DENVER DEPARTMENT OF EXCISE AND LICENSES
DENVER, COLORADO

RESPONDENTS' OBJECTION TO RECOMMENDED DECISION

IN THE MATTER OF MARIJUANA BUSINESS LICENSES ISSUED TO AJS FEDERAL LLC; AJS EVANS LLC; SWEET LEAF LLC; DGP 38TH LLC; HERBAL WELLNESS; FEDERAL CORRIDOR LLC; DGP WALNUT LLC; DGP SMITH LLC; AND DGP ELATI LLC, ALL DOING BUSINESS AS SWEET LEAF:

RETAIL MARIJUANA STORE LICENSES:
BUSINESS FILE #2017-BFN-0002513, AJS FEDERAL LLC, 468 S. FEDERAL BLVD
BUSINESS FILE #2013-BFN-1068876, DGP ELATI LLC, 4125 N. ELATI STREET
BUSINESS FILE #2015-BFN-0002743, HERBAL WELLNESS, 4400 E. EVANS AVE
BUSINESS FILE #2013-BFN-1069648, DGP 38TH LLC, 2647 W. 38TH AVE.
BUSINESS FILE #2013-BFN-1069644, DGP WALNUT, 2609 WALNUT STREET
BUSINESS FILE #2013-BFN-1070077, SWEET LEAF LLC, 5100 W. 38TH AVE.

RETAIL MARIJUANA CULTIVATION FACILITY LICENSES:
BUSINESS FILE #2013-BFN-1069504, DGP SMITH LLC, 7200 E. SMITH ROAD
BUSINESS FILE #2013-BFN-1070425, SWEET LEAF LLC, 136 N. YUMA STREET
BUSINESS FILE #2013-BFN-1069645, DGP WALNUT, 2609 WALNUT STREET
BUSINESS FILE #2013-BFN-1068877, DGP ELATI, 4125 N. ELATI STREET
BUSINESS FILE #2013-BFN-1068879, DGP ELATI, 4715 N. COLORADO BLVD
BUSINESS FILE #2015-BFN-0007352, HERBAL WELLNESS, 1475 S. ACOMA STREET

MEDICAL MARIJUANA CENTER LICENSES:
BUSINESS FILE #2010-BFN-1045792, DGP WALNUT STREET, 2609 WALNUT STREET
BUSINESS FILE #2010-BFN-1045809, SWEET LEAF LLC, 5100 W. 38TH AVE.
BUSINESS FILE #2015-BFN-0008409, AJS FEDERAL LLC, 468 S. FEDERAL BLVD.
BUSINESS FILE #2010-BFN-1045627, HERBAL WELLNESS, 4400 E. EVANS AVE.
BUSINESS FILE #2014-BFN-0003315, AJS EVANS, 4379 N. TEJON STREET
BUSINESS FILE #2010-BFN-1048434, DGP 38TH LLC, 2647 W. 38TH AVE.

MEDICAL MARIJUANA OPTIONAL PREMISES CULTIVATION LICENSES:
BUSINESS FILE #2016-BFN-0004042, AJS FEDERAL LLC, 136 N. YUMA STREET
BUSINESS FILE #2012-BFN-1061861, SWEET LEAF LLC, 136 N. YUMA STREET
BUSINESS FILE #2014-BFN-0004770, DGP 38TH LLC, 124 N. YUMA STREET
BUSINESS FILE #2015-BFN-0000384, FEDERAL CORRIDOR INC, 1475 S. ACOMA STREET
BUSINESS FILE #2012-BFN-1060600, HERBAL WELLNESS, 1475 S. ACOMA STREET
BUSINESS FILE #2014-BFN-0003959, AJS EVANS LLC, 1011 W. 45TH AVE.
BUSINESS FILE #2012-BFN-1060642, DGP WALNUT, 2609 WALNUT STREET

MEDICAL MARIJUANA-INFUSED PRODUCTS MANUFACTURING LICENSE: BUSINESS FILE #2013-BFN-1068155, SWEET LEAF LLC, 136 N. YUMA STREET

Respondents, by and through undersigned counsel, respectfully submit this Objection to the Recommended Decision (the "***Objection***") stating as follows:

On March 14, 15, 20, 22, April 3, 4, and 10, the presiding Department of Excise and Licenses ("***Excise and Licenses***") Hearing Officer (the "***Hearing Officer***") conducted an Order to Show Cause Hearing for the above-referenced licenses (the "***Hearing***").

