-504(a).

ARGUMENT

A. This Court must deny Plaintiffs' request for a TRO because Plaintiffs fail to meet their burden under Md. Rule 15-504(a) of demonstrating specific facts by statements made under oath that clearly show immediate, substantial, and irreparable harm will result in the absence of a TRO.

Plaintiffs' request for a TRO falls short of meeting the requirements set forth in Rule 15-504(a) because they fail to clearly demonstrate by affidavit or other sworn testimony that they would suffer an immediate, substantial, and irreparable harm if this Court does not grant them a TRO. Plaintiffs have not—and cannot—demonstrate that they will suffer immediate injury absent a TRO because they waited for almost three months after the Act took effect to bring the instant challenge. By Plaintiffs' own account, and without any explanation for the delay, they waited more than three weeks after they believed the law took effect before filing this challenge. However, Plaintiffs misstate the effective date of the relevant provisions of the law, which was May 3, 2023. If they were able to wait that long by choice, certainly they could wait at least until the Court holds a full evidentiary hearing on a preliminary injunction.

Nor have Plaintiffs demonstrated that they face substantial and irreparable injury in the absence of a TRO. Plaintiffs make vague assertions that "almost all" of the products sold by retailer Plaintiffs are intoxicating hemp products containing more than 0.5mg of THC, *see, e.g.*, Motion Ex. A ¶ 10, but offer no details regarding, for example, the number of products sold that contain less than 0.5mg of THC and what portion of their revenue is driven by such products. Plaintiffs likewise make general claims, at times based upon only

information and belief, that they will be excluded from the regulated market, but they fail to address the ability of grower and processor plaintiffs to sell hemp to cannabis licensees under the former and current medical cannabis regulations. *See* COMAR 10.62.22.03B(1). Indeed, at least one plaintiff appears to concede that it has no plans to grow hemp in 2023. See Motion Ex. F ¶ 2 ("This year we will not grow hemp because the market is very uncertain, given the new recreational cannabis laws and the fact that most hemp retailers will likely be put out of business unless the Courts intervene."). For this business, at least, an TRO enjoining the enforcement of § 36-1102 will not affect its business operations for 2023.

Nor can Plaintiffs establish any irreparable injury in the State's enforcement of § 36-1102; Plaintiffs will not lose their businesses but at most will realize a change in the value of their businesses that would be readily quantifiable in a monetary value. "[I]rreparable injury is suffered whenever monetary damages are difficult to ascertain or are otherwise inadequate." *Maryland–National Capital Park and Planning Commission et al. v. Washington National Arena,* 282 Md.588, 615 (quoting *Glasco v. Hills,* 558 F.2d 179, 181 (3d Cir. 1977)); *see also Dudley v. Hurst,* 67 Md. 44, 52 (1887) ("An injury may be said to be irreparable when it cannot be measured by any known pecuniary standard.").

> As ordinarily understood, an injury is irreparable, within the law of injunctions, where it is of such a character that a fair and reasonable redress may not be had in a court of law, so that to refuse the injunction would be a denial of justice—in other words, where, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial

> condition of the person committing it, it cannot be readily, adequately, and completely compensated for with money.

Coster v. Department of Personnel, 36 Md. App. 523, 526 (1977) (quoting 42 Am. Jur.2d, *Injunctions*, § 49).

The Field Enforcement Division within the Office of the Executive of the ATCC has legal authority to enforce restrictions on the sale of intoxicating hemp-derived products and, in doing so, may seize inventory of intoxicating hemp products if they are offered for sale by unlicensed operators. Md. Code Ann., Alc. Bev. §§ 1-313, 6-101. Any aggrieved entity could easily demonstrate the value of seized product and be completed compensated with money if this Court were to later find a basis upon which to order relief. Plaintiffs raise vague concerns about losing customers, but they refuse to recognize that they can continue to operate their businesses. Hemp farmers can sell to any number of industrial client and can also sell to medical cannabis licensed processors. Hemp processors can manufacture and sell non-intoxicating CBD products or low THC products and hemp retailers are free to sell the same product lines. While there is caselaw that recognizes the loss of a business as an irreparable injury, those cases are easily distinguishable from the facts here. In *DMF Leasing, Inc. v. Budget Rent-A-Car Of Maryland, Inc*., the parties' dispute arose after a business holding a sub-franchise license lost its license to conduct business and was therefore prohibited from conducting any business at all. 161 Md. App. 640, 651–52 (2005) (citing *Semmes Motors, Inc. v. Ford Motor Co*., 429 F.2d 1197, 1205 (2d Cir. 1970)). Here, at most, Plaintiffs will not be permitted to sell an unregulated product

line that they previously sold for human consumption. This is not the loss of a business but at most a diminution in the range of products that may be sold by the business which could be easily reduced to a monetary value. Injunctive relief is not properly granted on such facts. For these reasons, Plaintiffs' purported risk of irreparable and substantial injury is not sufficient to meet the burden for obtaining a TRO.

