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

GEORGE HACKNEY, INC., d/b/a
TRULIEVE,

Plaintiff,

v. Case No. 2018 CA 698

FLORIDA DEPARTMENT OF HEALTH,

Defendant.
_____/

ORDER ON CASE MANAGEMENT CONFERENCE AND FINAL JUDGEMENT

THIS CAUSE came before the Court on January 29, 2019 for a case management conference to address plaintiff Trulieve's January 14, 2019 motion for clarification or rehearing and the defendant Department's January 17, 2019 motion for rehearing. Counsel for both parties were present, as was a court reporter.

The Court having reviewed the parties' papers, having heard argument of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The January 2, 2019 Order Denying the Defense Motion for Summary Judgement, Order on Trial and Final Judgement for Plaintiff and the related January 4, 2019 Appendix are withdrawn, with the trial transcript [filed September 10, 2018] replacing the Appendix and the ruling set forth below replacing the January 2, 2019 Order and Judgement.

2. Trulieve's January 14, 2019 motion and the Department's January 17 motion are granted in part and denied in part, as set forth in more detail herein. [The parties agreed that the prior ruling provided relief broader than that sought in this case by Trulieve and objected to the Court granting relief beyond the scope of the ruling sought by Trulieve].

ORDER DENYING MOTION FOR SUMMARY JUDGEMENT, ORDER ON TRIAL AND FINAL JUDGEMENT FOR PLAINTIFF

THIS CAUSE came before the Court on August 27, 2018 for hearing on the defense motion for summary judgement

and for trial. Attorneys Miller, Atkins, Lombard, Coppola and Reynolds were present, with a court reporter.

Factual Background

1. In this case, the plaintiff is a provider of medical marijuana to qualifying patients on the registry. Plaintiff Trulieve initially began providing low THC products as a "dispensing organization" pursuant to the 2014 and 2016 legislatively adopted statutes, [section 381.986(5)(b)] enacted prior to the Medical Marijuana Constitutional Amendment adopted by Florida's Voters in November 2016.

2. Florida's citizens were not satisfied that the 2014 and 2016 legislation provided proper access to medical marijuana for those who could benefit from treatment with medical marijuana.

3. In November 2016, a majority of Floridians voted to amend the Medical Marijuana Amendment.

The Medical Marijuana System Was Broken.
Now, In The Constitution, The People Have Spoken.

4. In November 2016, Florida's voters overwhelmingly approved adding medical marijuana access to the Florida Constitution; the right of access now appears in Article X, Section 29 of the Constitution. In the case of any conflict or inconsistency of a statute with the Constitution, the Constitution controls.

Article X, Section 29

5. Article X, Section 29 is titled "Medical Marijuana Production, Possession and Use". There are four sections: a statement of the public policy, a definitional section, the limitations section [to make clear what the voters are not expecting the Amendment to do] and the duties the Amendment in Section 29 imposes on the Department.

6. Unlike other constitutional amendments, Florida

Voters directed the executive branch on its role to be taken in implementing the access of qualifying patients to medical marijuana by detailing the actions the Department of Health was to take in (1) setting up a registry for qualifying patients and their certifying physicians, and (2) registering those involved in growing, providing and dispensing the qualifying patients with the medical marijuana needed for treatment of their qualifying condition.

7. Florida's Voters in 2016 inserted in the Medical Marijuana Amendment a provision expressly prohibiting the legislature from enacting any provision inconsistent with the voter-adopted access provisions in the Amendment. [The Amendment replaced the pre-Amendment statutes the legislature adopted in 2014 and 2016.

The 2017 Statute

8. After Florida Voters' adoption and effective

date of the 2016 Constitutional Amendment, the legislature revised the prior statute, attempting to create a completely separate intact system, effective June 23, 2017, separate from the voter-approved change to the Constitution.

9. In the Constitutional Amendment titled "Duties of the Department", Section 29(d)(1) stressed the Department's obligation "to ensure the availability and safe use of medical marijuana by qualifying patients", and procedures for issuance and renewal of qualifying patient identification cards, qualifications and standards for caregivers, procedures for registration of Medical Marijuana Treatment Centers [MMTCs], and a regulation defining the amount of marijuana reasonably presumed to be adequate for qualifying patients' medical use. Section 29(d)(2) directed the Department to begin the issuance of the patient and caregiver identification cards and to begin "registering MMTCs no later than nine (9) months after the effective date of this section".

