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

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| BROTHELLA QUICK *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | 19 C 7797 |
| | ) | |
| v. | ) | District Judge Rowland |
| | ) | Magistrate Judge Weisman |
| ILLINOIS DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION *et al.*, | ) | |
| | ) | |
| Defendants. | ) | |

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR RULE 12(b)(6) MOTION TO DISMISS**

Defendants – the Illinois Department of Financial and Professional Regulation ("IDFPR") and Brett Bender, individually and in his capacity as Deputy Director of Medical Cannabis within IDFPR – by their counsel, Kwame Raoul, Illinois Attorney General, submit this memorandum of law in support of their motion to dismiss all claims against them in Plaintiffs' First Amended Complaint with prejudice and state as follows:

## INTRODUCTION

Two companies applied unsuccessfully in 2014 for medical marijuana dispensary licenses tied to specific geographic districts pursuant to the Illinois Compassionate Use of Medical Cannabis Act. Several years later, both companies decided that they would exercise an imaginary right to claim licenses tied to two different geographic districts. The companies separately requested that IDFPR allow them to change the proposed locations in their old applications to new locations that fall within two other geographic districts where IDFPR has not yet awarded a license. Plaintiffs' theory is that (1) they were both previously deemed qualified applicants for specific geographic districts but did

not ultimately obtain the licenses for those districts, (2) IDFPR is required to let them change their proposed location to new districts that they never applied for and award them the licenses, and (3) they therefore have a vested property right to the licenses for these new districts.

When IDFPR denied the companies' requests to change districts, they (along with the individual owner of one of the companies) filed this two-count lawsuit against IDFPR, Brett Bender (the head of the medical cannabis pilot program for IDFPR)[1], and "As Yet Unknown Defendants." Count I asserts a state-law claim for judicial review of IDFPR's location change denials, which plaintiff incorrectly attempts to classify as a final administrative decision. Count II alleges that Defendants violated Plaintiffs' due process rights by depriving them of a property right to receive the licenses for the two new geographic districts.

Several problems doom Plaintiffs' complaint. First, Plaintiffs do not have a property right to any license at issue in this case. Second, Eleventh Amendment immunity bars Count I, and Plaintiff may not sue IDFPR in Count II due to this immunity and because the agency is not a "person" under Section 1983. Third, they cannot sue Defendant Bender for damages in his official capacity. Fourth, qualified immunity bars any damages claim against Bender in his individual capacity. Fifth, they cannot use administrative review to challenge IDFPR's recent denials, and moreover they could not have even used administrative review to challenge the prior decisions not to award Plaintiffs a license. Sixth, even if this Court were to review IDFPR's recent location

[1] Plaintiffs do not identify whether they are suing Bender in his official capacity or individual capacity. They reference his state position, which would suggest an official capacity suit. However, they are also seeking monetary damages, which would suggest an individual capacity suit. This motion assumes that Plaintiffs have sued Bender in both capacities.

denials using the common-law of certiorari, Plaintiffs still fail to state a claim because IDFPR's decisions were unquestionably correct as a matter of law.

## RELEVANT STATUTORY AND REGULATION FRAMEWORK

### *Key Provisions of the Medical Cannabis Act*

The Medical Cannabis Act authorizes IDFPR to issue up to 60 "dispensing organization registrations" (in other words, a license to dispense medical cannabis to qualifying patients) that are geographically dispersed throughout the state. *See* 40 ILCS 130/115(a). IDFPR must issue 60 licenses if there are qualified applicants. *Id.* The Act also authorizes IDFPR to adopt rules that establish the application procedures to obtain these licenses. *See* 40 ILCS 115(b). Section 130 of the Medical Cannabis Act adopts the Illinois Administrative Review Law with regard to that section. *See* 410 ILCS 130/130(n) (providing for judicial review regarding IDFPR's final administrative decisions to revoke or suspend a license, or otherwise impose discipline on any person who has been granted a dispending license); *see also* 735 ILCS 5/3-101, *et seq.*