Having failed to meet the requirements of Rule 15-504(a), Plaintiffs' Motion for TRO should be denied.

B. This Court must deny the Motion because Plaintiffs fail to meet their burden to support the issuance of the injunctive relief sought.

Plaintiffs fail to meet their burden of demonstrating that all of the four factors warrant interlocutory injunctive relief. *See Fogle*, 337 Md. at 456, 654 A.2d at 456.

1. Plaintiffs do not demonstrate likelihood of success on the merits of their claims.

A party seeking the interlocutory injunction "must establish that it has a real *probability* of prevailing on the merits, not merely a remote *possibility* of doing so." *Fogle*, 337 Md. at 456 (emphasis in original); *accord Eastside Vend Distributors, Inc. v. Pepsi Bottling Grp., Inc*., 396 Md. 219, 241 (2006). Plaintiffs have not, and cannot, demonstrate a likelihood of success on the merits of their claims that the Act violates Articles 24 and 41 of the Maryland Declaration of Rights or Article III, Section 40 of the Maryland Constitution. As a threshold matter, Plaintiffs challenge the Act as unconstitutional on its face. *See* Motion at 25, 30. To prevail on a facial challenge, the "party challenging the

facial validity of a statute 'must establish that no set of circumstances exist under which the Act would be valid.'" *Koshko v. Haining*, 398 Md. 404, 426 (2007) (quoting *U.S. v. Salerno*, 481 U.S. 739 (1987)); *see also Pizza di Joey, LLC v. Mayor and City Council of Baltimore*, 241 Md. App. 139, 165 (2019); *Sabri v. United States*, 541 U.S. 600, 609 (2004) (Facial constitutional challenges are generally disfavored because they carry the risk of "premature interpretation of statutes on the basis of factually barebones records") (quotation marks omitted). This is a high standard that Plaintiffs fail to meet. Rather than establishing "no set of circumstances" under which the Act would be valid, *Koshko*, 398 Md. at 426, Plaintiffs make a series of incomplete allegations about the nature of their business and unfounded allegations about their ability to receive a license to sell such products.[11] On this basis alone, Plaintiffs failed to carry their burden of demonstrating a likelihood of success on their facial constitutional challenges and their Motion should be denied.

a. Plaintiffs' claim that the Act violates Article 41 of the Maryland Declaration of Rights must fail because the Act does not create a monopoly for sale of intoxicating hemp products but, rather,

[11] For example, Plaintiffs make vague assertions that "almost all" of the products sold by retailer Plaintiffs are intoxicating hemp products containing more than .5mg of THC, *e.g.*, Motion Ex. A ¶ 10 rather than offer specific facts on the matter. Plaintiffs also aver in sworn affidavits that, "to the best of [their] knowledge," they and everyone affiliated with their companies do not qualify as a social equity applicant, *e.g.*, Motion Ex. E ¶ 11, notwithstanding that the specific criteria for social equity applicant have not been published. Such affidavits are hardly sufficient where Rule 15-504(a) requires that "it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the party seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction."

> creates a regulatory framework to protect the public health and a licensing system that aims to redress the harms that cannabis prohibition disproportionately inflicted on communities across the State.

