February 9, 2022 **VIA E-MAIL**

Joint Committee on Administrative Rules
Boji Tower – 3rd Floor
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RE: Committee on Legislation and Administrative Rules - Cannabis Law Section of the State Bar of Michigan

Public Comments on Marijuana Regulatory Agency's Pending Rule Sets: JCAR 21-77, JCAR 22-01, JCAR 22-02, JCAR 22-03, JCAR 22-04, JCAR 22-05, JCAR 22-06, JCAR 22-07, JCAR 22-08 & JCAR 22-09

Disclaimer: The Cannabis Law Section of the State Bar of Michigan ("Cannabis Law Section") is not the State Bar of Michigan but rather a section whose membership is voluntary. The position expressed in this correspondence is that of the Cannabis Law Section's Committee on Legislation and Administrative Rules only, and the State Bar of Michigan has no position on this matter. The Cannabis Law Section has approximately 972 members as of the date of this correspondence. The Committee on Legislation and Administrative Rules of the Cannabis Law Section consists of seven members of the Cannabis Law Section. All members of the Committee voted in favor of the positions contained in this correspondence.

To Whom It May Concern,

On behalf of the Cannabis Law Section, the undersigned members of its Committee on Legislation and Administrative Rules had the opportunity to meet and discuss the proposed rule sets at significant length. Each member of the Committee is an attorney whose practice consists primarily of assisting clients with cannabis-related legal issues. Accordingly, the Committee is well suited to offer practical suggestions to assist the Joint Committee on Administrative Rules ("JCAR") as it navigates through many of the changes proposed in the Marijuana Regulatory Agency's ("MRA") pending rule sets.

The Committee engaged in thorough discussion and debate before reaching consensus on the comments presented herein. We thank JCAR in advance for its time and consideration of our comments.

JCAR 22-01 (MOAHR 2020-121 LR) – Marihuana Licenses Rule Set

- R 420.1(1)(c)(i)(I): This rule would amend the definition of an "Applicant" for a trust to include any "individual or body able to control or direct the affairs of a trust." The phrase "individual or body" should be replaced with the word "person" to eliminate potential ambiguity about how ad-hoc advisory bodies that do not formally exist as legal entities would submit applications. This rule would also add "trustees" to the definition of an

"Applicant." The rule's scope should be limited to "trustees who exercise control over or participate in the management of the prospective licensee." Limiting the scope in this manner makes the rule more consistent with other entity applicant definitions by providing a safe harbor for law firms, financial institutions (including nationally chartered banks), and other large professional service providers that offer trust administration and custodial services without actively participating in the management or business affairs of any companies held within those trusts.

- R 420.4(3): It is unclear whether the 2.5% disclosure threshold contemplated in this rule would establish a lower limit for disclosing individual equity interests in a prospective licensee—as the sub-paragraphs either mandate disclosure of "all" individuals or individuals with equity interests above 5% for public corporations. As drafted, the rule is internally inconsistent and creates ambiguity for licensees and stakeholders.

- R 420.5(1)(c)(ii): The rule specifies that a complete application must disclose "persons who have a direct or indirect ownership interest in the marihuana establishment," but does not limit that disclosure consistent with Rule R 420.4(3). For clarity and consistency, this rule should explicitly reference the limitation on disclosure set forth in R 420.4(3).

- R 420.6(6): This rule asserts that licensees do not have a property interest in their license. This rule is subject to a constitutional challenge in light of prior Michigan Supreme Court precedent. *Bundo v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976) (holding that the licensee had a property interest in his liquor license and, in particular, a property interest "in obtaining a renewal of his liquor license"). Notably, the Michigan Court of Appeals and Michigan Court of Claims both recently issued opinions whereby the Court suggested that licenses issued pursuant to the MMFLA and MRTMA constitute a property right in light of *Bundo*. *Coeus, LLC v City of Walled Lake*, unpublished per curiam opinion of the Court of Appeals, issued January 20, 2022 (Docket No. 353844), p 10 (noting that licenses issued under the MMFLA "likely" confer a property right to the licensee); *Viridis Laboratories, LLC v Michigan Marijuana Regulatory Agency*, unpublished opinion of the Court of Claims, issued February 3, 2022 (Docket No. 21-000219-MB), p 11 ("The holder of a license possesses a property interest in the license that can give rise to due process protections."). A copy of the *Coues, LLC* and *Viridis Laboratories, LLC* opinions are included as Exhibit A and Exhibit B to this correspondence for JCAR's convenience.

JCAR 22-02 (MOAHR 2020-120 LR) – Marihuana Licensees Rule Set

- R 420.102(10): This rule as currently written only allows Class A MRTMA Growers to transfer in their initial plant stock from a primary caregiver if that caregiver was an applicant for the license. Since the MRTMA does not specifically contemplate such restrictions, MRA has discretion to expand this provision uniformly for all MRTMA growers—not just Class A Growers—and should allow Class B and C Growers to transfer in their initial stock from a primary caregiver if that caregiver was an applicant for the license. This further encourages primary caregivers to transition into the regulated market, which JCAR and the MRA should support. JCAR should also send this rule back to MRA to add additional language conforming the rule with the MRTMA's language regarding a

Grower's acquisition of seeds or seedlings. MCL 333.27960(1)(a) explicitly allows Growers to accept seeds or seedlings from any person who is at least 21 years of age. Since the MRTMA expressly allows this conduct, MRA's rules should conform to the statute.

- R 420.105a(9): This rule would be clearer and more concise if the phrase "an individual, registered qualifying patient, or registered primary caregiver" was replaced with the term "person"—which, as defined in the MMFLA and MRTMA, accurately and concisely captures this rule's language.

JCAR 22-09 (MOAHR 2020-122 LR) – Marihuana Operations Rule Set

- R 420.203(f)(iii): This rule imposes a new record retention policy on licensees. The Committee does not take issue with implementing a record retention policy, but this rule should be revised to make clear that it does not apply retroactively. The rule should make clear that licensees have an obligation to must implement a record retention policy on or after the effective date of the rules, but will not face enforcement action under the amended rule for conduct prior to its effective date. Additionally, the term "licensee records" is not defined anywhere in the rules. At a minimum, the term should be defined so that licensees have adequate notice of what specific records are subject to this rule—particularly since there are other record retention requirements elsewhere in the rules, such as a licensee's requirement to preserve video surveillance recordings.

- R 420.204: This rule would introduce a list of permissible purposes for "combined space[s]" shared by marihuana licenses operating at the same location. The singular phrase "a combined space" should be changed to the plural "combined spaces" to clarify that multiple different spaces at a licensee's facility may be appropriate for use as a combined space. Additionally, the Committee recommends that an additional subdivision (f) should be added to this rule to permit use of a combined space for "Any other purpose consistent with the MMFLA, MRTMA, and these rules that MRA has approved to operate in a combined space."

- R 420.207: This rule contemplates the requirements for marihuana sales locations to provide delivery services to eligible customers. The rule specifically authorizes the delivery of adult use marihuana product to a "residential address"—but no statute or provision of the Michigan Administrative Code specifically defines a "residential address." "Residential address" should be defined in the definitions section of this rule set to clarify whether hotels, university dormitories, and other temporary dwellings (e.g. homeless shelters or improvised dwelling units) are eligible for delivery service.

