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Montana Department of Health
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Marijuana Program

MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

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)	
BIG SKY HERBALS AND EDIBLES,)	Dept. 2 Judge Robert Deschamps, III
LIONHEART CAREGIVING, GREEN TREE MT,)	
LLC, URBAN FARMER, and WILLOW BARK)	Case No. DV-18-1589
SCIENCES, LLC,)	
)	
Petitioners,)	RESPONDENT'S RESPONSE AND
v.)	BRIEF IN OPPOSITION TO
)	WILLOW BARK SCIENCE, LLC'S
MONTANA DEPARTMENT OF PUBLIC)	APPLICATION FOR A
HEALTH AND HUMAN SERVICES,)	PRELIMINARY INJUNCTION
)	
Respondent.)	
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COMES NOW the Respondent, Montana Department of Public Health and Human Services (the Department), and pursuant to § 27-19-201, MCA, files its RESPONSE AND BRIEF IN OPPOSITION to Petitioner WILLOW BARK SCIENCES, LLC's (Willow Bark's) Application for Preliminary Injunction.

The Court should DENY Willow Bark's Application for Preliminary Injunction for the following reasons:

1. Willow Bark lacks standing in this case, so Willow Bark's Application for Preliminary Injunction is procedurally deficient;
2. Willow Bark is not likely to win on the merits of the case because their theory rests on errant legal interpretation;
3. Willow Bark cannot show great or irreparable injury that requires injunctive relief;
4. Granting a preliminary injunction would change the *status quo* rather than maintain *status quo*; and
5. On balance, equity demands that Willow Bark's application be dismissed; Willow Bark's claim of financial distress does not outweigh the need for consistent and fair regulation of the medical marijuana industry.

I. FACTS

The Court should deny Petitioner's Application for Preliminary Injunction, but if a hearing is set, the Department will establish the following facts at hearing:

1. The Department has no regulatory or licensing authority over Willow Bark because Willow Bark is not and has never been a medical marijuana provider or medical marijuana infused products provider (MIPP).

2. The Department did not represent to Ms. Hill Smith or to the medical marijuana industry that the law would allow Willow Bark's business model or practices.
3. The Department did not commit to consider third-party rental agreements or businesses as employees; the Department advised Ms. Hill Smith that it was unable to consider those things until after seed-to-sale tracking was in place and operating efficiently.
4. The Department published "Frequently Asked Questions" (FAQs) on its website in January 2018 to answer the medical marijuana industry's questions about the program. The Department posted a FAQ on January 9, 2018, that stated a provider or MIPP could not use a third-party company to provide chemical manufacturing or infused product manufacturing services.
5. In 2018, fewer than ten (10) MIPPs applied who listed Willow Bark as their registered premises.
6. In 2018, Ellie Hill Smith emailed the Department with a list of providers who wanted to use Willow Bark's equipment to process medical marijuana. Several of those providers never listed Willow Bark in their MIPP application, and all those providers currently have licensed MIPPs.
7. The Department has a working draft of administrative rule changes that would allow licensed MIPPs to rent third-party immovable medical marijuana chemical extraction equipment.
8. Many licensed providers are not using METRC correctly and are not considered fully compliant. Lionheart Caregiving is not in full compliance with METRC, which compromises its future as a licensed provider.

9. Ms. Ellie Hill Smith's role in the industry is unclear and fluid. The Department is never sure if Ms. Hill Smith is appearing or speaking on her own behalf, for her husband's testing laboratory, as an attorney for a provider the Department is inspecting, as a paid compliance consultant or as a state representative.
10. Because Ms. Hill Smith is not a licensed provider or applicant, the Medical Marijuana Program is not able to respond in its regulatory capacity; therefore, Ms. Hill Smith has been referred to Department leadership and legal staff to address her communication based upon her roles of legislator and attorney.
11. There are other providers who own the same type of chemical manufacturing equipment owned by Willow Bark; those providers would like the same access to business opportunity that Willow Bark is demanding.
12. Lionheart Caregiving never transferred product through METRC to Willow Bark and Big Sky Herbals and Edibles has transferred product twice to Willow Bark since the Stipulated Preliminary Injunction went into effect.
13. Pending legislation may very well change the Medical Marijuana Act in ways that either preclude Willow Bark's business model or allow many providers to act as third-party rental businesses.

II. ARGUMENT

The Court must deny Willow Bark's *Application for a Preliminary Injunction* because Willow Bark has failed to demonstrate the requisite conditions to qualify for injunctive relief.