10. Instead of adopting legislation completely and Properly consistent with the registration program for MMTCs with an uncapped number of dispensary locations, the 2017 legislative plan called for a vertically integrated cultivation, processing, transporting and dispensing marijuana for medical use. See section 381.986(8)(2017).

11. Instead of carrying out the Voters' mandate, i.e., the Florida Constitutional requirements of Section 29, the legislature envisioned licensure a limited number of MMTCs with limits on the number of dispensing facilities each MMTC could open as a way to cap the number of dispensaries for every licensed MMTC, initially capping the total number of dispensaries at 25, with the number [currently 30] to periodically increase as the number of qualifying patients increase.

12. The 2017 statute also provides that the legislatively artificially restricted number of dispensaries would exist until at least the scheduled

2020 sunset; the Voters Amendment provided no limit on the number of dispensaries a particular MMTC could operate.

The Case At Bar

13. In this case, plaintiff Trulieve summarized its actions and attempts to provide qualifying patients with medical marijuana, first as a dispensing organization under the statutes existing before the 2016 Constitutional Amendment, then as an MMTC under the 2017 statute.

14. The plaintiff notes the 2017 legislature of dispensaries per MMTC, and seeks a ruling on two and only two issues: (1) that its 14 pre-Constitutional Amendment dispensing organization locations should not count against the 2017 statutory dispensary cap, and (2) that the 2017 dispensary cap [initial 25 now 30] on its dispensing facilities is unconstitutional because of the inconsistency with the 2016 Constitutional Amendment. Plaintiff Trulieve is not challenging any

statutory provision other than the dispensary cap in section 381.986(8)(a)(5)[1].

15. In its answer and motion for summary judgement, the Department disagrees with the plaintiff, contending the plaintiff is entitled to no relief[2], denying first that the plaintiff has any vested rights as a dispensing organization and defending the 2017 legislation cap as being only temporary.

The Summary Judgement Motion

16. The Court reserved ruling on the summary judgement motion at the hearing, and proceeded with the trial testimony.

17. Analysis of the summary judgement motion, the parties' arguments, and the law make clear that the Department is not entitled to judgement as a matter of

[1] The parties agree that the severability provision in 381.986(8)(a)(5) allows the cap to be stricken as invalid without affecting the rest of the statute.

[2] The Court asked the parties to brief the Chevron deference issues in light of the recent passage of Amendment 6, effective January 8, 2019. Because Amendment 6 was not effective at the time of the trial, and based on the defense objection, the Court is not relying on the Amendment 6 elimination of Chevron deference in reaching its rulings here.

law, because the Department has not met its burden of showing the requisite complete absence of material facts and entitlement to judgement as a matter of law.

18. Trulieve's grandfathered in right to operate Pre-Constitutional Medical Marijuana Amendment dispensing organizations should not be counted against the 2017 adopted statutory cap of section 381.986(8)(a)(5).

19. The Department has not met its burden as a summary judgement movant of showing that the 2017 statutory cap of section 381.986(8)(a)(5) can be fairly and lawfully applied to disadvantage Trulieve by including in the dispensing facilities cap Trulieve's dispensing organizations existing or in the approval pipeline at the time of the 2017 statute's adoption.

20. The Department has also failed to meet its burden as a summary judgement movant of showing that the 2017 cap on dispensing facilities is consistent with the 2016 Medical Marijuana Constitutional

Amendment, and the Department is therefore not entitled to judgement on this issue as a matter of law.

21. The motion for summary judgement must be, and is, therefore, denied.

The Trial And Evidence

22. The plaintiff called two Trulieve witnesses and moved into evidence a number of documents and the relevant portions of the deposition Courtney Coppola [interim director of the office of Medical Marijuana Use with the Department of Health]. The Department called Interim Director Coppola as it only witness.

23. The Court having considered the testimony, demeanor and credibility of the witnesses, and the pertinent documentary evidence, and being otherwise fully advised in the premises, finds the following facts established credibly and without any dispute.

