**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

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| BROTHELLA QUICK,BQ ENTERPRISES, INC., et al., | ) | |
| PLAINTIFFS, | ) | |
| v. | ) | NO:1:19-cv-7797 |
| IDPFR, et al., | ) | Hon. Judge Mary M. Rowland<br>Mag. Judge M. David Weisman |
| DEFENDANTS. | ) | |

**PLAINTIFFS' RESPONSE TO DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS**

Disputes of this nature are rarely amenable to resolution via motions to dismiss, and this case is hardly an exception. Crediting Plaintiffs' allegations and applying the relevant law, the Defendants' Motion has no merit, and should be denied.

## FACTUAL BACKGROUND

### 1. The Program

In 2014, Illinois passed the Compassionate Use of Medical Cannabis Act. 410 ILCS 130/1 *et seq.* (the "Act"). The purpose was to set-up the State's nascent Medical Cannabis Program (the "Program") by which medical patients in Illinois could procure doctors' prescriptions for medical cannabis products to treat certain medical conditions. *Id.* Cannabis can only be sold at licensed dispensaries, which are single-site retail outlets. *Id.* The Act authorized up to 60 dispensary licenses, and the process of awarding these licenses was overseen by the Illinois Department of Financial and Professional Regulation ("IDFPR"). 410 ILCS 130/115(a).

### 2. The Plaintiffs

Brothella Quick, Crystal Anderson and Maria Davis, are three entrepreneurs who applied for dispensary licenses under the Act. The companies they formed to hold the dispensary licenses, BQ Enterprises Inc. ("BQ") for Ms. Quick, and Crystal Clear Compassionate Care Inc. ("CCCC" or "Crystal Clear") for Ms. Anderson and Ms. Davis, are the Plaintiffs in this lawsuit.

Plaintiffs did everything that the State expected of the applicants. They invested substantial quantities of time, money and other resources, secured property that complied with zoning and setbacks requirements, and engaged professionals to design their proposed facilities. Amended Complaint ("AC") ¶¶ 10. They also brought unique expertise in healthcare. Ms. Quick, a longtime healthcare businesswoman with a nursing degree from Howard University, has a distinguished record of working in the interests of public health, including serving as a Second Lieutenant in the

United States Public Health Service. Id. ¶¶ 25-27.[1] Ms. Anderson and Ms. Davis are both licensed Nurse Anesthetists with long-standing careers administering controlled substances and managing treatment for patients with conditions that can be ameliorated with medical cannabis. Id.

Aside from being professionals with highly relevant experience (bearing in mind that no one in Illinois could have accumulated lawful experience with dispensing marijuana prior to passage of the Act), the three also brought another element that would benefit the new State program – diversity. Each are African American women entrepreneurs, a group that, as it turned out, was entirely excluded from program when IDFPR awarded the licenses. AC ¶¶ 7, 25-27.

3. Licensing of Dispensaries

As stated, the Act authorized up to 60 licenses for dispensaries. 410 ILCS 130/115(a). Importantly for this suit, the law obligated the IDFPR to issue as many of the 60 licenses as there are qualified applicants seeking them. The requirement is mandatory:

> The Department of Financial and Professional Regulation *may not issue less than the 60 registrations if there are qualified applicants who have applied* with the Department of Financial and Professional Regulation. The organizations shall be geographically dispersed throughout the State to allow all registered qualifying patients reasonable proximity and access to a dispensing organization.

Id.; AC ¶¶ 13, 21 (emphasis added).

The Act does not specify any process for geographically distributing dispensary locations, nor even provide direction to the IDFPR as to how to choose licensees. IDFPR adopted a plan that that distributed the 60 licenses among 43 "districts" that it drew using local population figures. 68 IAC 1290.20. More populous districts received multiple licenses, while others got only one. Id. Pursuant to rules it promulgated, IDFPR required would-be applicants to pick one of these districts

[1] Due to counsels' error, the AC contains two different paragraphs for each of numbers 7, 16, 25-27, and 38-39. The errors are not consequential to this brief because Plaintiffs refer to both paragraphs by each citation. Plaintiffs will seek leave to correct the error after this motion is resolved.

for each application. 68 IAC 1290.50(a). Applicants also had to provide proof that they controlled compliant property in the specified district. 68 IAC 1290.60(a)(16-17, 19).[2]

Applicants were to receive a license in the specified district in one of two instances. First, if the number of qualified applicants did not exceed the number of allocated licenses, then each qualified applicant would receive a license. AC ¶¶ 28-29; 68 IAC 1290.40(a)(11). For those districts where there were more qualified applicants than licenses allocated, the IDFPR decided to hold a competition and created a points-based scoring process. Id.