JCAR 22-05 (MOAHR 2020-124 LR) – Marihuana Sampling and Testing Rule Set

The Committee acknowledges and applauds the MRA's efforts to eliminate reference to published guidance elsewhere in the rules. As the Cannabis Law Section's Special Committee on Administrative Rules noted in its public comments to the MRA on this rule set and the other pending rule sets back in September 2021, the Administrative Procedures Act ("APA") requires administrative agencies to use the formal notice and comment rulemaking procedures when

promulgating rules that have the force of law. As a result, JCAR should hold MRA to this APA standard and send this rule back to the MRA with instructions to remove language indicating that MRA may publish written guidance as a substitute for promulgating rules through the formal rulemaking process.

While the Committee understands circumstances that require a rapid response from MRA may arise, the APA provides a mechanism for emergency rulemaking that MRA can use to address any emerging threats to public health, safety, or welfare.

Absent such emergency circumstances, the APA's rulemaking process, while cumbersome and occasionally time consuming, is critical to ensure stakeholder input and agency accountability. Further, the APA's rulemaking process provides the cannabis industry and other stakeholders with notice and the opportunity to begin implementing process changes contemplated in newly modified rules without incurring tremendous inconvenience or expense.

Lastly, the Committee strongly recommends that JCAR consider sending this ruleset back for MRA to include specific rules on when and how MRA can issue administrative holds and recalls of product to ensure an orderly process with objective and defined standards.

JCAR 22-08 (MOAHR 2020-119 LR) – Marihuana Infused Products and Edible Marihuana Products Rule Set

- R 420.403(2), (11): The Committee echoes its comments from the Sampling and Testing Rule Set with respect to the reference in 420.403(2), (11) that the MRA would publish future guidelines concerning homogeneity and shelf stability in violation of the APA.

- R 420.403: This rule would introduce a broad range of restrictions for the production and marketing of edible marihuana products. MRA and JCAR should note that certain restrictions on product and packaging designs as drafted could be subject to constitutional challenges—including, without limitation, violations of protected commercial speech rights. *See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that regulation of protected commercial speech must "directly advance the governmental interest asserted," and may not be "more extensive than is necessary to serve that interest").

- R 420.403(9)(c): This rule would prohibit packaging edible marihuana products "in a package that can be easily confused with a commercially available food product." The phrase "in a package" should be replaced with the term "trade dress"—the legal term of art for distinguishing between generic packaging features common to most commercially available food products, and the more specific brand-identifying marks or packaging designs that could lead an edible marijuana product to be confused with an established brand of commercial non-marijuana food products.

JCAR 21-77 (MOAHR 2020-117 LR) – Marihuana Disciplinary Proceedings Rule Set

- R 420.802(3)(c): The rule would require licensees to seek MRA approval before "[t]he addition or removal of a person named in the application or disclosed." This could result in the MRA controlling whether corporate officers and directors of licensees and their supplemental applicants could voluntarily leave their employment or resign their positions without prior MRA approval. MRA could reasonably require notice within 10 days if such a disclosed person/applicant does quit or otherwise cease affiliation with the licensee, thus avoiding the agency having any unintended veto power over the action.

- R 420.802(4): The rule would require notification within three days of when a licensee becomes aware or should have become aware of "(c) Action by another party in violation of the acts or these rules," or "(d) Action by an employee in violation of the acts or these rules." The intent of the rule appears to be to only require this of "another party" or "employee" of the licensee required to report, but the language of the rule does not make this explicit. The language should be clarified to read "(c) Action by another party of the licensee in violation of the acts or these rules," and "(d) Action by an employee of the licensee in violation of the acts or these rules."

- R 420.808a(1)(b): This rule would allow a person included on any "valid and current exclusion list from another jurisdiction in the United States. . ." to "be excluded from employment at, or participation in, a marihuana business." Since the term "exclusion list" is not defined, the potential breadth of this language could raise due process issues. The Committee suggests narrowing the scope to an "exclusion list from another jurisdiction's cannabis regulatory or licensing body or authority" for clarity.

JCAR 22-07 (MOAHR 2021-029 LR) – Marihuana Declaratory Rulings Rule Set

- R 420.822(12): The effective date of a declaratory ruling should be required to be included when a declaratory ruling is issued by MRA.

On behalf of the Cannabis Law Section's Committee on Legislation and Administrative Rules, the Committee respectfully submits the comments above to the Joint Committee on Administrative Rules. The Committee appreciates the opportunity to participate in the rulemaking process, and the Committee is available to discuss should JCAR have any questions about the comments contained herein.

Sincerely,

Committee on Legislation and Administrative Rules of the
Cannabis Law Section of the State Bar of Michigan

Allison Arnold, Brett Border, John Fraser, Ari Goldstein, Robert Hendricks, Benjamin Joffe, and Benjamin Sobczak

STATE OF MICHIGAN

COURT OF APPEALS

COEUS, LLC,

Plaintiff/Counterdefendant-Appellant,

v

CITY OF WALLED LAKE, LINDA S. ACKLEY, L. DENNIS WHITT, CHELSEA PESTA, and JENNIFER A. STUART,

Defendants-Appellees,

and

JOHN AND JANE DOES 1 THROUGH 20, FRANK MARRA, and MATTHEW CECCHETTI,

Defendants,

and

CUSTOM BUILT PROPERTIES, LLC, doing business as GREEN HOUSE OF WALLED LAKE, and JERRY MILLEN,

Defendants/Counterplaintiffs.

UNPUBLISHED
January 20, 2022

No. 353844
Oakland Circuit Court
LC No. 2018-170030-CZ

Before: GADOLA, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

Plaintiff, COEUS, LLC, appeals as of right the trial court's stipulated order of dismissal.[1] On appeal, plaintiff challenges the trial court's earlier opinion and order granting summary disposition in favor of defendants city of Walled Lake, Mayor Linda S. Ackley, City Manager L. Dennis Whitt, City Development Manager Chelsea Pesta, and City Clerk Jennifer A. Stuart (collectively, "the city defendants"). On appeal, plaintiff argues that the city defendants are not entitled to governmental immunity and that its claims alleging a violation of due process and promissory estoppel were legally sufficient. We affirm.

This case arises from the city of Walled Lake's implementation, under the authority of the Medical Marihuana Facilities Licensing Act (MMFLA), MCL 333.27101 *et seq*., of its medical marijuana facilities licensing ordinance and plaintiff's subsequent application for a license to operate a provisioning center. The ordinance specifies that there are to be three licenses for provisioning centers, with two located in the C-2 zoning district and one located in the C-3 zoning district. Walled Lake Ordinance C-334-17, § 6b, enacting § 21.49(b) of the Zoning Ordinance. Subsequently, the city passed Resolution 2018-10, which established administrative rules for processing MMFLA permit applications.

After submitting applications to the city, plaintiff attempted numerous times to obtain status updates. In response to plaintiff's repeated phone calls, the city informed plaintiff that no action had been taken on any of the applications, no permits had been issued, and no meetings had been held addressing any of the applications. Plaintiff alleged that contrary to the city's claims that no MMFLA licenses had been issued, it was evident that the city had issued a license to defendant Green House of Walled Lake. Ultimately, plaintiff was advised that its request for the C-3 license was denied.

In its second amended complaint, plaintiff alleged the following counts against the city defendants: fraudulent misrepresentation (Count II); silent fraud (Count III); negligent misrepresentation (Count IV); unjust enrichment (against the city of Walled Lake only) (Count V); breach of an implied contract (Count VI); promissory estoppel (Count VII); violation of due process and equal protection (Count VIII); civil conspiracy (Count IX); injunctive relief (Count X); and gross negligence (Count XI).