24. By virtue of working with the Department of

Health and by virtue of the Department having approved and licensed Trulieve as a dispensary organization prior to the 2016 Medical Marijuana Constitutional Amendment, Trulieve acquired the vested right to continue operating the 14 dispensary locations.

25. As a licensed MMTC under the Constitutional Amendment Trulieve had a right to operate the additional dispensary locations [initially 25, now 30] provided by the 2017 statute.

26. The testimony is unrefuted and the evidence clearly establishes that Trulieve would have been at the statutory cap of 30 by the end of January 2019, making it clear that Trulieve is adversely impacted by the legislatively imposed cap.

27. Considering the initial 14 to be part of the later added cap would unfairly prejudice Trulieve and the qualifying medical marijuana patients, as the evidence conclusively establishes Trulieve would not have selected the same initial locations if there had

been an initial existing cap as part of the pre 2016 Constitutional Amendment or the pre-Amendment statutes, and would have made different location decisions.

28. The 2017 cap added after Trulieve was well along the path of establishing its pre-Amendment dispensing locations could not fairly include the pre-existing locations chosen before there was any cap.

29. Even apart from the issue of whether the preexisting dispensing locations could appropriately be considered to be subject to the later added statutory dispensing facility cap applicable to MMTC Trulieve is the clear inconsistency between the uncapped, limitless number of dispensing locations provided in the Medical Marijuana Constitutional Amendment and the 2017 severable statutory cap in section 381.986(8)(a)(5).

30. Statutes are presumed constitutional unless shown to be invalid beyond a reasonable doubt, and are to be construed so as to be constitutional, if possible.

31. The Medical Marijuana Amendment was adopted for the purpose stated in subsection (d), to "ensure the availability and safe use" of medical marijuana products from licensed suppliers by qualified patients. As provided in the Medical Marijuana Amendment the Legislature may enact laws consistent with the Amendment and this purpose. The statutory cap this provision erects barriers that needlessly increase patients' costs, risks, and inconvenience, delay access to products, and reduce patients' practical choice, information, privacy and safety. The reasons offered to justify this law and its practical effects are inconsistent with the Constitutional purpose and language. The limit on the number of dispensaries that licensed MMTCs may open, even if time limited, is the kind of regulation that the Amendment was intended to eliminate.

32. The Department's suggestion that this provision is to buy more time for the State and local communities to consider and enact new regulation is unsupported by

the evidence, and is contrary to the Amendment. There is no need for more time. The Legislature first enacted a medical cannabis law in 2014, and the Constitutional Amendment was approved for the ballot in 2015. *In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Debilitating Med. Conditions,* 181 So. 3d 471 (Fla. 2015). The Department cites no reason and provides no evidence why the State and local communities could not have studied the issues and prepared laws or ordinances if needed in the years before the 2017 statute was enacted, or why 3 more years of study are needed throughout the state.

33. The Amendment [in section 29(d)(1)c] required The Department to adopt regulations for MMTCs within 6 months of its effective date, by July 3, 2017. Nothing in the Constitution allows the Legislature to delay the licensed MMTCs from opening dispensaries around the state, to allow the State to study some (undefined) issues for 3 more years or for any other reason. As to the Department's suggestion that limiting the number of

dispensing facilities may help MMTCs avoid failure by overexpansion, the evidence shows the contrary, with risks increased to MMTCs from the after the fact 2017 cap.

34. Handicapping existing, performing, competitive businesses to help less competitive businesses, at the expense of consumer efficiency and choice, is not rationally related to a legitimate public purpose. *State ex rel. Fulton v. Ives*, 167 So. 394, 399 (Fla. 1936), struck a law imposing minimum fees for barber services, apparently to assist small competitors, holding that a barber's right to acquire and use property in pursuit of a lawful business and set fees, is a constitutionally protected liberty and property right. Arbitrary restriction on sellers' methods for interacting with customers is invalid. *Prior v. White*, 180 So. 347, 356 (Fla. 1938) (ordinance prohibiting door-to-door sales is invalid). "Fair trade" pricing laws are invalid. *Liquor Store, Inc. v. Cont'l Distilling Corp.*, 40 So. 2d 371 (Fla. 1949). Arbitrary

restriction on the right to compete is invalid. *Eskind v. City of Vero Beach*, 159 So. 2d 209, 212 (Fla. 1963). Arbitrary restriction on competitive pricing is invalid. *Dep't of Ins. v. Dade Cty. Consumer Advocate's Office*, 492 So. 2d 1032, 1034 (Fla. 1986).