Article 41 of the Maryland Declaration of Rights provides that "monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." Md. Decl. Rights art. 41. As the Maryland Supreme Court explained, "when the creation or grant of such a privilege is needed to aid some governmental function or purpose essential to the protection of the public security, health, or morals, it may not be obnoxious to the constitutional condemnation of monopolies." *Raney v. Montgomery County Comm'rs*, 170 Md. 183, 193 (1936).[12] The Court reaffirmed this point in *Levin v. Sinai Hospital of Baltimore City*:

> A monopoly within the prohibition of our Declaration of Rights, is a privilege or power to command and control traffic in some commodity, or the operation of a trade or business to the exclusion of others, who otherwise

[12] Plaintiffs rely heavily on *Raney* in support of their argument that Defendants have violated Article 41, *see* Motion 23-24, but fail to mention that the circumstances in *Raney* are far different than those at issue here. In *Raney*, the Court examined the constitutionality of a Montgomery County act that required the county, when publishing certain public notices, to print the notices in two Montgomery County newspapers of general circulation that met specific criteria, namely newspapers to be printed in Montgomery County and to have been in service for four consecutive years prior to the publication of the notices. 170 Md. at 186. Only one newspaper in Montgomery County met the requirements. *Id.* at 190. Examining the act in light of Article 41, the Court concluded that the act essentially conferred on that single paper a special privilege for which no other paper was eligible to compete. *Id.*

Here, in contrast, any number of businesses are eligible to seek a cannabis license in the first round or later rounds, including Plaintiffs. Plaintiffs baldly claim that they are not eligible to apply for licensure, but they cannot know that because the criteria have not yet been published.

> would be at liberty to engage therein, necessarily implying the suppression of competition, and ordinarily causing a restraint of that freedom to engage in trade or commerce which the citizen enjoys by common right. A monopoly is more than a mere privilege to carry on a trade or business or to deal in a specified commodity. It is an exclusive privilege which prevents others from engaging therein. *A grant of privileges, even though monopolistic in character, does not constitute a monopoly in the constitutional sense when reasonably required for protection of some public interest, or when given in return for some public service, or when given in reference to some matter not of common right*.

186 Md. 174, 182-83 (1946) (emphasis added).

The Act's requirement that regulated entities sell intoxicated hemp products, Md. Code Ann. Alc. Bev. § 36-1102(b)(1), is a matter of public health and, accordingly, not monopolistic for purposes of Article 41. Protecting the public from intoxicating products that previously were subject to no testing or quality control requirements, that vary widely in potency, and come with little or no little or no warning of intoxicating effects is certainly a matter of genuine public interest. So, too, is the licensing system that the General Assembly created for cannabis, including intoxicating hemp products, namely one that considers individuals from communities disproportionately harmed by cannabis prohibition. Such public interests do not offend in the constitutional sense and, accordingly, do not violate Article 41. *See Levin*, 186 Md. at 183.

Plaintiffs' claim that the Act violates Article 41 fails for the additional reason that the restriction on which they complain, the right to sell intoxicating hemp products without a license to do so, is not a matter of a common right. Absent a common right, there is no monopoly at issue in the constitutional sense. *See Levin*, 186 Md. at 183, 46 A.2d 298.

For these reasons, Plaintiffs cannot meet their burden of demonstrating a likelihood of success on the merits of their Article 41 claim.

b. Plaintiffs' claim that the Act violates Article 24 of the Maryland Declaration of Rights must fail because the Act's requirement that intoxicating cannabinoids be sold by licensed retailers, and that such licenses be limited in number and some preference be given to individuals from areas that were disproportionately impacted by cannabis prohibition, are rationally related to legitimate government interests.

Article 24 of the Maryland Declaration of Rights provides that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Decl. Rights art. 24. In considering an equal protection challenge that does not involve a suspect classification, "i.e., when the statute does not differentiate based on race, religion, alienage, or national origin, and when no fundamental, enumerated constitutional right is implicated, it is subject to highly deferential, rational basis review." *Pizza di Joey*, 241 Md. App. at 166 (citation omitted). Here, Plaintiffs do not allege that the Act discriminates on any suspect classification.[13] Nor does Plaintiffs' challenge involve a fundamental constitutional right, which are those "'explicitly or implicitly guaranteed' by the federal constitution." *Attorney Gen. of Maryland v. Waldron*, 289 Md. 683, 706 (1981) (quoting *San Antonio Independent Sch.*

[13] In fact, Plaintiffs appear to bemoan the lack of preference given to women and racial minorities. *See* Motion Ex. F ¶ 11 ("I know that I do not qualify for any sort of preference despite being an African American woman.").

Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973)). Plaintiffs assert discrimination on the basis on geography, Motion at 27, but do not allege that is a fundamental right. Accordingly, Plaintiffs' equal protection claim is subject to rational basis review. *Pizza di Joey*, 241 Md. App. at 166.