The city defendants thereafter moved for summary disposition under MCR 2.116(C)(7), arguing that they were entitled to governmental immunity with respect to the alleged torts, and under MCR 2.116(C)(8) on plaintiff's due-process and promissory-estoppel claims. In a thorough opinion and order, the trial court granted the motion and dismissed all claims against the city defendants.

I. GOVERNMENTAL IMMUNITY

This Court reviews de novo a trial court's decision on a motion for summary disposition, *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008), as well as issues involving

[1] That order dismissed with prejudice plaintiff's claims against defendants Custom Built Properties, LLC, Jerry Millen, Frank Marra, and Matthew Cecchetti. The order also dismissed the counterclaims brought by Custom Built and Millen against plaintiff.

questions of law, such as the construction and interpretation of a city charter or ordinance. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998); *Ferguson v City of Lincoln Park*, 264 Mich App 93, 95; 694 NW2d 61 (2004).

A party is entitled to summary disposition under MCR 2.116(C)(7) if, among other things, the plaintiff's claims are "barred because of immunity granted by law." When considering a motion brought under this subrule, the court considers all the affidavits, depositions, admissions, or other documentary evidence submitted by the parties. MCR 2.116(G)(5). "The contents of the complaint are accepted as true unless contradicted by the evidence provided." *Odom*, 482 Mich at 466 (quotation marks and citation omitted).

A. CITY OF WALLED LAKE

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides that "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."[2] MCL 691.1407(1); see also *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 326-327; 869 NW2d 635 (2015). While there are six statutory exceptions to this broad grant of immunity, plaintiff did not allege that any applied.[3] Thus, as the trial court noted, the only question is whether the city was engaged in a governmental function.

The GTLA defines "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). Conversely, when "a governmental agency engages in an activity which is not expressly or impliedly mandated or authorized by constitution, statute, or other law (*i.e.*, an *ultra vires* activity), it is not engaging in the exercise or discharge of a governmental function" and "is therefore liable for any injuries or damages incurred as a result of its tortious conduct." *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984). However, when determining whether an act is a "governmental function" or merely an ultra vires act, courts are to " 'look to the general activity involved rather than the specific conduct engaged in when the alleged injury occurred.' " *Genesee Co Drain Comm'r*, 309 Mich App at 327, quoting *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 84; 782 NW2d 514 (2010).

Although plaintiff alleges that the city engaged in fraudulent and corrupt acts, its focus is too narrow. In this instance, the general activity in which the city had been engaged was the implementation and adoption of its medical marijuana facilities licensing ordinance and the

[2] There is no dispute that the city of Walled Lake is a "governmental agency" as defined by the GTLA. See MCL 691.1401(a), (d), and (e).

[3] "The six statutory exceptions are: the highway exception, MCL 619.1402; the motor-vehicle exception, MCL 691.1405; the public-building exception, MCL 691.1406; the proprietary-function exception, MCL 691.1413; the governmental-hospital exception, MCL 691.1407(4); and the sewage-disposal-system-event exception, MCL 691.1417(2) and (3)." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84 n 10; 746 NW2d 847 (2008).

processing of applications for a license. The implementation of the ordinance was expressly authorized by the MMFLA, and the processing of applications for licenses was authorized by the city's ordinance. Therefore, the city was engaged in a governmental function, and accordingly, it is immune from tort liability. Thus, the trial court did not err by granting summary disposition to the city on this ground.[4]

B. CITY DEVELOPMENT MANAGER PESTA AND CITY CLERK STUART

Plaintiff next argues that the trial court erred by granting summary disposition in favor of City Development Manager Pesta and City Clerk Stuart.

The GTLA also grants immunity to officers and governmental agency employees for negligent and intentional conduct if other conditions are met.

Regarding negligent torts, MCL 691.1407(2) provides, in pertinent part:

> [E]ach officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

In response to the city defendants' motion for summary disposition, plaintiff only contested the gross-negligence component by stating, "[T]he sole issue before this Court is whether Plaintiff has properly alleged the elements of gross negligence." Thus, our review is whether the conduct of Pesta and Stuart amounts to gross negligence.

[4] To the extent that plaintiff argues that the city could be liable under a theory of gross negligence, the gross-negligence exception to governmental immunity contained in MCL 691.1407(2) only applies to *individuals*; it does not apply to the *governmental agency* itself. *Gracey v Wayne Co Clerk*, 213 Mich App 412, 420; 540 NW2d 710 (1995), abrogated on other grounds in *American Transmissions, Inc v Attorney General*, 454 Mich 135; 560 NW2d 50 (1997); see also *Tarlea v Crabtree*, 263 Mich App 80, 89; 687 NW2d 333 (2004).

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). The alleged failure of Pesta and Stuart to follow the procedures in the city's ordinance and resolution do not amount to gross negligence. Notably, on appeal and without providing any citations to the lower court record, plaintiff merely asserts that it had "specifically plead[ed] that the actions of those individuals [Pesta and Stuart] constituted gross negligence, citing specific examples and drawing upon the deposition of Pesta." This type of cursory argument constitutes an abandonment of the issue on appeal. See *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Even considering the cursory argument, however, it appears that plaintiff is referring to its response to the city defendants' motion for summary disposition because it is in that filing that plaintiff cites and provides the deposition of Pesta. But plaintiff's allegations are limited to Pesta failing to advise plaintiff of the results of the preliminary review, which plaintiff asserts was required under the city's Resolution 2018-10. Pesta testified that she thought the resolution only required her to notify applicants if the preliminary review revealed that their application was somehow incomplete.[5] Assuming Pesta had an obligation under the resolution to conduct a preliminary review and to communicate the results to plaintiff, yet failed to do so because she was mistaken, such conduct is not "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). At best, such conduct amounts to ordinary negligence. Therefore, the trial court properly granted summary disposition in favor of Pesta and Stuart on all of plaintiff's negligence claims.

While MCL 691.1407(2) governs negligence claims, intentional-tort claims are governed by MCL 691.1407(3), which simply provides that the law regarding intentional torts is as it existed

[5] The pertinent section of Resolution 2018-10 states:

> Upon receipt of an Application for site plan and/or operational approval of a Marijuana Facility and payment of all required fees, the City Clerk shall conduct a preliminary review of the Application for purposes of determining completeness and preliminary eligibility of the proposed or existing facility at the proposed or existing location. The City Clerk shall notify the applicant of the results of the preliminary review, including deficiencies rendering the application incomplete, and afford the applicant an opportunity to withdraw the application and receive a refund of the application fee and consultant review fee if the preliminary review reveals the proposed facility is not eligible for further review. If an application is incomplete, the applicant may withdraw the application and receive a refund of refundable fees, or cure any deficiencies rendering the application incomplete. Preliminary administrative review fees are non-refundable. Unless the Applicant withdraws the application, the Clerk shall forward a complete application for an eligible facility and all supporting materials for final review, recommendation and/or action by City staff, administration and/or consultants as may be required by applicable City Code or ordinance. Unless otherwise provided by these rules or applicable code or ordinances, complete applications for an eligible facility will be processed in the order received as determined by the date the application is completed. [Walled Lake Resolution 2018-10, § 4.]

before July 7, 1986. *Odom*, 482 Mich at 470-471. Thus, with respect to intentional torts, a governmental employee is immune from liability if (1) she was acting within the course of her employment and was acting, or reasonably believed that she was acting, within the scope of her authority; (2) the acts were not undertaken with malice; and (3) the acts were discretionary, as opposed to being ministerial. *Id*. at 480.