A. WILLOW BARK'S APPLICATION NECESSARILY FAILS DUE TO LACK OF STANDING

The overarching “question of standing is whether the litigant is entitled to have the court decide the merits of the dispute.” *Hefferman v. Missoula City Council*, 2011 MT 91, ¶ 30, 360 Mont. 207, 255 P.3d 80. “Standing is determined as of the time the action is brought....and requires the plaintiff to have a personal stake in the outcome of the controversy at the commencement of the litigation...”. *Id.* Federal jurisprudence has established three minimum elements of standing: injury in fact, causation, and redressability. *Id.* at 32. Beyond those constitutional requirements, the United States Supreme Court “has adopted several prudential limits: the plaintiff...must assert her own legal rights and interests; the courts will not adjudicate generalized grievances more appropriately addressed in the representative branches; and the plaintiff’s complaint must fall within the zone of interests protected by the law invoked.” *Id.*

In Montana, a plaintiff meets the case-or controversy requirement when she can “clearly allege a past, present, or threatened injury to a property or civil right. *Id.* at ¶ 33. The Montana legislature may enact statutes that create legal rights, “the invasion of which creates standing even though no injury would exist without the statute.” *Id.* at ¶ 34. However, the person bringing the action must “clearly allege a[n] ...injury to a *property or civil right*—i.e. an invasion of a *legally protected interest*. *Id.* at ¶ 35.

1. Willow Bark lacks standing to challenge the Department’s decision to deny licenses to applicants.
 - a. Willow Bark is not an applicant whose license was denied.

Willow Bark cannot challenge the denial of a medical marijuana license because it has not applied for a license with the Department. Willow Bark has never applied to the Department to become a Montana Medical Marijuana Infused Products Provider (MIPP). Willow Bark does

not allege that it had a license application denied, nor does it allege that it will apply for a license. Willow Bark is not asserting its own legal rights or interests.

b. Willow Bark does not have standing as a third-party beneficiary.

Willow Bark has also failed to show it has suffered injury to a property interest in the past, present, or future. Willow Bark alleges that it provided medical marijuana chemical manufacturing for providers in the past, but Willow Bark has not identified those providers nor provided evidence showing that those providers are no longer able or willing to use Willow Bark based upon Department action. Other than the co-Petitioners, Willow Bark has provided no evidence that other providers seek to use Willow Bark. Further, Willow Bark has shown no actual damages in its Application or supporting Affidavit.

c. The Department has not invaded a statutorily-created legal interest in which Willow Bark can demonstrate a property interest.

Willow Bark does not have standing because it does not have a property interest in medical marijuana created by statute. Willow Bark is not a provider, nor a card holder nor a testing laboratory pursuant to the Montana Medical Marijuana Act. Willow Bark is a business operating outside regulation and law; Willow Bark does not have a legally protected interest that the Department is infringing upon.

B. WILLOW BARK HAS FAILED TO ESTABLISH THAT A PRELIMINARY INJUNCTION IS NECESSARY

A District Court may grant a preliminary injunction pursuant to § 27-19-201, MCA, if the applicant satisfies one of the statute's two subsections. Section 27-19-201(1), MCA, allows a court to grant a preliminary injunction "when it appears that the applicant is entitled to the relief demanded and...the relief...consists in restraining the commission or continuance of the act

complained of, either for a limited period or perpetually.” Section 27-19-201(2), MCA, requires an applicant to show that “the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant.” The Montana Supreme Court has held that the subsections are disjunctive, which requires an applicant to satisfy the requirements of only one of the subsections. *Sweet Grass Farms, Ltd. V. Board of County Commissioners*, 2000 MT 147, § 27, 300 Mont. 66, 2 P.3d 825. The applicant “must establish a *prima facie* case or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated.” *Id.*, ¶ 28.

The Supreme Court has determined that it is not within a District Court’s province to “determine finally matters that may arise upon a trial on the merits, [but that the] limited function of a preliminary injunction is to preserve the *status quo* and to minimize the harm to all parties pending full trial...”. *Yockey v. Kearns Properties, LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185. *Status quo* has been defined as “the last actual, peaceable, noncontested condition which preceded the pending controversy.” *Sweet Grass Farms*, 2007 MT 147, ¶ 28. In considering an application for preliminary injunction, a court must “balance the equities and minimize potential damage.” *Four Rivers Seed Company v. Circle K Farms, Inc.*, 2000 MT 360, ¶ 12, 16 P.3d 342.

The Montana Supreme Court has established a four-part test to determine whether a preliminary injunction is appropriate in the context of a claim for monetary damages. The test analyzes the following four components: “(1) the likelihood that the movant will succeed on the merits of the action; (2) the likelihood that the movant will suffer irreparable injury absent the issuance of a preliminary injunction; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party (a balancing of the equities); and

(4) the injunction, if used, would not be adverse to the public interest.” *Van Loan v. Van Loan*, 271 Mont. 176, 182, 895 P.2d 614, 617. An injunction “is to be issued only under the most clear facts that fully satisfy the four-part test.” *Id.*, 271 Mont. At 183.