The districting and scoring process proved problematic. First, there were numerous diverse applicants like Plaintiffs, AC ¶ 7, and yet not one of them received a license. It is a matter of public record that IDFPR's process resulted in almost all of the licenses going to companies majority-owned by white men. Id. Second, IDFPR did not even award all 60 licenses; it issued only 55 licenses. Id. ¶ 15. This was solely a result of the IDFPR's districting plan: in four of the districts, no qualified applicants submitted compliant property, and for one of the districts, there were fewer qualified applicants than there were allocated licenses. Id.

Plaintiffs allege that IDFPR's failure to issue at least 57 licenses is a violation of the plain terms of the Act because there are at least two additional qualified applicants beyond the 55 that the IDFPR chose: the Plaintiffs. They are in this discrete class because: (1) they timely submitted their applications prior to the deadline on September 22, 2014, and (2) their applications complied with all of the Act's and the rules' requirements, rendering them qualified applicants. AC ¶ 36.

[2] The statute required only that proposed dispensary locations comply with setback requirements, *e.g.*, being located 1,000 feet or more from locations such as churches and schools, and meet local zoning/special use requirements. 410 ILC.130/115(f)(2, 3). To these, the IDFPR's rules added the application districting and proof of control requirements described in the text.

4. The Wait

IDFPR rules informed the public how it intended to proceed if the districting process failed to fulfill the statutory mandate to award 60 licenses:

> If the Division determines that a District has no qualified applicants or fewer qualified applicants than authorized registrations, the Division shall post a notification on the Division's website detailing the dates of the next open application period.

See 68 IAC 1290.40(a)(13). IDFPR completed its process and ceased announcing new license awards in or about 2016. Of course this statement of the agency's position cannot trump the statutory command to have awarded all 60 licenses if there were 60 qualified applicants. But it was a reason for Plaintiffs to await the agency. Plaintiffs waited and waited, but the announcement never came. AC ¶ 16. To this day, the IDFPR has not followed through with any posted notification for how it intends to award the additional five licenses.[3]

5. The "Giveaway" To The Industry

In June of 2019, in conjunction with the decision to permit recreational cannabis use, the State passed a law giving special new rights to the companies holding the 55 medical licenses. For each medical dispensary license, the holder would automatically receive two additional licenses: one to sell recreational cannabis at the same site as the medical dispensary, and one that would allow it to open up another recreational dispensary at a second site of their choosing. 410 ILCS 705/15-15, 15-20. The law limited the amount of time that a medical cannabis dispensary owner had in which to submit paperwork to get the two additional licenses to 60 days from the effective date of the

[3] One possible interpretation of the agency's failure to make this announcement in accordance with its rule is that the predicate for the announcement has not yet occurred – *i.e., IDFPR has not made the determination that there are no qualified applicants in those districts.* Although not needed for Plaintiffs to prevail on the motion, this inferential fact would provide an independent basis for awarding them the licenses, because (as explained below) they are presently the only qualified applicants with compliant property in two of the five districts. AC ¶ 22. At this stage of the litigation, all reasonable inferences must be drawn in Plaintiffs' favor.

legislation, id., meaning that Plaintiffs were in danger of being shut out of this benefit if the IDFPR did not promptly follow through with its pledge to award the remaining medical licenses. Id.

The IDFPR did not do so. It made no announcement and had no plan for how Plaintiffs (or other aspiring qualified applicants) would be able to receive their license award in time to take advantage of the giveaway for the additional two licenses.