35. The evidence clearly and conclusively establishes beyond any doubt that conveniently located medical marijuana dispensaries (as opposed to vehicle delivery, the only allowed alternative means of dispensing) promote authorized users' improved access to medical marijuana products and related information and services, at lower cost, and promote public safety [the stated goals for regulation in the Amendment].

36. The evidence clearly and conclusively establishes beyond any doubt that the imposition of regional and statewide caps on the number of dispensaries for each licensed MMTC does not support Voter-Approved constitutional goals.

37. By the same reasoning, Trulieve's rights to acquire and use property in its lawful business to

compete and serve consumers, by opening dispensaries in communities that allow such use, is a property and liberty right protected by Fla. Const. Art. I §§ 2 and 9. The subsequently added statutory limit on the number and location of dispensaries is arbitrary and not rationally related to any legitimate public purpose, and contravenes the uncapped locations The Department anticipated, and thus deprives Trulieve of property and liberty without substantive due process.

38. Accordingly, Section 381.986(8)(a)5(2017). limiting the number and location of dispensaries is invalid as inconsistent with the Amendment, and also invalid as depriving Trulieve of property and liberty rights protected by Fla. Const. Art. I sections 2 and 9. [This finding and ruling does not affect the rest of the statute, as this provision is severable under Fla. Stat. § 381.986(8)(a)5(2017), flush left provision after sub-subparagraph d].

RELIEF

In accordance with the foregoing, the Court finds appropriate, and, grants the following declaratory relief as follows:

39. Apart from the issue of the cap's constitutionality Trulieve is vested for continued use of the 14 approved dispensary locations under its initial application as amended, as grandfathered in by the 2017 law and the vesting doctrine, and is also entitled to the full quota of 30 dispensary locations authorized by the 2017 statute; and

40. Further, because the credible evidence establishes the inconsistency between the lack of a cap for the dispensing locations in the Amendment and the after-the-fact 2017 statute, the limitation on the number and location of dispensaries for licensed MMTCs in Fla. Stat. 381.986(8)(a)5 is unconstitutional as in clear and indisputable violation of The Voter-Approved

Amendment in Article X, Section 29, and Art. I §§ 2 and 9, and shall not be enforced.

41. Florida's Voters changing the Constitution to include Article X, Section 29 in 2016 was, and remains, a "game changer" with which the Department of Health and Legislature were obligated to comply. Regrettably, they have not complied, ignoring the citizens' clear mandate and the FACT that compliance with The Constitutional Medical Marijuana Amendment is mandatory, not merely a citizen suggestion or request.

42. As is clear and uncontroverted from the evidence, the Medical Marijuana System was broken and now Florida Voters have spoken. Their voices and the Constitution cannot be allowed to be ignored, nor changed by the legislature or executive branches of government.

Based on the foregoing, and the Court being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The Department's motion for summary judgement is denied as the movant has not met its burden in demonstrating its entitlement to judgement. Not only do the facts support the plaintiff's claims, the facts do not support the Department's position further the Department's reliance on the unconstitutional statute is ineffective: In the Constitution, the voters have spoken.

2. Even apart from The Constitutional issue, Trulieve's 14 pre-Amendment dispensing organizations are not to be applied against or counted toward the 2017 statutory cap of 30.

3. The plaintiff's request for declaratory relief is granted as to the unconstitutionality of the cap portion of the 2017 statute, Section 381.896(8)(a)(5).

4. Plaintiff shall submit any motion for costs and, if appropriate, for attorney fees, within 30 days.

ORDERED AND ADJUDGED this 14 day of February, 2019 in Tallahassee, Leon County, Florida.

KAREN GIEVERS
Circuit Judge

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