It is important to recognize which intentional torts are at issue here. The only intentional torts alleged against the city defendants (and, hence, Pesta and Stuart) are plaintiff's claims of fraudulent representation and silent fraud. We agree with the trial court that plaintiff did not allege in its second amended complaint any facts that would lead to the conclusion that either Pesta or Stuart had acted outside the scope of their authority. Indeed, processing permit applications and communicating with the applicants is within both of their job responsibilities, and given the need to review applications for completeness and sufficiency, the trial court was correct in concluding the process was not ministerial in nature.

That leaves open the question whether the trial court erred when it stated that plaintiff did not plead any facts supporting the conclusion that either Pesta or Stuart acted with malice. A lack of good faith has been described as "malicious intent, capricious action or corrupt conduct" or "willful and corrupt misconduct." *Id*. at 474 (quotation marks and citations omitted). For the reasons articulated in section I.B of this opinion, we again conclude that plaintiff has not adequately presented the argument as to what allegations exist as to Pesta and Stuart on the existence of malice. We have canvassed both plaintiff's principal and reply briefs, and have found no specific citation to the record—or citation to any specific factual allegations—that are meant to show that either defendant acted with malice. Both briefs do contain assertions that these defendants "acted fraudulently and corruptly," and that they (and others) engaged "in corrupt and illegal practices," but those were in reference to the argument that they (and the city) were not engaged in a governmental function, because they were acting ultra vires. But even if those allegations were directed toward whether there was malice as to these two defendants under *Odom*, these allegations are conclusory and come nowhere close to what is required for a properly developed argument. Hence, we conclude that plaintiff has effectively abandoned the argument that there are sufficient factual allegations of malice against defendants Pesta and Stuart to withstand summary disposition. *Peterson Novelties, Inc*, 259 Mich App at 14.[6]

C. CITY MANAGER WHITT

[6] In fact, there is not a single citation to any paragraphs from the second amended complaint (nor the original or first amended complaints) in either brief, and the exhibits cited in the briefs that are written by defendants Petra or Stuart are letters responding on behalf of the city to freedom of information act requests submitted by plaintiff's counsel (by defendant Petra) and a letter to the state licensing agency regarding the status of a certificate of occupancy and pre-approval of a license for Custom Built Properties (by defendant Stuart). Even if the Petra letters reflect a denial of information that existed, without more expansive argument, it is difficult to discern how this reflects malice on the part of Petra. And, confirmation of certain facts to an agency by Stuart could go towards allegations against the city or other decision-maker, but says nothing about decisions made by Stuart.

Plaintiff also argues that the trial court erred by ruling that City Manager Whitt was absolutely immune from liability. We note that a panel of this Court recently rejected this same argument as to Whitt in a case involving these same parties. See *Jones v Walled Lake*, unpublished opinion per curiam of the Court of Appeals, dated June 17, 2021 (Dkt No. 350997). We agree with the rationale and conclusions reached in that opinion, but set forth our reasoning for the sake of completeness and further appellate review.

The GTLA provides certain high-ranking governmental officials with absolute immunity from tort liability. MCL 691.1407(5) states:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

Thus, "[t]o qualify for absolute immunity from tort liability[,] an individual governmental employee must prove his or her entitlement to immunity by establishing, consistently with the statute's plain language, (1) that he or she is a judge, legislator, or the elective or highest appointive executive official of a level of government and (2) that he or she acted within the scope of his or her judicial, legislative, or executive authority." *Petipren v Jaskowski*, 494 Mich 190, 204; 833 NW2d 247 (2013). Because there is no dispute that Whitt was not a judge or legislator, the first question that must be answered is whether he was "the elective or highest appointive executive official" for the city of Walled Lake.

Plaintiff asserts that Whitt is an administrator who lacks any executive function and has no legal role.[7] The duties of the city manager are described by ordinance as follows:

> (1) Be responsible to the council for the efficient administration of all administrative departments of the city government.
>
> (2) *See that all laws and ordinances are enforced*.
>
> (3) Appoint, with the consent of the council, the heads of the several city departments whose appointments are not otherwise specified in the city Charter or ordinance, and to discharge the department heads without the consent of the council, and to direct and supervise the department heads.

[7] Plaintiff raises this argument for the first time on appeal. Plaintiff takes exception to the trial court noting that plaintiff had not "dispute[d]" that Whitt was the highest appointive executive official in the city, but this characterization is accurate because plaintiff never provided any contrary argument in its response to the city defendants' motion for summary disposition. Plaintiff mischaracterizes the trial court's opinion as saying that plaintiff had *conceded* this point, when the court merely said that plaintiff did not *dispute* it.

(4) Give to the proper department or officials ample notice of the expiration or termination of any franchises, contracts or agreements.

(5) See that all terms and conditions imposed in favor of the city or its inhabitants in any public utility franchise, or in any contract, are faithfully kept and performed.

(6) Recommend an annual budget to the council and to administer the budget as finally adopted under policies formulated by the council, and to keep the council fully advised at all times as to the financial condition and needs of the city.

(7) Recommend to the council for adoption such measures as may be deemed necessary or expedient, and to attend council meetings with the right to take part in discussions but not to vote.

(8) Exercise and perform all administrative functions of the city that are not imposed by the city Charter or ordinance upon some other official.

(9) Perform such other duties as may be prescribed by the city Charter or as may be required by ordinance or by direction of the council. [Walled Lake Ordinances, § 2-43 (emphasis added).]

The fact that this ordinance omits the use of the term "executive" and uses the term "administrative" is not dispositive. Indeed, the type of administration Whitt performs clearly is "executive administration." See *Black's Law Dictionary* (11th ed) (defining "executive administration" as "[c]ollectively, high public officials who administer chief departments of the government"). Further, "executive branch" is defined as "[t]he division of government charged with *administering* and *carrying out the law*." *Id*. (emphasis added). While Whitt is the chief administrative officer of the city, his duties also include "[s]ee[ing] that all laws and ordinances are enforced." Walled Lake Ordinances, § 2-43(2). Also, "[a]n executive should have broad-based jurisdiction or extensive authority similar to that of a judge or a legislator." *Chivas v Koehler*, 182 Mich App 467, 471; 453 NW2d 264 (1990). Whitt's authority as city manager is very extensive, as evidenced by the lengthy duties delineated in the ordinance. See Walled Lake Ordinances, § 2-43. Thus, it is evident that Whitt possesses executive authority, as that term is commonly understood.[8] See also *Rental Prop Owners Ass'n of Kent Co v City of Grand Rapids*, 455 Mich 246, 267; 566 NW2d 514 (1997) (recognizing a city manager as an "executive").

Plaintiff's argument that the Mayor Pro-Tem is the highest appointive person in the city government is not supported by the plain reading of the relevant portions of the city charter, which provide:

[8] The Michigan Supreme Court also has recognized that a city manager is an "executive," stating, "Under the city manager form of government, popular among smaller cities, the executive, the city manager, serves at the will of the legislature, the city commission." *Rental Prop Owners Ass'n of Kent Co v City of Grand Rapids*, 455 Mich 246, 267; 566 NW2d 514 (1997).

> At each municipal election, the new Councilman from among those incumbents who ran for re-election at the most recent election, *who has received the highest number of votes* in that election, and who shall have served a tenure of two (2) years shall be Mayor Pro-tem, unless such Councilman shall in writing notify the clerk of their declination to so serve before such *appointment* becomes effective, in which event, the Councilman who has received the second highest number of votes in that election shall become Mayor Pro-tem, provided that person has served as a Councilman for at least two (2) years. [Walled Lake Charter, § 4.4.]