6. Preferential Treatment

Given the IDFPR's apparent unwillingness to post the promised notification for the remaining five medical dispensary licenses, coupled with the reality that the IDFPR was instead moving forward to award new (time-sensitive) rights to the original licenses holders, Plaintiffs each filed paperwork to change the address of their proposed dispensaries to new properties located in one of the five remaining districts. AC ¶ 16, 22, 36. BQ secured compliant property and zoning in District 23, and Crystal Clear secured compliant property with zoning in District 28. Id. On November 6, 2019, IDFPR issued a decision refusing to allow Plaintiffs to change addresses on the grounds, *inter alia*, that there was no open application period at that time. AC Exhibit A at 1-4.

In so determining, the IDFPR treated Plaintiffs differently than it had treated at least some of the 55 original winning applicants. At least five of those became eligible for a dispensary license *only because IDFPR allowed them to change the address proposed dispensary location.* AC ¶ 7; 410 ILCS 130/115(f) (2-3). At least three of these companies were allowed to change to a new address within the district in which they had applied, while at least two of these were allowed to change between two districts. Id. ¶¶ 31-35. Importantly, all of these changes were allowed *after* the deadline for submission of the applications, id., giving these applicants a material advantage – and an unfair advantage if the agency does not afford the same rights to all qualified applicants, including Plaintiffs.

7. Plaintiffs Seek Equal Treatment

Plaintiffs filed this suit seeking an injunction and declaratory relief under the Administrative Review Act because they are prejudiced by the Agency's denial of their address change, and by its use of a different set of rules for their request than it had used for the other applicants that were allowed to change addresses. They seek the same fair treatment.

For purposes of this Motion, the Amended Complaint specifically pleads the reasons why the Agency action violates Plaintiffs' rights. First, timing is not a differentiator between Plaintiffs and the other applicants whom IDFPR allowed to change addresses or districts altogether. Each of those five or more applicants became eligible for their license only because IDFPR allowed them to change their application after the application submission deadline, and before IDFPR opened a new application period. Id. ¶¶ 16, 31-35. Plaintiffs filed their address change in the exact same time span – after the application deadline, and before IDFPR opened a new one. Id.

Likewise, the inter-district nature of Plaintiffs address changes does not support differential treatment. Id. For purposes of this Motion to Dismiss, there are three independent reasons alleged for why that is so. First, IDFPR permitted other applicants to change their selected districts after the application period closed, id., so the predicate to IDFPR's inter-district argument is lacking on a motion to dismiss. Second, the statutory command to award 60 licenses assuming there are qualified applicants is clear and unambiguous, and an agency does not have discretion to use districting to deprive a qualified applicant (which Plaintiffs are) of a license. Id. ¶¶ 20-22. While an agency may enact its own rules, those rules yield to the statute as a matter of law when enforcement is inconsistent with the Act. Id. Third, having the high score in a district is not a valid differentiator on these facts because the agency's rules specify that there will be no scoring in districts with sufficient available licenses. Regardless of scoring, the address change is what allowed these other five

applicants to become part of the class of those eligible for a license,[4] so scoring in a different district is no basis to deny Plaintiffs an address change too.

ARGUMENT

1. Applicable Standard

This Court has already accurately summarized the standard on a motion to dismiss:

> A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint; the purpose is not to decide its merits. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). A Rule 12(b)(6) motion is considered in light of the liberal pleading standard of Rule 8(a)(2), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (internal citations and alterations omitted). A determination of the sufficiency of a claim must be made "on the assumption that all allegations in the complaint are true (even if doubtful in fact)." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). All well-pleaded facts are assumed to be true, "and all such facts, as well as the reasonable inferences therefrom, are viewed in the light most favorable to the plaintiff." Gutierrez v. Peters, 111 F.3d 1364, 1368–69 (7th Cir. 1997).

Bernero v. Village of River Grove, 17 CV 05297, 2018 WL 3093337, at *3 (N.D. Ill. June 22, 2018).

2. Plaintiffs Have an Entitlement to the License

Plaintiffs bring injunctive and declaratory claims that they have a due process-protected interest in issuance of the licenses. Defendants attack based on two incorrect premises: first, that the agency only allowed intra-district application changes, Defendants' Memorandum In Support of Motion to Dismiss ("MTD") at 7, and second, that agency's requirement to specify a district at the time an applicant applied defeats any expectancy of a property right to change districts. Id. at 9.