### *Key IDPFR Rules Implementing the Medical Cannabis Act*

IDFPR created 60 geographic districts statewide, with specific numbers of districts assigned to Chicago, the rest of Cook County, the Chicago metropolitan region outside of Cook County, and the rest of the State. *See* 68 Ill. Adm. Code § 1290.20(a). It also established an application process to award one dispenser license for each of the 60 geographic districts. *See* 68 Ill. Adm. Code § 1290.40(a). During an application period, a prospective dispenser may submit one application per district and may submit separate applications for up to five districts; however, if more than one separate application is submitted, the applicant must pay the application fee for each submission and comply

with all other requirements for each application. *See id.* § 1290.40(a)(3), (5), (6). If more than one applicant for a specific district meets the basic qualifications for a license, then IDFPR must examine all qualifying applicants and select one using certain criteria. *See id.* § 1290.40(a)(9), (11); *see also* 68 Ill. Adm. Code § 1290.60(e)-(g); 68 Ill. Adm. Code § 1290.70 (setting forth competitive selection criteria). If the initial application process does not result in one qualified applicant awarded a license in each district, then IDFPR is directed to provide public notice of when the next application process for remaining districts will take place. *See* 68 Ill. Adm. Code. § 1290.40(a)(13); 68 Ill. Adm. Code. § 1290.60(i).

Given that the Medical Cannabis Act provides for administrative review of disciplinary decisions, IDFPR's rules include procedures for administrative hearings to challenge these decisions. *See* 68 Ill. Adm. Code. § 1290.500 through 1290.590. The Act is silent as to court challenges regarding IDFPR's decisions to approve or deny applications, and so IDFPR's rules make it clear that applicants do not have a "property right, duty, privilege or interest" that would entitle them to a hearing upon denial of an application. *See* 68 Ill. Adm. Code. § 1290.60(k).

Once an applicant has been selected to receive a license, the applicant must complete a registration process before being able to operate as a dispenser. *See* 68 Ill. Adm. Code. § 1290.100 (describing formal registration process). IDFPR's rules allow for a fully registered dispenser, or a dispenser not yet fully registered, to relocate somewhere else *in the same district* if IDFPR approves. *See* 68 Ill. Adm. Code. § 1290.140(a). Plaintiff's complaint devotes considerable attention to the fact that Section 1290.140 was amended earlier this year to allow for dispensers who had not yet been fully registered to

seek relocation. The complaint references other instances where non-registered dispensers had been allowed to relocate prior to this amendment, but for the reasons set forth below, the relocation rule and amendment are not relevant to the claims in this complaint.

**FACTUAL BACKGROUND**

Plaintiff Brothella Quick owns Plaintiff BQ Enterprises, Inc., which applied for a dispensing license in 2014 along with more than 200 other applicants statewide. [ECF #5, First Am. Compl., ¶¶ 4, 6.] BQ Enterprises claims it met the requirements of the Medical Cannabis Act, but IDFPR selected another qualifying applicant for the district to which BQ Enterprises applied. [*Id.*] Plaintiff Crystal Clear Compassionate Care, Inc. also applied for a dispensng license in 2014. [*Id.*, ¶¶ 4, 5.] Crystal Clear claims that it also met the requirements of the Act, but IDFPR selected another qualifying application for the district to which Crystal Clear applied. [*Id.*] Plaintiffs' complaint does not state when IDFPR awarded licenses during this initial round, and so IDFPR will just represent here that decisions were announced in 2015 (the year of these decisions is not relevant to the legal arguments contained in this motion). Neither company alleges that IDFPR's selection of another applicant was in any way improper. Earlier this year, BQ Enterprises and Crystal Clear each obtained property in a district where there were no qualifying applications during the 2014 application process. [*Id.*, ¶ 16 (there are two paragraphs back to back labeled 16).] Both companies arrived at the conclusion that they were entitled to the licenses for these two districts because IDFPR was required in 2019 to let them change their 2014 rejected applications with respect to the physical location of the dispensary and the geographic district. [*Id.*, ¶¶ 10, 13-14, 22, 38-41.] The companies

wrote to IDFPR and requested relocations to these new districts, but IDFPR responded in letters dated November 6, 2019, and stated that these requests were denied. [*Id.*, ¶¶ 11-12.] IDFPR's reasoning is detailed in the argument section below.