Although the charter uses the word "appointment" once in describing the position, there is nothing about the position that is appointive. Who becomes mayor pro-tem is not decided by any governmental official or body. Instead, the mayor pro-tem is determined by which incumbent council member received the *highest number of votes from the general election*. There is nothing appointive about such a scheme. As such, regardless of how the charter may view this as an "appointive" position, it is not one as contemplated by the GTLA.

Therefore, as the highest appointive executive official in the city, Whitt is absolutely immune from tort liability under the GTLA with respect to actions performed "within the scope of his . . . executive authority," MCL 691.1407(5), and the trial court did not err by coming to the same conclusion.

II. FAILURE TO STATE A CAUSE OF ACTION

Plaintiff also argues that the trial court erred by granting summary disposition in favor of the city defendants on plaintiff's claims of violation of the constitutional right to due process of law and on its tort claim of promissory estoppel.

"A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

A. DUE-PROCESS CLAIM

"The United States and Michigan constitutions preclude the government from depriving a person of life, liberty, or property without due process of law." *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004), citing US Const, Am XIV; Const 1963, art 1, § 17. " 'A procedural[9] due process analysis requires a dual inquiry:

[9] In its second amended complaint, plaintiff labeled its due-process claim a "substantive" due-process claim. However, courts are not bound by the labels parties use in their pleadings, *Buhalis v Trinity Continuing Care Servs*, 292 Mich App 685, 691-692; 822 NW2d 254 (2012), and the substance of plaintiff's count demonstrates that it was making a procedural due-process claim. Moreover, plaintiff never disputed that it needed to have a property interest for its due-process claim to be viable.

(1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.' " *Hinky Dinky*, 261 Mich App at 606 (citation omitted). Due process is only implicated "if there is a liberty or property interest at stake." *Galien Twp Sch Dist v Dep't of Ed* (*On Remand*), 310 Mich App 238, 241; 871 NW2d 382 (2015).

The city defendants argued, and the trial court agreed, that plaintiff's claim failed for the simple reason that plaintiff had no viable property interest. On appeal, plaintiff argues that a license under the MMFLA confers on the recipient a property right. While this principle likely is applicable to MMFLA licenses, see *Bundo v City of Walled Lake*, 395 Mich 679, 695; 238 NW2d 154 (1976) (stating that a liquor license holder has a property interest in the license), it is not dispositive because plaintiff ignores the fact that *it never possessed a license*. It is well established that the law treats those who possess a license and are attempting to renew it differently from those who do not possess a license and are first-time applicants. See *Wong v City of Riverview*, 126 Mich App 589, 593; 337 NW2d 589 (1983) ("In fact, a first-time applicant is not even entitled to minimal due process."); *Shamie v City of Pontiac*, 620 F2d 118, 120 (CA 6, 1980) (stating that first-time license applicants do not enjoy procedural due-process rights under Michigan law), citing *Morse v Liquor Control Comm*, 319 Mich 52, 66; 29 NW2d 316 (1967), and *Bisco's, Inc v Liquor Control Comm*, 395 Mich 706, 716; 238 NW2d 166 (1976). Therefore, it is clear that plaintiff did not have a recognized property interest because it never had a license to begin with. Furthermore, because it was undisputed that the city had more applicants than licenses available, there necessarily was discretion involved in selecting who would receive the licenses. "A party cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary." *RSWW, Inc v City of Keego Harbor*, 397 F3d 427, 435 (CA 6, 2005) (quotation marks, citation, and brackets omitted).

The trial court properly dismissed plaintiff's violation of due process of law claim.[10]

B. PROMISSORY-ESTOPPEL CLAIM

In *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999), this Court observed:

> The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on part of the promisee, and (3) that in fact produced reliance or

[10] Plaintiff also asserts that its due-process claim should have survived summary disposition because it was seeking injunctive relief. But plaintiff's Count VIII, alleging a violation of due process, contains no allegations or requests for injunctive relief. Moreover, even if plaintiff's request for injunctive relief survived the city defendants' motion for summary disposition, count X ultimately was dismissed via the stipulated order to dismiss. Because plaintiff agreed to dismiss the "claim" for injunctive relief, it cannot now assert on appeal that the dismissal was erroneous. See *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003); *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 455 n 1; 733 NW2d 766 (2006).

> forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided.

In its second amended complaint, plaintiff alleged that the "promise" that forms the basis for its claim of promissory estoppel is found in the city's ordinance and administrative rules, providing that the "orderly, efficient, fair and coordinated" processing of applications would occur. At the outset, it should be clear that the only city defendant that possibly could be subject to this claim would be the city of Walled Lake. The alleged promise is contained in enactments of the city; it is not alleged that any individual city defendant made these promises. Thus, we can affirm the dismissal of this claim against the other city defendants for this reason alone. See *Washburn v Michailoff*, 240 Mich App 669, 678 n 6; 613 NW2d 405 (2000) (stating that this Court can affirm a trial court's decision when it reaches the right result albeit for different reasons).

The city defendants argued in the trial court that the promissory-estoppel count should be dismissed because statutes and ordinances do not create contractual rights. While this is a recognized principle of law, see *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005), it is not necessarily controlling because promissory estoppel does not require contractual rights. Indeed, "promissory estoppel is an exception to general contract principles in that it permits enforcement of a promise that may have no consideration." *State Bank of Standish v Curry*, 442 Mich 76, 96; 500 NW2d 104 (1993) (RILEY, J., dissenting). Because of this exception, the promise must be definite and clear. *Id*., citing *McMath v Ford Motor Co*, 77 Mich App 721, 726; 259 NW2d 140 (1977); see also *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993) ("The sine qua non of promissory estoppel is a promise that is definite and clear.").

The specific "promise" plaintiff has identified is located in the preamble section of the city's Resolution 2018-10, which provides:

> WHEREAS, in order to facilitate orderly, efficient, fair and coordinated processing of the various state and local applications and approvals in a manner consistent with the requirements of the Act, the Rules and the City's codes and ordinances, City Council has determined that it is necessary and expedient to adopt the following administrative rules concerning processing of City applications for local approval of Marijuana Facilities. [Walled Lake Resolution 2018-10, p 2.]

The identified "promise" above is not definite and clear. It promises nothing. Instead, this portion of the preamble merely states that its accompanying rules were enacted to facilitate the orderly, efficient, fair, and coordinated processing of applications. That is not the same as a definite and clear promise to actually have orderly, efficient, and fair processes. While those concepts are part of the aspirational goals of the resolution, it is not a promise. Indeed, the passage simply refers the reader to the remainder of the resolution to determine what the specific administrative rules are "concerning [the] processing of City applications for local approval of Marijuana Facilities." Moreover, preambles are not authoritative. *King v Ford Motor Co*, 257 Mich App 303, 311-312; 668 NW2d 357 (2003); see also *Yazoo & MVR Co v Thomas*, 132 US 174, 188; 10 S Ct 68; 33 L Ed 302 (1889) (stating that a "preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous"); *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 79 n 20; 748 NW2d 524 (2008).

Consequently, because the promise on which plaintiff relies for its claim of promissory estoppel is not clear and definite, the claim fails as a matter of law. We affirm the trial court's grant of summary disposition in favor of the city defendants because the trial court reached the correct result, albeit for different reasons. See *Washburn*, 240 Mich App at 678 n 6.

Affirmed.