Both arguments are easily addressed because they ignore the Plaintiffs' allegations. First, Plaintiffs did plead that the agency allowed other the applicants to change the district specified in their application after the application deadline had passed:

[4] The Act bears this out. Those applicants without a property meeting zoning and setback requirements must be denied. 410 ILCS 130/115(f) (2-3).

> After the application deadline, IDFPR allowed at least two applicants to change the district in which they applied to one where they had compliant property. The Department did so despite the fact that there was no rule specifically providing for such changes.

AC ¶ 31. Ignoring well-pleaded allegations is unavailing on a motion to dismiss. Plaintiffs had a right to the same treatment as the other applicants, and Defendants make no argument otherwise.[5]

Defendants' second argument is likewise unpersuasive. Defendants ignore the fact that Plaintiffs quite properly predicate their claimed entitlement on the terms of the statute itself, not IDFPR's rules. Id. ¶¶ 21, 27-31. In particular, 410 ILCS 130/115(a) *requires* the agency to award as many licenses, up to 60, as there are qualified applicants: "The Department of Financial and Professional Regulation may not issue less than the 60 registrations if there are qualified applicants who have applied with the Department of Financial and Professional Regulation." This language is mandatory, flowing solely form the number of qualified applicants, up to 60. It leaves no discretion in that regard. It is thus nonsensical for the Defendant Agency to point to its own rules (which are inconsistent with the Act) as a defense to the claim that it is violating the Act.

The Act's language presents the prototypical circumstance for an entitlement: the use of mandatory language in which required conduct flows from a specified fact or facts. "[T]he use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the State has created a liberty interest." Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 463, 109 S. Ct. 1904, 1910 (1989). Although Thompson concerned a liberty interest claim, the analysis is the same for the property-based entitlement claims Plaintiffs bring here. Kim Constr. Co. v. Bd. of Trustees of Vill. of Mundelein, 14 F.3d 1243, 1247 (7th Cir. 1994)("In [Thompson] the Supreme Court held that in order to create a protected liberty interest, a state regulation must contain specific directives to the decisionmaker

[5] In pleading, Plaintiffs have relied on publically available information and press reports. Over the IDFPR's objection, the Court has permitted limited discovery which will corroborate what is alleged.

such that if the regulation's 'substantive predicates' are met, a particular outcome necessarily follows. These principles are equally applicable to the analysis of property interests.").

Moreover, business licenses are a well-established subject of entitlement protection. Simpson v. Brown Cty., 860 F.3d 1001, 1006 (7th Cir. 2017) ("Government-issued licenses to perform certain types of work that allow the license holders to earn their livelihoods are a form of government-created property—an entitlement—and have long been considered property protected by the Fifth and Fourteenth Amendments.") citing Barry v. Barchi, 443 U.S. 55, 64, 99 S.Ct. 2642 (1979) ("[I]t is clear that [plaintiff] had a property interest in his license [as a harness-racing trainer] sufficient to invoke the protection of the Due Process Clause."); Baer v. City of Wauwatosa, 716 F.2d 1117, 1121 (7th Cir. 1983) (gunshop license is a due process protected property interest); Morgan v. Dep't of Fin. & Prof'l Regulation, 374 Ill. App. 3d 275, 303, 871 N.E.2d 178, 201 (2007) (psychologist's entitlement in license to practice).

As applied here, case law dictates a finding of entitlement. First, IDFPR has only issued 55 of the 60 authorized licenses, meaning it has not completed a clear mandate of the Act. 410 ILCS 130/115(a). Second, there are more than 55 qualified applicants, meaning that the precondition for issuing more than 55 licenses is satisfied. AC ¶¶ 5-6, 38-41. Third, Plaintiffs are in the class of those to whom the licenses must be issued – the qualified applicants. Id. And, fourth, Plaintiffs are the only qualified applicants to have submitted compliant property in the respective districts, id., meaning they are eligible for and have the right to receive the associated licenses. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it."); Mallette v. Arlington Cty. Employees' Supplemental Ret. Sys. II, 91 F.3d 630, 636 (4th Cir. 1996) ("As a member of the class of persons the Retirement System was intended to protect and benefit, Mallette has more than an abstract desire for the benefits. If she can make a prima facie case of eligibility, she

has a property interest in those benefits"); Ressler v. Pierce, 692 F.2d 1212, 1215 (9th Cir.1982) (Applicant had "a constitutionally protected 'property' interest in [HUD rent subsidies] by virtue of her membership in a class of individuals whom the [ ] program was intended to benefit").