## LEGAL STANDARDS

1In ruling on a motion to dismiss under Rule 12(b)(6), the court accepts as true all well-pleaded facts alleged in the complaint, and it draws all reasonable inferences from those facts in the plaintiff's favor. *Sanner v. Bd. of Trade*, 62 F.3d 918, 925 (7th Cir. 1995). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and quotations omitted); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-52 (2009). To survive a Rule 12(b)(6) motion, a complaint must "not only provide the defendant with fair notice of the claim's basis but must also establish that the requested relief is plausible on its face." *Harris v. Illinois*, 753 F.Supp.2d 734, 738 (N.D. Ill. 2010). Due to Eleventh Amendment immunity, qualified immunity, controlling U.S. Supreme Court precedent regarding the scope of 42 U.S.C. § 1983, and a lack of sufficient allegations that Defendants violated Plaintiffs' rights, Plaintiffs' Complaint cannot meet the *Iqbal-Twombly* standard and should be dismissed.

## ARGUMENT

### I. Defendants did not violate Plaintiffs' due process rights because Plaintiffs do not have a property right at issue in this case.

Plaintiffs' theory that they are entitled to two dispensary licenses is nonsensical. It is based mainly on allegations that some successful applicants were able to relocate

within their respective geographic districts. Plaintiffs then conclude that this can only mean that unsuccessful applicants should be able to relocate to another districts and that IDPFR must therefore recognize Plaintiffs' supposed property right to licenses that have not yet been awarded.

All the allegations about intra-district relocations are a classic red herring – they have nothing to do with Plaintiffs' claims. These other applicants were in the process of registering their licenses with IDFPR. The rules concerning license holders in 2014 plainly allowed for registered license holders to relocate within their districts, and there was enough ambiguity about whether not-yet-registered license holders could seek a relocation within their districts that IDFPR enacted an amendment earlier this year to explicitly allow for this.

Yet, none of this concerns the claims asserted in Count II. Plaintiffs concede that they do not hold dispensary licenses and have never held such a license. In order to demonstrate a property right, Plaintiffs have to show "more than an abstract need or desire…or unilateral expectation" for some government action; rather, they must have a "legitimate claim of entitlement to it." *Bayview-Lofberg's Inc. v. City of Milwaukee*, 905 F.2d 142, 145 (7th Cir. 1990). Property is "what is securely and durably yours under law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." *Scott v. Village of Kewaskum*, 876 F.2d 338, 340 (7th Cir. 1986). A statute that sets forth application procedures does not, standing alone, create any property interest for an applicant. *See Residences at Riverbend Condominium Ass'n v. City of Chicago*, 5 F. Supp. 3d 982, 987 (N.D. Ill. 2013) (procedures for zoning amendment applicants did not establish a property right).

In *Bayview-Logberg's*, the Seventh Circuit rejected essentially the same argument that Plaintiffs are making here. Two stores maintained that the combination of a state liquor law and a city liquor ordinance took away any discretion for the city council and that the stores therefore had a property right to a liquor license so long as they submitted a complete application. *Bayview-Lofberg's Inc.*, 905 F.2d at 144. The court disagreed and held that no property right was involved because a committee of the city council had to exercise its judgment in evaluating whether an application had an appropriate location, whether the location would create any undesirable neighborhood problems, and whether any overconcentration of neighborhood liquor stores would result. *Id.* at 145-46. A similar result can be seen in *DeSalle v. Wright*, in which an applicant for a temporary medical license had no property right because his application did not satisfy the criteria set forth in the relevant statute. 969 F.2d 273, 277 (7th Cir. 1992).

Plaintiffs certainly desire dispensary licenses, but it is truly a unilateral and uncertain expectation. The Medical Cannabis Act directs IDFPR to create an application process that results in statewide geographic diversity. IDFPR's rules allow for a person to apply for up to five of 60 statewide districts, so long as an application is submitted for each district and the required fee accompanies each application. *See* 68 Ill. Adm. Code § 1290.40(a)(3), (5), (6). IDFPR must exercise its judgment when applying the criteria established in Section 1290.70 to all qualifying applicants in each district at issue, and it must do so only for those applicants who properly applied. If the initial application process results in any district not having even one qualifying applicant, then an entirely new application process will be announced through the public notice requirement in

IDFPR's rules. *See* 68 Ill. Adm. Code. § 1290.40(a)(13); 68 Ill. Adm. Code. § 1290.60(i).