/s/ Michael F. Gadola
/s/ Jane E. Markey
/s/ Christopher M. Murray

STATE OF MICHIGAN

COURT OF CLAIMS

VIRIDIS LABORATORIES, L.L.C., and VIRIDIS NORTH, L.L.C.,

Plaintiffs,

v

MICHIGAN MARIJUANA REGULATORY AGENCY, ANDREW BRISBO, Individually, JULIE KLUYTMAN, Individually, DESMOND MITCHELL, Individually, and CLAIRE PATTERSON, Individually,

Defendants.
_____/

OPINION AND ORDER

Case No. 21-000219-MB

Hon. Thomas C. Cameron

Pending before the Court is defendants' December 15, 2021 motion for summary disposition filed under MCR 2.116(C)(4), (C)(7), and (C)(8). Also pending before the Court is plaintiffs' January 12, 2022 motion to exceed page limits. The motion to exceed page limits is GRANTED and plaintiffs' response brief is accepted for filing. In addition, and for the reasons stated below, defendants' motion for summary disposition is GRANTED in part as to all claims except for plaintiff Viridis North, LLC's substantive due process claim, and DENIED in part as to that substantive due process claim. Furthermore, summary disposition is GRANTED in part to plaintiff Viridis North, LLC as the non-moving party under MCR 2.116(I)(2), and defendant Michigan Marijuana Regulatory Agency is prohibited from enforcing the November 17, 2021 recall against Viridis North. This matter is being decided without oral argument as allowed by Local Rule 2.119(A)(6).

I. BACKGROUND

A. THE RECALL OF PLAINTIFFS' PRODUCTS

The pertinent background information is largely set forth in the December 3, 2021 opinion and order issued by predecessor Judge Christopher M. Murray and need not be restated at length herein. In short, plaintiffs are limited liability companies that operate laboratories in Lansing (Viridis Laboratories, LLC) and Bay City (Viridis North, LLC). The entities share a name, but they are otherwise separate entities with separate ownership structures. According to the allegations in the complaint, plaintiffs are "safety compliance facilities" that are licensed under the Medical Marihuana[1] Facilities Licensing Act, MCL 333.27101 *et seq*., and the Michigan Regulatory and Taxation of Marihuana Act (MRTMA), MCL 333.27951 *et seq*. Defendant Michigan Marijuana Regulatory Agency (MRA) regulates and licenses facilities such as plaintiffs.

This case involves plaintiffs' testing of marijuana products for the presence of bacteria, fungi—such as Aspergillus—and mold. After receiving complaints about the method plaintiffs used to test marijuana products, defendant MRA issued a recall bulletin on or about November 17, 2021. The bulletin recalled all products tested by plaintiffs between August 10, 2021, and November 16, 2021, with limited exceptions not pertinent to this case. The bulletin stated that the recall was issued due to inaccurate or unreliable results in product testing. Plaintiffs allege that the stated reason was a subterfuge and that defendants really intended to dilute plaintiffs' market share and to retaliate against plaintiffs for pursuing a separate administrative complaint against the MRA.

[1] While the Legislature uses the "marihuana" spelling, this Court uses the more common "marijuana" spelling, unless quoting from statute or referring to the title of pertinent acts.

B. PLAINTIFFS' COMPLAINT

Plaintiffs filed a ten-count complaint on November 22, 2021, that names as defendants the MRA and various MRA officials, but in their individual, rather than official, capacities.[2] The complaint takes aim at the recall as well as what plaintiffs have described as "de facto" rules—the "microbial rule" and the "log rule" that it claims are invalid. The complaint alleges that defendants prevented plaintiffs from performing microbial analysis on cannabis products and effectively suspended plaintiffs' licenses. Count I asks for injunctive relief to prevent defendants from enforcing the recall. Count II seeks a writ of mandamus directing the MRA to immediately commence administrative proceedings related to what the complaint describes as the propriety of the MRA's partial suspension of plaintiffs' licenses.

Counts III and IV seek declaratory relief. With respect to Count III, plaintiffs allege that the MRA improperly and arbitrarily created new rules—the "microbial rule" and the "log rule"—that are substantively and procedurally invalid. According to plaintiffs, the only relevant rule that has been promulgated in accordance with the appropriate standards is Mich Admin Code, R 420.502(2), but that rule does not provide standards that would allow the MRA to issue a recall notice. Plaintiffs ask the Court to declare that the microbial rule and log rule were created without resort to the notice-and-comment requirements contained within the Administrative Procedures Act (APA), MCL 24.201 *et seq*. They also ask the Court to declare that the purported rules are invalid in their substance because they are arbitrary and capricious.

[2] As will be discussed, plaintiffs have since conceded that the claims against the individual defendants should be dismissed.

The request for declaratory relief in Count IV asks the Court to declare that the MRA lacks authority to summarily restrict a marijuana business license. The complaint alleges that even if the MRA did not "suspend" plaintiffs' licenses, the Court should declare that the MRA does not have the ability to summarily "restrict" a license without following proper procedures. The actions taken by defendant in this case, allege plaintiffs, circumvented the normal procedural safeguards that would accompany a summary suspension and amount to a "contrived mechanism" employed by the MRA to impose restrictions without any procedural safeguards.

Counts V and VI allege procedural and substantive due process violations, respectively. According to the complaint, plaintiffs claim a vested property interest in their licenses issued under the MRA. Defendants denied plaintiffs the procedural protections afforded under the United States and Michigan Constitutions when they restricted or effectively suspended plaintiffs' licenses, according to plaintiffs. This includes, according to ¶¶ 233-234 of the complaint, but is not limited to, the lack of ability to challenge the microbial rule or the log rule. Count VI alleges a substantive due process violation stemming from what plaintiffs allege was wrongful and arbitrary conduct. Paragraph 259 of the complaint alleges that plaintiffs were deprived of their property and liberty interests and that such deprivation will continue if defendants are not prevented from enforcing the microbial rule or log rule.

Count VII of the complaint alleges a violation of plaintiffs' right to equal protection under the United States and Michigan constitutions. This count alleges that plaintiffs were treated differently from other similarly situated safety compliance facilities. The complaint cites an alleged incident where another laboratory purportedly admitted to falsifying records; however, that laboratory did not face a recall like the one issued against plaintiffs.

The remaining counts are asserted against defendants Julie Kluytman, Desmond Mitchell, and Claire Patterson. Count VIII seeks monetary damages against these individual defendants for alleged tortious interference with plaintiffs' business relationships and contracts. Count "X"[3] is asserted against the same individuals and it alleges abuse of process. Finally, Count "XI" alleges civil conspiracy against the individual defendants noted above.

C. PRELIMINARY INJUNCTION DECISION

Plaintiffs moved for a preliminary injunction and, in a December 3, 2021 opinion and order, Judge Murray granted the injunction in part and denied it in part. *Viridis Laboratories, LLC v Michigan Marijuana Regulatory Agency*, opinion and order of the Court of Claims, issued December 3, 2021 (Docket No. 21-000219-MB). At a hearing on the motion for preliminary injunction, defendant Claire Patterson testified that the MRA issued the recall for two reasons: (1) certain re-tested samples of products originally tested by the Lansing facility yielded unacceptable results; and (2) plaintiffs' facilities did not keep a temperature "incubation log." *Id*. at 3. Plaintiffs raised issues under the APA as well as substantive and procedural due process challenges under the United States and Michigan constitutions. *Id*. at 4. At that time, there was no dispute that plaintiffs were allowed to engage in all of their business operations because, one week after the issuance of the recall, the MRA informed plaintiffs that they could continue all testing operations. *Id*. at 5.

Turning first to plaintiffs' assertion that a "summary suspension" of their licenses occurred, Judge Murray rejected the assertion based on the record produced at the hearing on the motion for

[3] The number of claims in the complaint skips "Count IX." This opinion will use the numbers assigned to the counts in the complaint.

preliminary injunction. *Id.* at 7. Judge Murray also noted that injunctive relief would not be appropriate for the purported "restriction" of plaintiffs' licenses, as there was no dispute that plaintiffs resumed their full testing operations approximately one week after the recall issued. *Id*.