Moreover, the mandatory language in Section 130/115(a) show Defendants' cases to be inapposite. For example, Bayview-Lofberg's, Inc. v. City of Milwaukee, 905 F.2d 142, 144 (7th Cir. 1990) involved a Wisconsin law and city ordinance granting decision makers discretion to withhold a liquor license: the "governing body may grant and issue ... licenses for retail sales of intoxicating liquor . . . as the issuing municipal *governing body deems proper*". Id. at 144-45. That language is utterly dissimilar to the unconditional legislative command in Section 130/115(a). Likewise, Scott v. Vill. of Kewaskum, 786 F.2d 338, 340 (7th Cir. 1986), also turned on the reservation of discretion in Wisconsin's alcohol licensing scheme: "Section 176.05(1) authorizes village boards to grant liquor licenses 'to such persons as they deem proper'. No one has an entitlement to be 'deemed proper;' no fact or set of facts creates a right to a license. The Supreme Court of Wisconsin has declined to treat § 176.05 as establishing substantive criteria and has repeatedly characterized liquor licenses as 'privileges,' to be doled out at the discretion of local governments."

DeSalle v. Wright, 969 F.2d 273, 277 (7th Cir. 1992), is even further off the mark. It did not question that mandatory statutory language creates an entitlement. Rather, the issue was that the plaintiff had not fulfilled one of the express statutory conditions. Id. There is no such dispute here. The statutory criteria are that less than 60 licenses have been issued, and that additional qualified applicants remain. Both of those facts are admitted (as they must be) on this motion to dismiss.

Finally, Residences at Riverbend Condo. Ass'n v. City of Chicago, 5 F. Supp. 3d 982 (N.D. Ill. 2013), addresses for zoning board notice rules. The plaintiffs were upset because the board allowed construction on a neighboring property without following the public notice statute and tried to claim a property to publication of notice. The sole holding was that there are no property rights in

a notice statute, an issue absent here. Id. ("Plaintiffs reliance on Section 11–13–7 as providing an independent source of their constitutionally protected property rights is misplaced because the statute outlines the procedure for giving proper notice when applicants apply to amend a zoning ordinance and '[p]rocedural guarantees, whether relied on or not, do not establish a property interest protected under the Fourteenth Amendment's Due Process Clause.'") (citation omitted).

Accordingly, denying Plaintiffs a license when they are in the limited class of qualifying applicants in the statute and have secured compliant property in one of the five open districts violates the Act: "The Department of Financial and Professional Regulation may not issue less than the 60 registrations if there are qualified applicants who have applied." 410 ILCS 130/115 (a).

3. The Court Has Jurisdiction Over IDFPR for Administrative Review

Defendants' next argument is that the Court should dismiss the administrative review count supposedly because IDFPR may not be sued in federal court. The argument lacks merit. For one thing, IDFPR is sued in federal court with some regularity, and is presumably aware of that. E.g. Goodman v. Illinois Dep't of Fin. & Prof'l Regulation, 430 F.3d 432, 437 (7th Cir. 2005) (raising constitutional challenge and appealing denial of preliminary injunction after district court's evidentiary hearing); Wilson v. Illinois Dep't of Fin. & Prof'l Regulation, 376 F. Supp. 3d 849, 871 (N.D. Ill. 2019) (in Section 1983 suit, court exercised supplemental jurisdiction over Defendants' state law claims against IDFPR); Benjamin v. Illinois Dep't of Fin. & Prof'l Regulation, 837 F. Supp. 2d 840, 852 (N.D. Ill. 2011) ("Because the Eleventh Amendment does not foreclose claims for injunctive relief (and plaintiff requests injunctive relief here), plaintiff's Ethics Act claims based on plaintiff's request for injunctive relief survive against IDFPR and Martinez (in his official capacity)").