On April 30, 2018, the Hearing Officer issued a Recommended Decision (the "***Recommended Decision***") to the Director of the Department (the "***Director***") recommending that all of the above-listed marijuana business licenses held by Respondents should be revoked.

Respondents now respectfully submit the following Objection to the Recommended Decision.

Introduction

In the Department's quasi-judicial process, the Director delegates her authority to the Hearing Officer to determine the facts, assess the credibility of witnesses and weigh evidence presented at the Hearing. After reviewing the evidence presented on the record at the Hearing, the Director must determine if the Hearing Officer made any procedural, factual or legal errors that warrant overturning the Hearing Officer's recommendation. Additionally, the Director must review any objections to the Recommended Decision and any responses to such objections. The Director must then determine if the Hearing Officer made any factual or legal errors in reaching a recommendation.

In contrast to a hearing on a new license application, Respondents hold twenty-six (26) existing licenses in the City of Denver. In this matter, the City seeks permanent revocation of each and every one of these licenses. Each of Respondents' business licenses, however, is a property right entitled to due process protection. *See Price Haskel, Inc. v. Denver Dep't of Excise and Licenses*, 694 P.2d 364, 366 (Colo. App. 1984). The Recommended Decision erroneously interprets the law, misconstrues the evidence, incorporates inadmissible evidence, and is arbitrary and capricious. As such, the Recommended Decision damages Respondents' significant property rights and cannot stand as a matter of law. Respondents respectfully request that the Director overturn the Recommended Decision for the reasons set forth herein.

The Hearing Officer Made Up Facts

Central to this case is whether Respondents sold more than one ounce of marijuana per sales transaction, in violation of State law. The City never even offered testimony or other evidence to support an assertion that multiple sales in a day constitute one sales transaction, yet the Hearing Officer created that fact in her Recommended Decision. Not only did the City not make such an assertion, the City's witnesses admitted that multiple sales transactions in a day were

just that—multiple sales transactions—and not a single transaction. Respondents' counsel cross-examined every relevant City witness on this issue, and every one of them made the same admission. The first admission came from the City's lead witness, Detective Kafer. Eliciting laughter and eye rolls in the Hearing Room, Respondents' counsel asked:

"If two corporations are merging over two years, does the transaction last two years?" Detective Kafer agreed.

"If I buy a timeshare with a 72 hour rescission period, does the transaction last three days?" "Yes."

"If I buy a pack of gum, pay my money and walk out of the 7-11, is the transaction over?" "Yes."

"Did your undercover officers, or any of the loopers you arrested, take out a loan to buy the marijuana?" "No."

"Was any of the marijuana purchased on a lay-away plan?" "No."

"Was any of the marijuana purchased with a credit card?" "No. Cash."

"Did any of your undercover officers, or the loopers you arrested, pay for the marijuana in installments?" "No."

"Did your officers and the loopers leave the licensed premises completely every time, before returning for a subsequent purchase?" "Yes."

"Were your officers or the loopers in visible possession of marijuana when they returned to the store later that day for their next purchase?" "No."

"Was any individual sale to your officers or loopers over one ounce?" "No."

These questions were asked of every officer about their undercover purchases, and every purchase by every looper they arrested. They answered the same way every time. These were not quick aside questions and answers. These witness exchanges were repeated every day of the Hearing, dozens and dozens of times per day. Despite the City's witnesses' constant, repeated admissions against it, and any evidence to support her, the Hearing Officer created out of whole cloth her finding that multiple sales in a day constituted a single sales transaction.