When reviewing a legislative enactment under the rational basis test, a court does not substitute its judgment for that of the legislative body. *See, e.g., Tyler v. City of College Park*, 415 Md. 475, 500-01 (2010); *Governor of Md. v. Exxon*, 279 Md. 410, 425-26 (1977); *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 48 (1973). Rather, courts must recognize that the "Legislature exercises a large discretion in determining what the public welfare requires, in what may be injurious to the general welfare of the public and also what measures are either necessary or appropriate for the protection and promotion of these interests." *Salisbury*, 268 Md. at 48. This is particularly the case when the legislative body is "dealing with a serious problem in a new and untried fashion"; in such cases, "courts are under a special duty to respect the legislative judgment as to the proper means of solving the problem." *Exxon*, 279 Md. at 428; *see also Tyler*, 415 Md. at 500 (noting that "courts are under a special duty to respect the legislative judgment where the legislature is attempting to solve a serious problem in a manner which has not had an opportunity to prove its worth").

In passing the Act, the General Assembly faced several novel and important issues of first impression, including how to address the unregulated market for intoxicating hemp

products and how to redress harms caused by cannabis prohibition now that Maryland voters decided cannabis should be legal. The General Assembly deliberated these issues extensively. The resulting law, including the elements of the Act of which Plaintiffs complain, are the result of the General Assembly's legislative judgment and rationally related to legitimate government interests in protecting public health, redressing past harms to certain communities, and establishing efficient and orderly regulatory systems. The elements of the Act of which Plaintiffs complain are therefore not unconstitutional, even if, as Plaintiffs allege, "in practice, [the] laws result in some inequality." *Supermarkets Gen. Corp. v. State*, 286 Md. 611, 617 (1979) (citation omitted). Accordingly, Plaintiffs have failed to meet their burden of demonstrating a likelihood of its success on their Article 24 claim.

c. Plaintiffs' claim that the Act violates Article III, Section 40 of Maryland Constitution must fail because a restriction on the sale of specific, intoxicating cannabinoids does not constitute a taking.

Plaintiffs put forth no argument for why their claim that the Act constitutes an unconstitutional taking is likely to succeed on the merits and, accordingly, Plaintiffs fail to carry their burden of making this necessary showing. *See Fogle*, 337 Md. at 456. Nor could Plaintiffs make this showing if they tried. "Regulations which restrict the use and enjoyment of property, but which nonetheless permit an existing use to continue, generally do not constitute a 'taking' because they leave the owner with some beneficial use of the property." *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 580 (1980). Put

differently, "[r]egulations generally constitute a 'taking' only if the owner affirmatively demonstrates that the restrictions imposed deprive him of essentially all beneficial use of the property." *Id.*

Here, Plaintiffs continue to be able to sell hemp products containing less than 0.5mg of THC, *see* Md. Code Ann., Alc. Bev. § 36-1102(b)(1), and hemp growers continue to be able to sell hemp into Maryland's cannabis marketplace. Conclusory allegations aside, Plaintiffs have not plead facts demonstrating that the Act deprives them of all beneficial use of their businesses.

d. Plaintiffs' claims against each individually named commissioner of the ATCC or the former MMCC must fail because none of those individuals is a proper party to this action.

Plaintiffs cannot prove the likelihood that they will succeed on the merits against the commissioner defendants because they are not proper defendants to this action. These defendants are not "the persons and bodies charged with licensing and regulating the distribution of certain products at the core of this litigation." Compl. ¶ 12.

In 2023, the General Assembly dissolved the MMCC and created the MCA. 2023 Md. Laws, Ch. 556; 2023 Md. Laws Ch. 254. C. Obi Onyewu, MD, Brian P. Lopez, Philip Cogan, RPh, Mark Martin, PhD, MHA, Tereance Moore, PMP, SHRM-CP, Gina Scarinzi, Konrad Dawson, MD, Megan Dingus, MSN, Elizabeth Q Hines, MD, Charles P. LoDico, MS, PhD, Saundra O. Washington, and Scott Welsh no longer have authority to participate

in licensing and regulating the cannabis industry on behalf of the State.[14] Thus, these individuals are not proper defendants and Plaintiffs cannot succeed on the merits against them. The Court should deny the temporary restraining order and preliminary injunction against them.