Moreover, IDFPR misunderstands the Eleventh Amendment's application to administrative review claims. Plaintiffs do not seek damages from IDFPR and there is nothing in the relief requested that would impact the state's treasury. Administrative review is purely declaratory. There is

no Eleventh Amendment impediment to federal courts issuing such relief against a state agency. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908) (federal court enjoined state Attorney General from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment); Kroll v. Bd. of Trustees of Univ. of Illinois, 934 F.2d 904, 908 (7th Cir. 1991) ("Under an exception to the general rule, however, official-capacity actions may not be barred by the eleventh amendment insofar as they request prospective relief—*i.e.*, an injunction or a declaratory judgment"); Whitfield v. Illinois Dep't of Correction, No. 06-CV-00968-DGW, 2011 WL 5282639, at *4 (S.D. Ill. Nov. 2, 2011). ("To the extent that Plaintiff brings this action for violations of federal law, pursuant to Section 1983 and RLUIPA, his suit against Defendants for injunction and declaratory relief is permitted by the Young exception to the Eleventh Amendment immunity."); Benjamin, 837 F. Supp. 2d at 852 (No 11th Amendment immunity for injunctive claim against IDFPR).

Further, the Supreme Court has already made clear (in a case arising out of Illinois' own administrative review law no less) that the federal courts have supplemental jurisdiction over administrative review claims when the agency's action gives rise to constitutional claims over which there is original jurisdiction. City of Chicago v. Intl. Coll. of Surgeons, 522 U.S. 156, 166, 118 S. Ct. 523, 530 (1997). Defendants cite a footnote in the dissent in for the proposition that there is some particular Eleventh Amendment concern in reviewing a state agency's decisions, as opposed to simply enjoining the agency, but the dissent does not represent the holding of the Court, and the footnote was *dicta* at best in a case where the agency was part of a local government.

Unsurprisingly, lower courts have not read Intl. Coll. Of Surgeons in the way Defendants urge to bar claims against Illinois state agency. See Petroff Trucking Co. v. Illinois Dep't of Transp., No. CIV. 11-241-GPM, 2011 WL 6026108, at *1 (S.D. Ill. Dec. 2, 2011) ("In Count I of Petroff's complaint, Petroff seeks a declaratory judgment that Petroff is a DBE within the meaning of IDOT regulations . . . . Count I of Petroff's complaint is within the Court's supplemental jurisdiction

pursuant to 28 U.S.C. § 1367."); United States v. Illinois Pollution Control Bd., 17 F. Supp. 2d 800, 805 (N.D. Ill. 1998) (allowing claim "challenging Board's decision—a state administrative agency decision—[to be brought] into this federal court" because "federal district courts have original jurisdiction over federal question claims that arise from state administrative decisions."). Compare Pickford v. Bd. of Trustees of Se. Illinois Coll., No. 05-CV-4217-JPG, 2007 WL 1302712, at *1 (S.D. Ill. May 1, 2007) ("Given the similarity between common law certiorari and review under the Illinois Administrative Review Act, the Court finds the Supreme Court's decision in *International College of Surgeons* compels the conclusion that this Court has jurisdiction to hear this case.").

Elsewhere, Defendants challenge whether administrative review is available as a matter of law because that Act supposedly only mentions review of disciplinary decisions, MTD at 12,[6] but they then go on to recognize that *certiorari* would be available anyway. Id. at 14. Regardless of the label, what Plaintiffs are seeking is a declaration that that the agency improperly refused to award the Plaintiffs licenses once they secured compliant property in the available districts. In the end, Defendants acknowledge the availability of such relief, and simply argue that the allegations support

[6] Contrary to Defendants' suggestion, the section is not limited to disciplinary actions nor to persons already holding a license:

> Department of Financial and Professional Regulation may revoke, suspend, place on probation, reprimand, *refuse to issue* or renew, or take any other disciplinary *or non-disciplinary action* as the Department of Financial and Professional Regulation may deem proper with regard to the registration of any person issued under this Act to operate a dispensing organization or act as a dispensing organization agent…