Further, the Hearing Officer created an unsupported finding that Respondents' owners directed a looping operation. Again, there was no such evidence presented at the Hearing. Upon cross-examination, the City's witnesses admitted that, at most, an inference could be drawn that the owners know of looping, but there was no evidence that they directed it. Despite this, the Hearing Officer made up the fact that the owners directed it.

This was trial by ambush. Despite Respondents' requests, the City had no requirement to turn over evidence in advance, and only provided the enormous volumes of evidence on the eve of the Hearing. Respondents' counsel is certain that the City's counsel made their best efforts to turn over the evidence as quickly as they could, but that is irrelevant. It is no exaggeration to say that, even if undersigned counsel had not slept, eaten or used the restroom, there was not enough time to view all of the City's videos and read all of the documents before the Hearing, let alone contact disclosed witnesses. Despite Respondents' continuous objections, the Hearing Officer allowed in all of the City's evidence, including inadmissible hearsay within hearsay. After the Hearing Officer's Recommended Decision was publicly released, Respondents' counsel was contacted by people quoted by the City's witnesses, over counsel's hearsay objections, to say that they were falsely quoted. Counsel is prepared to disclose this evidence in an *in camera* review. The Hearing Officer then quoted those objected-to and false hearsay statements, and relied upon them in her Recommended Decision.

Ultimately, because central facts supporting the Recommended Decision were either created out of thin air or have no evidentiary basis, the Recommended Decision itself must be disregarded.

The Hearing Officer Allowed Myriad Amounts of Inadmissible Evidence

While the Colorado Rules of Evidence ("***CRE***") are relaxed in hearings before Excise and Licenses, the Hearing Officer abused her discretion by allowing a plethora of inadmissible evidence, affording that inadmissible evidence great weight in the Recommended Decision, and failing to note Respondents' contemporaneous objections in the Recommended Decision. The Hearing Officer's material errors of law at the Hearing now has the Respondent on the brink of a substantial loss of property rights with the revocation of its twenty-six (26) existing business licenses located in the City and County of Denver.

Throughout the multi-day Hearing, the Hearing Officer allowed the City to introduce inadmissible evidence. Respondents objected throughout, including but not limited to, the grounds of hearsay under CRE 802, hearsay within hearsay under CRE 802, the prejudicial effect outweighs the probative value under CRE 403, irrelevance under CRE 402, and cumulative evidence under CRE 403. Despite the general maxim that the rules of evidence are relaxed in administrative proceedings, the volume and materiality of the inadmissible evidence allowed by the Hearing Officer, over objections by Respondents, will cause significant harm to Respondents if the City revokes all of its business licenses as recommended.

In footnotes four and eight of the Recommended Decision, the Hearing Officer notes a few examples of evidence and states that she did not rely on that evidence "in the analysis herein." Recommended Decision, p. 34 n.8. However, the Recommended Decision goes on to summarize this evidence at length. *See* Recommended Decision, ¶ 18 (discussing Mr. Scott's hearsay statements for which the prejudicial effect outweighed the probative value), ¶ 29 (discussing Mr. Njie's hearsay statements for which the prejudicial effect outweighed the probative value), ¶ 51 (discussing Mr. Montez's hearsay statements for which the prejudicial effect outweighed the probative value).

The Hearing Officer states that "the witnesses are unavailable," although the City never made that argument at Hearing, and the availability of the witnesses was not discussed. The Hearing Officer is correct that the unavailability of witnesses is a relevant consideration in the court's analysis of allowing statements against penal interest into evidence under CRE 804(b)(3), but the Hearing Officer cannot summarily state that the witnesses were unavailable contrary to any discussion or evidence of the same at Hearing. *See People v. Jensen*, 55 P.3d 135, 138 (Colo. App. 2001) (stating a three-part test for CRE 804(b)(3)—statement against penal interest—including the witness's unavailability to testify, the statement must tend to subject the declarant to criminal liability, and whether corroborating circumstances at the time the statement was made demonstrate the trustworthiness of the statement).