1. Willow Bark has failed to demonstrate that it is likely to prevail on the merits of this case.
 - a. Willow Bark’s case is premised on a specious interpretation of Montana Code Annotated § 50-46-302(7)(a) and (b) the law that makes it unlikely that the Plaintiff will succeed.

Willow Bark’s case is based upon the erroneous assertion that § 50-46-302, MCA, includes a business or organization, as well as an individual, in the definition of “employee.” Section 50-46-302(7)(a), MCA, defines employee as, “an individual employed to do something for the benefit of an employer or a third person.” Subsection (7)(b) more specifically defines the term “employee,” which “includes a manager, agent, or director of a partnership, association, company, corporation, limited liability company, or organization.” Subsection (b) refers to the individual referenced in subsection (a). This section is contemplating the natural interactions a provider’s employee would have with third parties to conduct the provider’s business—property managers, cardholders, etc.

Review of § 50-46-302(7) concludes that subsection (b) provides some examples of individuals who are the employees mentioned in subsection (a). This subsection contemplates only an individual person as an employee, not an entire business. The Medical Marijuana Act is not authorizing providers to hire third party businesses as employees.

- b. Willow Bark’s interpretation of § 50-46-302(7) is too broad and undermines the structure of the statute; that broad definition sabotages the protections provided by the intended vertically integrated system for licensed medical marijuana providers.

The Montana Medical Marijuana Act contemplates a vertically integrated system for providers. The purpose of the model is to effect accurate tracking of product and to ensure the safety and security of medical marijuana. The vertical integration system ensures that the provider is in control of marijuana from seed to sale.

Willow Bark's proposed interpretation of "employee" to include an entire business as employee explodes the vertical integration model set forth by Montana law. The purpose of the vertical integration model is to tighten the tracking process of product, to ensure its safety, and to minimize possibility of product diversion. The Montana Department of Health and Human Services, Medical Marijuana Program ("the Department") has never licensed any provider to use Willow Bark's facilities. The Medical Marijuana Program has consistently rejected applications from providers who have listed Willow Bark as their registered premise for extraction.

The Department has never authorized, licensed, or granted permission for Willow Bark to operate outside of Montana law. The Department has never endorsed Willow Bark's faulty interpretation of "employee" under § 50-46-302, MCA. Willow Bark cannot use its own definition of "employee" to circumvent the regulatory system and then claim injury.

2. Willow Bark has not shown that it will suffer great or irreparable damage if the court does not grant its application for preliminary injunction.
 - a. Willow Bark's claim involves money damages that do not rise to the level of great or irreparable damage.

Willow Bark's application must fail because it rests on a claim of pecuniary loss that can be addressed by compensatory damages. If Willow Bark prevails in this case, Willow Bark can demonstrate its actual damages and recover those from the Department. Although Willow Bark has quoted an amount for which it purchased its equipment, Willow Bark has not provided any

details about other monetary loss. Willow Bark makes a vague reference to “17 providers,” but does not name providers nor provide any affidavits from any of them. Willow Bark claims that it lost money from the Department’s refusal to license MIPPs who want to use Willow Bark facilities, but Willow Bark has not provided any evidence of that prior income.

Willow Bark alleges financial damage that does not require injunctive relief. Willow Bark cannot demonstrate it will likely succeed on the merits of the case (as discussed above) nor will going out of business cause Willow Bark irreparable injury. Instead, requiring the Department to allow more providers to use Willow Bark as a third-party extraction will further confuse the issue and the industry. Willow Bark’s business decisions and complaints of imminent bankruptcy do not create a situation that compels the Court to grant an injunction.

- b. If Willow Bark has experienced any injury, it is due to Willow Bark’s own actions by proceeding outside of the regulatory context.

Willow Bark moved forward with a business model currently outside the regulatory context and legal system. The Department does not owe Willow Bark special dispensation as the Department promulgates rules and regulations for a novel and complex program. Willow Bark did not submit a provider application that the Department could adequately evaluate and approve or deny; Willow Bark was not an applicant in the system. The Department had no duty to approve or disapprove Willow Bark’s business practices other than deny MIPP applications that listed Willow Bark as its registered premise for extractions. Willow Bark made the decision to act outside of the law.

The Department posted FAQs on its website in January 2018. On January 9, 2018, the Department posted a FAQ that informed the industry that providers could not contract with separate companies for chemical manufacturing. Willow Bark knew by at least that January 9

date that the Department was not approving Willow Bark's business model. Willow Bark chose to move forward at its own peril. Again, Willow Bark's claim is for financial injury. If Willow Bark prevails on the merits of this case, Willow Bark may then obtain adequate relief through money damages.

- c. Any current financial difficulty alleged by Willow Bark is attributable to Lionheart Caregiving, its co-Petitioner and customer.