It is impossible to read the Medical Cannabis Act or its rules as creating a legitimate claim of entitlement to a license in a district where no applicant was successful in the initial round. Any applicant who wanted to win that district needed to file an application for that district and pay a separate fee. Plaintiffs admit that they did not apply for the districts they now seek and did not pay a fee to correspond with such applications. IDFPR, at some appropriate date in the future[2], will announce another application round and will conduct it in the same manner as the first. That means that, after public notice, all persons interested in the remaining licenses must apply for them, pay the fee associated with all submitted applications (up to five), and then be deemed qualified with respect any of their submitted applications. IDFPR will then review all qualifying applicants and apply the specific criteria set forth in the rules to determine which applicants should obtain the remaining licenses. Plaintiffs do not have a right to circumvent these rules by changing their applications five years later and demanding an automatic right to a license. So not only is there no violation of any due process right in this case, IDFPR in fact followed the law and its administrative rules by refusing to let Plaintiffs simply invent a new process for themselves.

**II. Plaintiffs cannot sue IDFPR in federal court for any relief.**

Although parties aggrieved by state agency decisions may sue the agency for administrative review in state court, they may not do so in federal court (even with

[2] The Medical Cannabis Act and its rules do not set a timeframe for IDFPR to conduct any further application rounds, and Plaintiffs do not allege that IDFPR is in fact subject to any specific timeframe.

supplemental jurisdiction) and it may not assert a Section 1983 claim against the agency. Eleventh Amendment immunity bars Plaintiffs from suing IDFPR, regardless of the relief sought, in federal court unless the State of Illinois consents or Congress has abrogated the immunity with respect to a particular statute.[3] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54-55 (1996); *Kroll v. Bd. of Trustee of the Univ. of Ill.*, 934 F.2d 904, 907 (7th Cir. 1991) (state agency is considered the State for Eleventh Amendment purposes); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U .S. 89, 100-01 (1984) (immunity applies regardless of relief sought).

This immunity extends to administrative review actions, since the stage agency is necessarily the proper defendant (when the action is filed in state court). *See* 735 ILCS 5/3-107. In *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 176, the U.S. Supreme Court held that federal courts were able to review a local administrative decision under supplemental jurisdiction. However, as the dissent noted, this holding does not extend to state agencies absent abrogation or state consent. *See id.* at 177, n. 3 (citing *Pennhurst* and Eleventh Amendment immunity). Count I must therefore be dismissed in its entirety. Furthermore, state agencies are not "persons" within the meaning of Section 1983 and cannot be sued under this statute. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Thus, IDFPR should be dismissed from Count II even if were to survive.

**III. Eleventh Amendment immunity bars any damages claims against Defendant Bender in his official capacity.**

Eleventh Amendment immunity bars Plaintiffs' monetary damages claims in Count II against Defendant Bender in his official capacity. *See Kentucky v. Graham*, 473

[3] Plaintiffs do not, and cannot, plead that either exception applies.

U.S. 159, 165-67 (1985) (official capacity suit for damages is the same as a suit for damages against a state for Eleventh Amendment immunity purposes).

## IV. Qualified immunity bars any damages claims against Defendant Bender in his individual capacity.

Plaintiffs' complaint does not actually allege that Defendant Bender did anything, but Defendants acknowledge that he was the official who wrote and sent the letters to Plaintiffs stating that IDFPR had denied the request to change the locations in the 2014 applications. There is no reason for this Court to consider whether qualified immunity would apply to the damages claims in Count II against Defendant Bender given that Plaintiffs fail to state a claim on the question of a due process right.

However, if this Court does not dismiss Count II based on the reasoning set forth above in Part I of this argument, it should still dismiss Count II against Defendant Bender due to qualified immunity. Courts must address two questions when deciding whether qualified immunity is available: (1) "whether plaintiff has alleged a deprivation of a constitutional right at all", and (2) "whether the right was clearly established at the time and under the circumstances presented." *Bianchi v. McQueen*, 818 F.3f 309, 319 (7th Cir. 2016) (affirming the granting of a motion to dismiss based, in part, on qualified immunity). Again, for the reasons set forth in Part I, Plaintiffs do not state a deprivation of any protected right.