Next, Judge Murray addressed plaintiffs' contentions that the MRA, arbitrarily and without adherence to the APA, created "new rules" for marijuana-product recalls. *Id*. at 7-8. Judge Murray rejected the notion that the MRA created new rules; instead, the recall "was merely a decision to issue a recall based upon [the MRA's] power to do so and the existing circumstances." *Id*. at 8. While noting that the MRA's decision may have been arbitrary in part, Judge Murray concluded that the recall decision "itself was not, in essence, the adoption of a rule and plaintiffs have provided no authority providing that such a decision can be considered so." *Id*. Accordingly, "much of plaintiffs' arguments about the failure to comply with the APA are not on point." *Id*.

Finally, while the prior opinion rejected many of plaintiffs' arguments, Judge Murray nevertheless granted a preliminary injunction in a limited scope as it concerned the Bay City facility. To that end, there was no dispute that the only re-testing done by the MRA concerned the Viridis facility in Lansing, and not the facility in Bay City. *Id*. In addition, there was no dispute that the purportedly missing "incubation log" was not required by statute or rule. *Id*. at 8-9. As a result, and while recognizing the extraordinary nature of a preliminary injunction, Judge Murray enjoined the recall as it pertained to the Bay City facility. *Id*. at 9-13.

D. SUMMARY DISPOSITION ARGUMENTS

On or about December 15, 2021, defendants moved for summary disposition under MCR 2.116(C)(4), (C)(7), and (C)(8). With respect to that portion of its motion under subrule (C)(4), defendants argue that this Court lacks jurisdiction over the individual defendants in their individual

capacities. In response, plaintiffs have subsequently conceded the same. In light of plaintiffs' concession, the Court will grant that portion of the motion as it concerns the individual defendants and they will be dismissed from this matter without prejudice to plaintiffs refiling in the appropriate court.

As it concerns that portion of the motion for summary disposition made under subrule (C)(7), the MRA argues that it is immune from plaintiffs' claims for money damages. Plaintiffs have conceded this matter as well and have withdrawn their claims to the extent they seek monetary damages against the MRA.

Finally, plaintiffs have conceded that Counts I and II should be dismissed as well. As it concerns Count I, the MRA argues, and plaintiffs concede, that a request for injunctive relief is not a standalone cause of action. See *Redmond v Heller*, 332 Mich App 415, 432; 957 NW2d 357 (2020). Plaintiffs agree to the dismissal of Count I, but they continue to asset they are entitled to injunctive relief on one or all of their remaining claims, which they assert are meritorious. With respect to the request for writ of mandamus pleaded in Count II, plaintiffs agree that the claim is moot and they agree that it should be dismissed, given that the MRA has ceased any activities that affected plaintiffs' licenses.

With those concessions by plaintiffs, all that remains are: (1) the due process and equal-protection claims pleaded in Counts V-VII; and (2) plaintiffs' claims for declaratory relief in Counts III-IV of the complaint.

II. ANALYSIS

At the outset, the Court will set forth the appropriate standard of review for the pending motion. While the MRA primarily cites MCR 2.116(C)(8) with respect to the only claims that

remain after plaintiffs' concessions, the Court agrees with plaintiffs that MCR 2.116(C)(10) is the more appropriate subrule in light of the manner in which the issues have been briefed. See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Indeed, both parties cite and rely on materials[4] that are not part of the pleadings, such as the evidence offered at the hearing on the motion for preliminary injunction. Under subrule (C)(10), the Court reviews "the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact." *Id*.

The Court next turns its attention, briefly, to the statutory authority of the MRA. The MRA is charged with administering and enforcing the state's marijuana laws—the Medical Marihuana Facilities Licensing Act and the Michigan Regulation and Taxation of Marihuana Act. MCL 333.27001(1). This includes promulgating and enforcing rules and enacting licensing procedures. MCL 333.27958(1)(a)-(b). Under Mich Admin Code, R 420.502(2), the MRA may, in order to "ensure access to safe sources of marihuana products," "recall marihuana products, issue safety warnings, and require a marihuana business to provide information material or notifications to a marihuana customer at the point of sale."

A. COUNT III, IMPROPER RULEMAKING

The allegations contained in Count III contend that the MRA has adopted two rules, the "microbial rule" and the "log rule," and that the rules are invalid. Plaintiffs ask the Court to declare that these purported rules are invalid because their promulgation failed to comply with the APA

[4] Defendants did not attach any documents to their briefing, but their brief contains numerous citations to the hearing on the motion for preliminary injunction and to testimony offered at that hearing.

and because they are arbitrary and capricious. "Under MCR 2.605(A)(1), a court 'may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.' " *Federal Home Loan Mtg Corp v Werme*, 335 Mich App 461, 469; 966 NW2d 729 (2021), quoting MCR 2.605(A)(1). An "actual controversy" must exist in order for the court to issue declaratory relief. MCR 2.605(A)(1). For purposes of the rule, an "actual controversy" exists "when a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve legal rights." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *Id*. (citation and some quotation marks omitted).

Count III of the complaint asks the Court to declare that the alleged microbial rule and log rule are invalid. However, the Court agrees with Judge Murray's analysis on a similar claim in the opinion and order denying injunctive relief. That is, it is apparent that the MRA did not, in fact, promulgate the alleged rules that lie at the heart of Count III. Instead, it merely enforced and applied an existing rule, R 420.502(2), that allowed it to issue a recall. A declaration is not needed to guide plaintiffs' conduct as it concerns rules that do not exist. See *UAW*, 295 Mich App at 495 (explaining that the "actual controversy" requirement "prevents a court from deciding hypothetical issues."). As a result, summary disposition is appropriate with respect to Count III.

B. COUNT IV, LICENSE "RESTRICTIONS"

Count IV asks the Court to declare that the MRA lacks authority to summarily "restrict" a license. By all accounts, plaintiffs' licenses were never suspended by the MRA. At most, the record contains some dispute as to whether plaintiffs were restricted or believed they were

restricted from performing certain testing activities. There is no dispute at this time, however, that any such restriction or perceived restriction ended approximately two months ago. The Court agrees with the MRA that any controversy related to the restriction or perceived restriction is moot at this time and that no live controversy exists. See *UAW*, 295 Mich App at 495 (explaining that MCR 2.605 "incorporates the doctrines of standing, ripeness, and mootness."). To that end, the only alleged injury occurred in the past and has been rectified. And while plaintiffs have raised concerns about the potential for future restrictions on their licenses, the Court will not issue declaratory relief based on hypothetical or anticipated events. *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020).

C. COUNTS V AND VI, DUE PROCESS

The due-process guarantees afforded under US Const, Amend XIV, § 1, and Const 1963, art 1, § 17 are procedural and substantive in nature. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008). "Procedural due process requires notice and a meaningful opportunity to be heard before an impartial decision-maker." *In re TK*, 306 Mich App 698, 706; 859 NW2d 208 (2014). Due process protections also incorporate a substantive component that "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v Burch*, 494 US 113, 125; 110 S Ct 975; 108 L Ed 2d 100 (1990) (citation and quotation marks omitted). "[T]he essence of a substantive due process claim is the arbitrary deprivation of liberty or property interest." *Mettler Walloon*, 281 Mich App at 201 (emphasis omitted). A litigant making a due-process claim under either component must establish a liberty or property interest. *Bonner v City of Brighton*, 495 Mich 209, 225-226; 848 NW2d 380 (2014).