The *Stipulated Preliminary Injunction* allows Lionheart Caregiving, Montana's largest medical marijuana provider, (as well as Big Sky Herbals and Edibles) to use Willow Bark for marijuana extraction and edible product manufacture. However, Lionheart Caregiving is not fully integrated into METRC as required by Montana law. To date, Lionheart Caregiving has not transferred any product to Willow Bark. Lionheart Caregiving's failure to comply with METRC or transfer product to Willow Bark cannot be Willow Bark's basis of damages.

3. Granting Willow Bark's application for a preliminary injunction would change the status quo, rather than maintain the status quo.

The *status quo* is that Marijuana Infused Products Providers (MIPPs) are not approved to use Willow Bark as a registered premise¹. Willow Bark is not asking the Court to enjoin the Department from ending providers' current, licensed practices. Willow Bark is asserting that providers have used Willow Bark in the past and is asking the Court to order the Department to approve new MIPP licenses. Willow Bark has provided no evidence from providers that they have used Willow Bark in the past and would like to continue to do so. Willow Bark has not provided any evidence that any provider is being harmed by not using the Willow Bark facility.

¹ The exceptions are obviously the two providers named in the Stipulated Preliminary Injunction, Lionheart Caregiving and Big Sky Herbals and Edibles.

Therefore, a grant of a preliminary injunction would defeat the purpose of a preliminary injunction and alter the status quo.

As previously discussed at hearing, pending legislation has the potential to radically change the legal landscape for all stakeholders in the Montana medical marijuana industry. Those likely legislative changes will likely render this issue and legal action moot. Granting an injunction is unnecessary and will potentially harm Willow Bark its co-petitioners. It is prudent to maintain the *status quo* established by the Stipulated Preliminary Injunction to protect all Petitioners as well as other members of the industry.

4. It is inequitable and against public policy to grant Willow Bark's Application for Preliminary Injunction.
 - a. Granting Willow Bark's application would place other industry members at significant disadvantage.

There are other providers currently ready and able to operate as Willow Bark is being allowed to do under the Stipulated Preliminary Injunction. If Willow Bark adds more MIPPs at this point, it gives them access to business that actual licensed providers are not able to obtain. Willow Bark should not benefit from acting outside of regulation and law while the other providers wait for the law to change or wait for the Department to release proposed changes to current administrative rules.

- b. Industry inequity undermines the Department's integrity and ability to regulate consistently.

The Montana medical marijuana industry is a small industry whose members are sensitive to any inconsistencies, real or perceived, in how providers are treated by the Department. If the Court orders the Department to allow additional MIPPs to use Willow Bark,

the rest of the program suffers. Consistent regulation is important for the well-being of the program and of the many providers who are licensed and operating within the law.

- c. The public policy for medical marijuana is to allow patients to access medicine, not for businesses to make money by circumventing the law.

The purpose of the industry is to provide safe, effective medicine for Montana patients who suffer from debilitating conditions. There are other licensed MIPPs who are ready to rent their equipment out to licensed MIPPs. Willow Bark is not the only business ready to rent out its premises to MIPPs; the other businesses are compliant licensees, however. Willow Bark's interest in avoiding proper licensing channels should not be rewarded. Other MIPPs are producing medicine for patients through legal channels. Willow Bark could do the same thing by applying for a provider license or by waiting for the law to allow its current business model.

III. CONCLUSION

Willow Bark's Application for Preliminary Injunction must be denied. Willow Bark lacks standing to bring this case, so its application is procedurally deficient. The purpose of a preliminary injunction is to preserve the *status quo* and to minimize harm to all parties pending trial on the merits. Willow Bark has failed to demonstrate that it is likely to win its case on the merits. Likewise, Willow Bark has fallen short of establishing any great or irreparable injury. Willow Bark's application for a preliminary injunction seeks to change the status quo rather than maintain it. In light proposed legislation, Montana laws regarding medical marijuana may change in large ways. The purpose of the medical marijuana program is to improve access to medicine for patients, not to provide Willow Bark with business. Patients have access to medical marijuana now through providers who are compliant with the law. Willow Bark's failing

business model is outside of the law and does not provide an emergent situation that requires immediate court action.

Respectfully submitted this 5th day of March 2019.



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CERTIFICATE OF SERVICE

I certify that on the 5th day of March, 2019, a true and correct copy of the foregoing "Respondent's Motion to Deny and Brief in Support" was duly served via U.S. Post and electronic mail upon the following:

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CERTIFICATE OF SERVICE

I, Bree Williamson Gee, hereby certify that I have served true and accurate copies of the foregoing Notice - Notice of Appearance to the following on 03-05-2019:

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Electronically Signed By: Bree Williamson Gee

Dated: 03-05-2019