Yet, even if this Court declined to make this conclusion at this stage of the lawsuit, it should still find that qualified immunity applies. It was not clearly established in November 2019 that Defendant Bender could not tell two unsuccessful 2014 applicants that they could not change their old applications and automatically take possession of two licensee that in reality must be awarded in accordance with a new competitive application

process. A right is said to be "clearly established" when existing case law at the time of the relevant events "placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Plaintiffs cannot point to any case that would have put Defendant Bender on notice that he was prohibited from applying the unambiguous terms of valid agency rules that did not allow Plaintiffs to simply invent their own way to obtain dispensary licenses.

## V. Plaintiffs cannot seek administrative review of IDFPR's November 2019 decisions.

For all the reasons argued above, Count II should be dismissed. If this Court does not find that Eleventh Amendment immunity bars Count I, it should decline to exercise its jurisdiction over this claim. Yet, if this Court is inclined to review Count I as well, it should dismiss it as well for two reasons. The first is that judicial review under the Administrative Review Law ("ARL") is not available to Plaintiffs. Review under the ARL is only available when the relevant section of a statute expressly adopts the ARL with respect to a particular section. *See Bd. of Educ. of Woodland Community Consol. School Dist. 50 v. Illinois State Charter School Comm'n*, 2016 IL App (1st) 151372, ¶38 (ARL did not apply because specific portion of Charter Schools Law did not adopt it); *Porter v. Illinois State Bd. of Educ.*, 2014 IL App (1st) 122891, ¶24 (same with respect to specific portion of School Code).

Only one section of the Medical Cannabis Act expressly adopts the ARL and therefore provides for administrative review under the terms of that statute – Section 130, which concerns disciplinary actions against anyone who holds a license. *See* 410 ILCS 130/130(n). Thus, the ARL does not apply to applicants for a license, such as Plaintiffs.

In fact, IDFPR's rules even clarify the Act by noting that no applicant has a right to a hearing with respect to an application's denial. *See* 68 Ill. Adm. Code. § 1290.60(k).

Of course, Plaintiffs are not even seeking administrative review of their applications' denial. They are challenging letters that Defendant Bender sent them that stated the very obvious position that Plaintiffs cannot resurrect their old applications and lay claim to unawarded licenses. The ARL only applies to final "administrative decisions", which are rendered in a particular case, affect the legal rights of a party, and terminate the proceedings before the relevant state agency. *See* 735 ILCS 5/3-101. As discussed in Part I, Plaintiffs do not have any legal rights that Defendant Bender's letters affected, and any "proceedings" with respect to Plaintiffs' applications terminated several years ago when IDFPR denied them.

## VI. Plaintiffs' request for judicial review of IDFPR's November 2019 decisions fails as a matter of law even if this Court reviews the decisions under a common-law writ of certiorari.

This Court should dismiss Count I even if it were to review IDFPR's November 2019 letters to Plaintiffs under a common-law writ of certiorari. *See Apostolov v. Johnson*, 2018 IL App (1st) 172084, ¶17 (writ of certiorari, nearly identical to review under the ARL, is the method of review in circuit court for administrative decisions where the enabling act does not adopt the ARL and does not provide for any other form of judicial review). For the same reasons outlined above in Section II, Eleventh Amendment immunity bars a common-law certiorari claim because it is essentially the same as administrative review.

Yet, if this Court disagrees, such a claim still fails as a matter of law. District courts exercising supplemental jurisdiction over a common-law certiorari claim consider

the question of whether there is evidence in the record "which fairly tends to support the agency's findings." *See Bodenstab v. County of Cook*, 569 F.3d 651, 662 (7th Cir. 2009).

Here, Plaintiffs' complaint states all the facts necessary for this Court to review IDFPR's November 2019 letters, and there is no need to seek out any additional documents to include in a formal administrative record. For all the reasons set forth in Part I, the decisions reflected in Defendant Bender's letters to Plaintiffs were fully consistent with the Medical Cannabis Act and IDFPR's rules.

WHEREFORE, Defendants respectfully request that this Honorable Court grant their motion, dismiss all claims against them in Plaintiffs' First Amended Complaint with prejudice, and grant any further relief deemed reasonable and just. Defendants request in the alternative that this Court should decline to exercise supplemental jurisdiction over Count I (for state-law administrative review) if Count II is dismissed.

Respectfully submitted,

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