The Hearing Officer further allowed, and relied upon, hearsay statements of SASS Security Guards, holding that the statements were admissions by a party opponent, stating that the security guards were agents of Respondents. Respondents objected numerous times and elicited testimony from the City's witnesses that the SASS Security Guards were in fact employees of SASS Security—a company entirely separate from Respondents. The City's witnesses further testified that the SASS Security Guards worked for SASS, reported to SASS, and did not take direction from Respondents. The Hearing Officer stated that Respondents objections would be noted but were overruled, yet the Recommended Decision does not mention SASS Security once, and instead erroneously refers to the security guards as "Sweet Leaf security guards" at least a dozen times throughout. Recommended Decision, ¶¶ 9, 23, 28, 56, 59, 74, 83, 98, 100, 101, 105, 127, 174. The City's case relied in large part on the words and actions of SASS Security Guard personnel—who are not party opponents—and therefore whose hearsay statements are not admissible.

Under Colorado law, a fact witness does not need to be neutral and impartial, but must provide a truthful recollection of events. *See* CRE 603 ("Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation."). A witness's credibility and truthfulness are subject to cross-examination and to impeachment by independent evidence. *See* CRE 607; *People v. Garcia*, 826 P.2d 1259, 1264 (Colo.1992). Over Respondents' timely objections, the Hearing Officer admitted the City's voluminous evidence of taped interviews between the police and Sweet Leaf employees, SASS Security Guards, neighbors, and other persons. The City did not attempt to call these interviewees as in-person witnesses at the Hearing. The interviewees did not appear under oath the Hearing. Nevertheless, the Hearing Officer admitted all taped interviews into evidence, which by definition are hearsay. Respondents were deprived of any opportunity to cross-examine the persons being interviewed in order to determine their credibility, potential bias, trustworthiness or competence to testify regarding relevant facts.

Under the Charter of the City and County of Denver, the Director has the exclusive duty to determine whether a duly issued business license should be revoked. *See* D.R.M.C. § 2.7.1. Under the Denver Retail Marijuana Code and Denver Medical Marijuana Code, the Director has the exclusive authority to issue or revoke local marijuana business licenses. *See* D.R.M.C. §§ 6-204(a) and 24-505. The Director may personally conduct hearings on the issuance or revocation of a marijuana license, or may appoint a hearing officer to conduct the hearing and "consult with" the Director with respect to such hearings. *See* D.R.M.C. §§ 6-204(b) and 24-505. Therefore, there is no legal or ethical requirement preventing the Director from personally conducting marijuana

hearings. Instead, the Director delegates her authority to the presiding hearing officer to conduct the hearing, on the Director's behalf, for procedural efficiency.

Here, because the Director did not personally conduct or attend this Hearing on the revocation of Respondents' licenses, she must rely upon the Recommended Decision to accurately summarize the facts and legal arguments presented. Throughout the forty-five page Recommended Decision, the Hearing Officer fails to note Respondents' contemporaneous objections, which were made throughout the Hearing. The Hearing Officer simply stated that Respondents' objections were "noted for the record." The Recommended Decision misstates the evidence in material ways that adversely affect Respondents (for example, stating that the City's witnesses were unavailable and that the SASS security guards were Sweet Leaf Security Guards without any mention that they were in fact employed by a completely unrelated entity).

These errors and omissions are highly prejudicial to Respondents and the Director cannot rely on the Recommended Decision.