410 ILCS 130/130(n) (emphasis added). Defendants' cases predicated on restrictive language are thus inapposite. Moreover, the paragraph goes on to use even further expansive language: "*All* final administrative decisions of the Department of Financial and Professional Regulation are subject to judicial review under the Administrative Review Law and its rules. The term 'administrative decision' is defined as in Section 3-101 of the Code of Civil Procedure." If the legislature intended to limit review to disciplinary actions, the express incorporation of the Section 735 ILCS 5/3-101 definition would be not only superfluous, but contradictory -- which cannot be. Id. ("'Administrative decision' . . . means any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency.").

the agency's actions. Id. Defendants do not develop the point and, as explained above, Defendants have ignored important factual allegations in the AC. Their argument must therefore be rejected.

4. Plaintiffs do not seek damages from Defendant Bender in His Official Capacity

The official capacity claims against Defendant Bender in County I seek only injunctive and declaratory relief. The Court has jurisdiction over these claims and Defendants do not contend otherwise. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n. 10, 109 S. Ct. 2304, 2312 n. 10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.")

5. Defendant Bender Cannot Establish Qualified Immunity At This Stage

Defendant Bender's qualified immunity claim applies only to potential damages in his individual capacity, not official capacity injunctive and declaratory claims. With regard to the former, the question at this stage is whether it is beyond doubt that Plaintiffs can prove "no set of facts" that would overcome a qualified immunity claim. Alvarado v. Litscher, 267 F.3d 648, 651–52 (7th Cir. 2001). Given the high hurdle and the fact-bound nature of a qualified immunity defense, motions to dismiss on the ground are almost never granted:

> In addressing the district court's denial of defendants' motion to dismiss based on qualified immunity, we note that a complaint is generally not dismissed under Rule 12(b)(6) on qualified immunity grounds. *See Jacobs v. City of Chicago*, 215 F.3d 758, 765 n. 3 (7th Cir.2000). Because an immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate: "[T]he plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity." *Id.* As noted in Jacobs' concurrence, "Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground for dismissal .... and when defendants do assert immunity it is essential to consider facts in addition to those in the complaint." *Id.* at 775 (Easterbrook, J., concurring).

Id.

Mr. Bender's claim is no exception. Given the development in the law of entitlements, going back to the 1970s, it should come as no surprise to a public official that mandatory language in a

statute is capable of creating an entitlement. See Thompson, 490 U.S. at 463 and cases cited supra Section 2. Likewise, the area of occupational licensure is replete with findings of an entitlement including in laws administered by the very agency for which Mr. Bender works. Id. Finally, although the foregoing is ample to deny the claim, it should be noted that other winning applicants were allowed to change addresses and districts, a premise ignored in Mr. Bender's cursory and dismissive treatment of the allegations.

## CONCLUSION

Leaving aside whatever arguments Defendants may have down the road about the scoring processes and Plaintiff's eligibility as a qualified applicant, those arguments are inappropriate for a motion to dismiss. Plaintiff has alleged a sufficient basis for relief, and the motion should be denied.

Meanwhile, it is not even clear why the Department is so reflexively fighting Plaintiffs' claim for relief. The State has publically expressed the desire to diversify the medical cannabis Program, and Plaintiffs are exactly the type of qualified applicants that the State has stated that it wants to see given the chance to succeed. Moreover, it will be a hollow victory for Plaintiffs if they win this lawsuit at some point in the distant future, long after the window to effectively capitalize on the now-present budding opportunity (no pun intended) has largely closed. As such, Plaintiff respectfully requests a settlement conference as soon as possible after resolution of this motion to initiate a dialogue among the parties, as well as any other relief the Court deems appropriate.

RESPECTFULLY SUBMITTED,

/s/ Michael Kanovitz

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**CERTIFICATE OF SERVICE**

I, Michael Kanovitz, an attorney, certify that on January 28, 2020, I delivered by electronic means a copy of the foregoing Response to all counsel of record via the Court's CM/ECF filing system.

/s/ Michael Kanovitz