The members of the ATCC also lack authority to license and regulate cannabis and hemp products. The powers and duties of the ATCC consist of educating the public and conducting studies for submission to the Governor. Md. Code Ann., Alc. Bev. § 1-307. The prohibitions on sale and distribution in § 36-1102 of the Alcoholic Beverages & Cannabis Article, the focus of Plaintiffs' complaint, fall within the enforcement authority of the Field Enforcement Division. *Id.* § 1-313. Lacking enforcement authority, the ATCC members named in the complaint, Robert H. Poole, Barbara Wahl, Elizabeth Buck, Eric Morrissette, and Alan I. Silverstein, are not proper defendants. Plaintiffs cannot demonstrate any likelihood of success on the merits against these defendants and the Court should dismiss these individuals from the suit.

2. Defendants would suffer greater harm if the Court grants the injunction than would Plaintiffs if the Court denies the injunction.

Plaintiffs carry the burden to show that the "balance of convenience" test weighs in their favor for this court to grant the relief sought. *State Dep't of Health and Mental*

[14] Dr. Martin continues to serve the State as the Director for the Office of Minority Health and Health Disparities for the State of Maryland, however he holds no official authority to act regarding cannabis business licensing or enforcement actions against unlicensed cannabis operators or unregulated cannabis products.

Hygiene v. Baltimore County, 281 Md. 548, 557 (1977). Thus, the court considers "whether greater injury would be done to the defendant[s] by granting the injunction than would result to the plaintiff[s] from its refusal." *Id*. at 557 (citations omitted). However, because this litigation is between private and governmental parties, and is a case that directly impacts governmental interests, "the court is not bound by the strict requirements of traditional equity as developed in private litigation." *Fogle*, 337 Md. at 456 (quoting *State Dep't of Health and Mental Hygiene*, 281 Md. at 554).

The State's purpose in enacting the Act was to protect the public and public health by ensuring that sale and distribution of cannabis products containing more than 0.5mg of THC or 2.5mg of THC per package is done in a well-regulated market, where products are rigorously tested. Dep't Legis. Servs., Fiscal and Policy Note, House Bill 556, at 21 (2023 Session). Absent from the Motion is any recognition of this purpose or the recognition that there is a potency of hemp products in the marketplace that endanger public health. This contrasts with Plaintiffs' statements to the Maryland Medical Cannabis Commission, which called for the establishment of guidelines, standards, and regulations for hemp extract and hemp extract products. *See* Exhibit 1 at Appendix G (November 2, 2022 letter from Plaintiff Maryland Hemp Coalition). While Plaintiffs themselves may be responsible operators, they are fully aware of the evidence of a wide range of public health risks presented by intoxicating hemp-derived products including inaccurate potency labeling, inaccurate and insufficient laboratory testing, contamination of products, intoxicating

products that resemble traditional, non-intoxicating foods and candies, marketing of products to youth, and the proliferation of packaging that is accessible to children. *See* Exhibit 1.

The Act aimed to close the loopholes that allowed Plaintiffs and others to sell intoxicating cannabinoids, products that are as potent, if not more so, than the products available in the regulated cannabis marketplace. Through this legislation, the State establishes a cannabis licensing and registration framework aimed to help the public health and safety while ensuring the government honors the will of the people in legalizing adult cannabis use. Fiscal and Policy Note, Senate Bill 516, at 2 (2023 Session). If this court grants Plaintiffs the injunction sought, then the State will be left without the enforcement authority to protect its citizens from the health risks presented by unregulated intoxicating cannabinoids. This will cause a greater injury to Defendants than refusing to grant Plaintiffs the injunction as this case continues in the legal system. For these reasons, Plaintiffs fail to satisfy the balancing of harms test and this court should deny the Motion.

3. Plaintiffs will not suffer irreparable harm.

The Act went into effect on May 3, 2023, the date when Governor Moore signed HB 556 and SB 516 into law. Plaintiffs contend that they will suffer irreparable injury as of July 1, 2023; however, they chose to illegally operate their businesses for nearly three months after Governor Moore signed the Act. They suffered no injury during these months as they continued to operate their businesses accordingly to make profits illegally.

Additionally, Plaintiffs, who believed the law went into effect on July 1, 2023, waited more than three weeks after that date to file this lawsuit. None of this constitutes irreparable injury and this court should deny Plaintiffs' Motion.