The Recommended Decision Reached Erroneous Legal Conclusions Without Analyzing the Applicable Law

Although the presentation of evidence at the Hearing lasted for several days, the sole legal issue in this matter is the application of one (1) state statute and one (1) state regulation to the relevant facts. In its Complaint and Order to Show Cause, the City alleged that Respondents violated C.R.S. § 18-18-406 and Colorado Marijuana Enforcement Division ("***MED***") Rule 402(C). Section 18-18-406 is a generally applicable state criminal statute regarding unlawful possession of controlled substances. It is not a statute specific to marijuana, much less to the lawful activities of licensed marijuana businesses pursuant Colorado state law. Rule 402(C) is a state regulation issued by the MED regarding marijuana sales by licensed medical centers and retail stores. It is promulgated pursuant to the Colorado Medical Marijuana Code and Colorado Retail Marijuana Code, the state business licensing statutes. By its plain language, the Rule has no applicability to licensed medical or retail marijuana *cultivation facilities* or marijuana-infused *products manufacturing facilities*. The Recommended Decision, however, erroneously recommends revocation of all of Respondents' business licenses—including cultivation facilities and products manufacturing facilities—based on this criminal statute and MED rule.

The Hearing Officer misinterpreted the law in finding that the language of the statute and rule prohibited Respondents from selling more than a certain amount of marijuana during a "single sales transaction." The Hearing Officer ignored the plain text of these applicable laws and mischaracterized the "central issue" as a matter of fact rather than a matter of law. Recommended Decision, ¶ 8. The Recommended Decision's incorporation of other sources of law, such as various provisions of the Denver Revised Municipal Code that were not raised by the City or Respondents at the Hearing, is irrelevant as to whether the City proved that Respondents violated either of the two (2) laws cited in the Complaint and Order to Show Cause.

The Director must independently review the Hearing Officer's application of the law to the facts presented at the Hearing. A reviewing court is required to set aside a final agency order where a hearing officer or administrative agency applied "an erroneous legal standard" or

"misconstrued the law" in reaching a quasi-judicial decision. *See Elec. Power Research Inst., Inc. v. City & Cnty. of Denver*, 737 P.2d 822, 825-26 (Colo. 1987). A court reviews an agency's interpretation of the applicable statutes and regulations *de novo*. *See Stell v. Boulder Cty. Dep't of Soc. Servs.*, 92 P.3d 910, 915 (Colo. 2004). The court will reverse an administrative agency's legal determination if the agency erroneously interpreted the law. *See McClellan v. Meyer*, 900 P.2d 24, 29 (Colo. 1995). For the same reasons set forth in Respondents' Pre-Hearing Brief, dated March 12, 2018, and declaration of Professor Sam Kamin, and as argued by Respondents at the Hearing, the Recommended Decision erroneously interprets and misconstrues the applicable law. A copy of Respondents' Pre-Hearing Brief is attached hereto as **Exhibit A**, and hereby incorporated into this Objection.

Recognizing that a violation of C.R.S. § 18-18-406 and Rule 402(C) could not be proven based on the facts, the City pursued a "complicity theory" in its closing argument. The Recommended Decision improperly relies on the same deficient legal theory. In Paragraph 149, the Recommended Decision provides that "[n]ot only did Sweet Leaf fail to take action to stop the illegal purchases, but it actively aided and abetted the illegal purchases through its looping scheme." Respondents argued, in the attached Pre-Hearing Brief and during Hearing, the standard of intent required under the complicity theory. The Recommended Decision does not conclude that Respondents *intended* that Respondents' customers possess more than one (1) ounce of marijuana at a time. To prove a violation of C.R.S. § 18-18-406 by utilizing the complicity theory, merely "knowing" is not enough—the City must prove actual *intent* by Respondents. The City failed to meet its burden under the complicity theory, and the Recommended Decision erroneously adopts the City's position without additional legal analysis.