Plaintiffs' procedural due process claim in Count V of the complaint alleges in ¶¶ 233-234 that plaintiffs were denied due process because they were not afforded an opportunity to participate in the MRA's promulgation of the purported "microbial rule" or "log rule," nor were they given an opportunity to challenge those rules. However, there can be no claim based on these allegations given that the evidence produced at the motion for preliminary injunction hearing showed, as noted above, that no such "rules" were ever promulgated.

Plaintiffs' allegations in Count V also contend that the MRA improperly suspended or restricted plaintiffs' license without affording them the process that they were due. The holder of a license possesses a property interest in the license that can give rise to due process protections. *Bundo v Walled Lake*, 395 Mich 679, 695; 238 NW2d 154 (1976). Here, however, there was no suspension of plaintiffs' licenses to conduct testing. Thus, plaintiffs' procedural due process claim must fail. In short, the procedures of which plaintiffs were allegedly deprived did not apply because they claim an interference with a property right—the suspension of their licenses—that did not occur.

While plaintiffs' procedural due process claim fails, though, the Court nevertheless agrees with Judge Murray's conclusion that the issuance of the recall as it concerned the Bay City facility was an arbitrary action that can give rise to a substantive due process violation. The due process clause protects against arbitrary government action, see *Bonner*, 495 Mich at 224; *Mettler Walloon*, 281 Mich App at 201, and the issuance of the recall against the Bay City facility was, on the Court's review of the record, arbitrary and without basis. Whether viewed as interference with a property right, or as interference with the facility's ability to engage in commerce in its chosen field, see *Wilkerson v Johnson*, 699 F2d 325, 328 (CA 6, 1983), the MRA's action with respect to the Bay City facility was arbitrary. Indeed, there was no re-testing that suggested a problem with

the facility's products and the facility was a separate legal entity from the Lansing facility. The record revealed no viable reason for extending the recall to the Bay City Facility. And as recognized by Judge Murray:

> Injunction is the appropriate remedy to determine whether rights have been affected by the arbitrary or unreasonable action of an administrative agency. If the discretionary power of an administrative agency is abused or its judgment improperly exercised, the judiciary has the right to restrain the same. [*Reed v Civil Serv Comm*, 301 Mich 137, 152; 3 NW2d 41 (1942).]

Furthermore, the threat of irreparable harm to the reputation of the Bay City facility arising out of the recall remains and has largely been left unrebutted. Such harm weighs in favor of issuing a permanent injunction to prohibit the MRA from enforcing the November recall against the Bay City facility. See *Slis v State*, 332 Mich App 312, 362-363; 956 NW2d 569 (2020); *Wiggins v City of Burton*, 291 Mich App 532, 558-559; 805 NW2d 517 (2011) (discussing injunctive relief). Likewise, the inadequacy of other available remedies and a weighing of the interests involved weigh in favor of granting permanent injunctive relief to the Bay City facility with respect to the MRA's arbitrary recall decision as to that facility. See *Kernen v Homestead Devel Co*, 232 Mich 503, 514; 591 NW2d 369 (1998).

The same arbitrary action was not, however, present with respect to the recall issued against the Lansing facility. The contains some evidence of defendants' assertions that there were accuracy and reliability issues with the product tested by the Lansing facility. While plaintiffs disagreed with the results as well as the decision to issue the recall—and the scope of the products recalled from the Lansing facility—an agency's decision is not arbitrary merely because plaintiffs disagree with the decision. See *Mich Farm Bureau v Dep't of Environmental Quality*, 292 /Mich App 106, 145; 807 NW2d 866 (2011). The administrative code gave the MRA authority to issue a recall to ensure safe access to marijuana products, and the Court declines, on the record before

it, to conclude that the safety recall with respect to the Lansing facility was arbitrary. See Mich Admin Code, R 420.502(2); *Henderson v Civil Serv Comm*, 321 Mich App 25, 44; 913 NW2d 665 (2017).

D. COUNT VII, EQUAL PROTECTION

The equal-protection clauses of the United States and Michigan constitutions both provide that "no person shall be denied the equal protection of the law." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010), citing US Const, Am XIV; Const 1963, art 1, § 2. The "threshold inquiry" for purposes of an equal-protection claim is "whether plaintiff has been treated differently from a similarly situated entity." *Id*. "To be considered similarly situated, the challenger and his comparators must be prima facie identical in all relevant respects or directly comparable . . . in all material respects." *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013) (citation and quotation marks omitted). In general, an equal-protection analysis also demands an examination of whether the government actor has treated the plaintiff differently based on a suspect or quasi-suspect classification. *Shepherd Montessori*, 486 Mich at 319. Here, plaintiffs have conceded that no such classification is at play, and that the least demanding level of review—rational-basis review—applies to their equal-protection claim. Under this deferential standard of review, the agency action is presumed to be valid, and plaintiffs bear the burden of proving otherwise. *Ass'n of Home Help Care Agencies v Dep't of Health & Human Servs*, 334 Mich App 674, 394; 965 NW2d 707 (2020). A classification challenged under the rational-basis test will be upheld if it "is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id*. (citation and quotation marks omitted).

While plaintiffs' complaint contains allegations regarding other, purported entities to which they are similarly situated, the Court concludes that plaintiffs fall short of pleading or showing that they are in fact similarly situated to the other entities that purportedly faced lesser punishments from the MRA. That is, although ¶ 277 of the complaint cites instances where other facilities did not face a product recall, it is not immediately apparent, and plaintiffs have not adequately explained how, the circumstances present with those other entities are similar to those present in the instant case. It is not apparent that the same or similar safety concerns cited in this case were involved in those other cases. Moreover, plaintiffs fail to show a lack of a rational basis in any event. Under Mich Amin Code, R 420.502(2), the MRA had authority to issue a recall to ensure access to safe sources of marijuana products. And here, the MRA identified testing discrepancies that implicated safety concerns. That the wisdom of such a recall is or could be debatable is not enough to survive rational-basis review or to establish an equal-protection claim. See *Ass'n of Home Help Care Agencies*, 334 Mich App at 694-695.

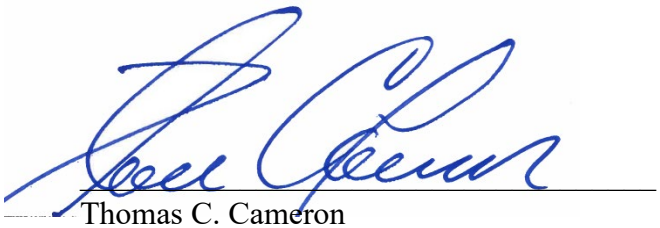
III. CONCLUSION

IT IS HEREBY ORDERED that defendants' motion for summary disposition is GRANTED in part and DENIED in part. In addition, the dismissal against the individual defendants for lack of jurisdiction is without prejudice to plaintiffs refiling in the proper court.

IT IS HEREBY FURTHER ORDERED that summary disposition is GRANTED in part to plaintiff Viridis North, LLC, as the non-moving party. See MCR 2.116(I)(2). To that end, defendant MRA is hereby permanently enjoined from enforcing the November 17, 2021 recall as it pertains to plaintiff Viridis North, LLC.

IT IS HEREBY FURTHER ORDERED that plaintiffs' motion to exceed page limits is GRANTED and that plaintiffs' responsive brief is accepted for filing.

This is a final order that resolves the last pending claim and closes the case.



February 3, 2022

Thomas C. Cameron
Judge, Court of Claims