"Irreparable injury is generally found in situations where courts are either unable to determine appropriate monetary damages or where monetary damages are inadequate." *Ademiluyi v. Egbuonu*, 466 Md. 80, 134 (2019) (citation omitted). Thus, an irreparable injury occurs "where, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing it, it cannot be readily, adequately, and completely compensated for with money." *Id*. (citation omitted).

The Act permits "a person to sell or distribute a hemp-derived tincture intended for human consumption that contains (1) a ratio of cannabidiol to THC of at least 15 to 1 and (2) 2.5 milligrams or less of THC per serving and 100 milligrams or less of THC per package." Dep't Legis. Servs., Fiscal and Policy Note, House Bill 556, at 21 (2023 Session). Plaintiffs complain that they cannot sell hemp products but fail to show how and why they cannot sell hemp products within the legally allowed limitations set forth in the updated law. Furthermore, Plaintiffs that grow and cultivate hemp to sell into markets face no restrictions in selling such products to the market. There is no merit to the argument that Plaintiffs will be put out of business without an injunction because the law permits them to operate even without obtaining a license. The mere inconvenience of converting their businesses into legally sound operations does not constitute irreparable harm. *See*

Antwerpen Dodge, Ltd. v. Herb Gordon Auto World, Inc., 117 Md. App. 290, 306-09 (1997) (finding maintenance of the status quo unnecessary because Herb Gordon had a sales history against which to measure damages in the event it lost business to Antwerpen).

Plaintiffs argue that their customers "may not come back." This statement is without merit. And if the statement was true, it would show that the inroads that Plaintiffs made in the industry over the last few years are not as strong as they believed. Plaintiffs bear the burden in proving the elements for injunctive relief. Bare, conclusory reasoning without support does not suffice. *State Dep't of Health and Mental Hygiene*, 281 Md. at 554; *El Bey v. Moorish Sci. Temple of Am., Inc.*, 362 Md. 339, 356 (2001) ("mere allegations or arguments by a petitioner that it will suffer irreparable damage are not sufficient foundation upon which to base injunctive relief; facts must be adduced to prove that a petitioner's apprehensions are well-founded"). Plaintiffs cannot meet their burden to show irreparable injury and this court should deny the request for an injunction.

4. <u>The public interest favors denying the injunction.</u>

Plaintiffs seek an injunction preventing the State from enforcing § 36-1102 of the Alcoholic Beverages & Cannabis Article against any person who was already lawfully in the business of selling hemp derived products prior to July 1, 2023[.]" Motion at 33. Setting aside that the Act took effect on May 3, 2023, such that no plaintiff was lawfully selling hemp products containing more than 0.5mg of THC after that date, Plaintiffs' public interest narrowly focuses on consumer choice for intoxicating cannabinoids. While there

may be some frustration to such consumers and to Plaintiffs through enforcement of the Act, that pales in comparison to the public health risk posed by having highly potent, unregulated cannabinoids available throughout the State. Certainly, the General Assembly had evidence detailing the public health risks associated with delta-8 and similar THC isomers before it when it considered and passed the Act. Exhibit 1 at 8-15.

Plaintiffs seek a return to the *status quo ante*, Motion at 21, which means sale of intoxicating hemp products that are not subject to laboratory testing standards, manufacturing standards, or packaging and labeling standards. The public has an interest in ensuring that products sold within the State, especially those that are intoxicating, are safe and rigorously tested. Plaintiffs would prefer to disregard that in favor of purported convenience for their customers, who in turn would suffer exposure to detrimental effects this legislation seeks to avoid. This public interest calculus clearly weighs in favor of enforcing the Act. As such, the public interest favors denial of the Motion.

CONCLUSION

Plaintiffs do not face any immediate, substantial and irreparable harm. Moreover, Plaintiffs fail to meet their burden as to any one of the four necessary elements for interlocutory injunctive relief. This Court should deny the Motion.

Dated: July 27, 2023

Respectfully submitted,

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Rule 20-201 Certification

Pursuant to Rule 20-201(h), I certify that this document does not contain any restricted information.

//s// James N. Tansey

James N. Tansey

CERTIFICATE OF SERVICE

I certify that on this 27th day of July 2023, a copy of the foregoing was served electronically, in accordance with MD E-File and TylerHost requirements, via MDEC on all parties entitled to service.

//s// James N. Tansey
James N. Tansey