Finally, the Recommended Decision improperly considered health, safety and welfare as "aggravating" factors when there is absolutely no basis in the law for such considerations. As noted in the City's Complaint and Order to Show Cause, D.R.M.C. § 32-22 sets forth the legal grounds for revocation of a business license in the City of Denver. Health, safety and welfare may be considerations for certain types of *other* licensing matters, such as new business license applications for a cabaret license or a medical marijuana center. The standard simply does not apply to a license revocation proceeding. To revoke a business license and deprive Respondents' of significant property rights, the City must prove at least one (1) of the factors listed in D.R.M.C. § 32-22. Health, safety and welfare are not considerations for revocation, and therefore the Hearing Officer made a material error of law in including this heightened standard in a Show Cause proceeding to revoke Respondents' licenses.

The Hearing Officer Gave No Weight—and Failed to Summarize—the Testimony of Respondents' Witnesses and Respondents' Relevant Evidence

The forty-five page Recommended Decision meticulously summarizes the City's witness testimony and evidence in a light most favorable to the City, without discussing material points that Respondents elicited on cross-examination, Respondents' witness testimony or its relevant evidence. The Recommended Decision utilizes this imbalanced summary of the Hearing to then make conclusory findings regarding the material legal issues in the case. With a recommendation issued in this improper manner, Respondents' established property rights in its twenty-six (26) business licenses are at significant risk.

Crucially, Paragraph 107 of the Recommended Decision asserts that Respondents' owners directed a looping scheme, but cites no evidence from the Hearing that the owners directed looping. There was in fact no testimony at any point in the Hearing that the owners directed looping. The closest evidence presented by the City as to the owners' *knowledge* of looping (rather than any direction or scheme) was speculation or circumstantial evidence. The City presented documents such as Respondents' meeting agendas for future company meetings, which may not have been a reflection of what in fact occurred at such meetings. During Respondent's cross-examination regarding the meeting agendas, the City's witnesses admitted that the agendas are simply documents and no one could actually know what the meeting participants discussed, unless they were present. This admission was not included in the written Recommended Decision.

Further, it is undisputed that there was no evidence presented during the seven-day Hearing that Respondents ever sold more than one ounce of retail marijuana (or the corresponding allowable amount of medical marijuana) to a customer during a single sales transaction. Respondents cross-examined each of the City's witnesses on this crucial point, and each witnesses admitted that he or she had never observed a transaction over the allowable quantity limit. The Recommended Decision, however, glosses over that key point and describes in dozens of pages different transactions made during the same day. The Hearing Officer's bare assertion that "Sweet Leaf artificially divided a single transaction" has no basis in the record or the evidence presented at the Hearing.

Finally, the Recommended Decision briefly recites the testimony of Respondents' witnesses without providing any meaningful detail regarding their statements. In Paragraph 12, the Recommended Decision merely states the identity of Respondents' witnesses, but fails to summarize any of their testimony or analyze their testimony with respect to the material issues in the case. The sheer volume of evidence presented by the City, without any limitation on duplicative and repetitive evidence during the seven-day Hearing, appears to have been the determinative factor in revocation of Respondents' licenses. The Recommended Decision erroneously gives no weight to Respondents' witnesses, resulting in an arbitrary and capricious recommendation.

For the reasons set forth above, the Recommended Decision erroneously interprets the law, misconstrues the evidence, incorporates inadmissible evidence, and is arbitrary and capricious. As such, the Recommended Decision damages Respondents' significant property rights and cannot stand as a matter of law. Respondents respectfully request that the Director overturn the Recommended Decision.

Respectfully submitted, this 11th day of May, 2018.

IRELAND STAPLETON PRYOR & PASCOE, PC

DULY SIGNED ORIGINAL ON FILE AT OFFICES OF
IRELAND STAPLETON PRYOR & PASCOE, PC

By: /s/ *Tom Downey*
Tom Downey
John Jennings
Kira Suyeishi

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing **OBJECTION TO RECOMMENDED DECISION** were served via email on May 11, 2018, addressed as follows:

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