STATE OF RHODE ISLAND
DEPARTMENT OF BUSINESS REGULATION
PASTORE COMPLEX
1511 PONTIAC AVENUE
CRANSTON, RHODE ISLAND

In the Matter of:	:	
THCBD, LLC,	:	**DBR No. 24OCR001**
Respondent.	:	

ORDER RE: APPEAL AND STAY REQUEST OF VIRTUAL QUARANTINE

I. Introduction

This matter arose from an Order to Show Cause Why Licenses Should not be Revoked or Otherwise Sanctioned, Appointment of Hearing Officer, and Notice of Prehearing Conference ("Order to Show Cause") issued by the Department of Business Regulation Office of Cannabis Regulation ("Department") on January 22, 2024 to THCBD, LLC ("Respondent"). Pursuant to R.I. Gen. Laws § 21-28.6-16, the Respondent holds a medical marijuana cultivator license. Pursuant to R.I. Gen. Laws § 21-28.11-7, the Respondent holds a hybrid cannabis cultivator license. On December 20, 2023, the Department issued a virtual quarantine ("Virtual Quarantine") to the Respondent regarding its marijuana licensed operations. The Respondent moved for interim relief requesting that the Virtual Quarantine be lifted to which the Department objected. For reasons set forth below, the Respondent's motion for interim relief is denied.

II. Travel of the Case

On December 18, 2023, the Department began an inspection of the Respondent's premises which was completed on December 21, 2023. On December 20, 2023, the Department issued the Virtual Quarantine to the Respondent which the Respondent appealed on December 29, 2023. On

January 2, 2024, the Department issued a notice of revocation to the Respondent. On January 4, 2024, the Respondent appealed the notice of revocation. When the notice of revocation was forwarded to the Respondent, the Respondent was notified that if it chose to appeal the revocation notice, the Department would issue an Order to Show Cause that would also incorporate the grounds for the Virtual Quarantine.

By email dated January 10, 2024 and sent in response to the Respondent's email of January 9, 2024 inquiring as to the basis of the Virtual Quarantine, the Department represented to the Respondent that the Order to Show Cause would cover the revocation and Virtual Quarantine actions. Exhibit D of the Department's Objection. The Department's January 10, 2024 email also cited to §1.11 and §1.13 of the 230-RICR-80-05-1 *Rules and Regulations Related to the Medical Marijuana Program Administered by the Office of Cannabis Regulation at the Department of Business Regulation* ("Regulation") for the Department's authority to impose the Virtual Quarantine in order "to effectuate a comprehensive investigation" of the deficiencies found during the December 20, 2023 inspection (presumably this was a typographical error as the inspection was also on December 21, 2023). These deficiencies were identified as including but not limited to the following: 1) Metrc trace and trace reporting and record keeping; 2) surveillance camera coverage; 3) security system; and 4) untested quality control packing sampling. The email then noted that these deficiencies had also been noted as the reasons for the notice of revocation.

The Order to Show Cause was forwarded to the Respondent on January 22, 2024. However, the Order to Show Cause just included the language about appealing the Virtual Quarantine and did not delineate that it covered the already filed appeal of the Virtual Quarantine.

By email dated March 19, 2024, the Respondent wrote requesting interim relief in regard to the Virtual Quarantine. By email dated March 21, 2024, the undersigned suggested that the

Department issue an amended Order to Show Cause including the Virtual Quarantine appeal. Meanwhile, the parties agreed the undersigned could separately entertain the motion on the Virtual Quarantine. The undersigned treated the Respondent's request for interim relief as a motion to lift the quarantine and set a schedule for the Department to file an objection to the request and the Respondent to file a response to the Department's objection. The Department objected to said motion on April 1, 2024 with the Respondent filing its reply by April 11, 2024.

At issue is the Department issuance of a Virtual Quarantine to the Respondent. The December 20, 2023 Virtual Quarantine provided in part as follows:

> The Office of Cannabis Regulation (OCR) is placing all inventory, plants, and products under a virtual quarantine via Metrc at your licensed facility. All physical plants and inventory on site must also be quarantined immediately.
>
> THCBD, LLC may continue to access the facility in order to tend to the quarantined plants. If plants are due to be harvested, THCBD, LLC must contact OCR Chief of Inspections, Pete Squatrito, no less than 72 hours prior to the anticipated harvest date so that an Inspector may be present. If any product or plant needs to be destroyed, THCBD, LLC must contact OCR Chief of Inspections, Pete Squatrito, no less than 72 hours prior to the anticipated destruction date so that an Inspector may be present. If THCBD, LLC has further questions pertaining to the product or plants currently quarantined, please reach out to OCR. (Department's Objection, Exhibit H).

The Metrc system is the seed-to-sale tracking system required by R.I. Gen. Laws § 21-28.6-16(d); (f); (g); and (j) and R.I. Gen. Laws § 21-28.11-7 and § 1.6 of Regulation.[1]

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[1] R.I. Gen. Laws § 21-28.6-16 provides in part as follows:

> Licensed medical marijuana cultivators.
> ***
> (d) The department of business regulation shall promulgate regulations that govern how many marijuana plants, mature and immature; how much wet marijuana; and how much usable marijuana a licensed medical marijuana cultivator may possess. Every marijuana plant possessed by a licensed medical marijuana cultivator must be accompanied by a valid medical marijuana tag issued by the department of business regulation pursuant to § 21-28.6-15 or catalogued in a seed-to-sale inventory tracking system in accordance with regulations promulgated by the department of business regulation.
> ***
> (f) Medical marijuana cultivators shall be subject to any regulations promulgated by the department of health or department of business regulation that specify how marijuana must be tested for items, including, but not limited to, potency, cannabinoid profile, and contaminants.
> (g) Medical marijuana cultivators shall be subject to any product labeling requirements promulgated by the department of business regulation and the department of health.

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(j) Inspection. Medical marijuana cultivators shall be subject to reasonable inspection by the department of business regulation or the department of health for the purposes of enforcing regulations promulgated pursuant to this chapter and all applicable Rhode Island general laws.

R.I. Gen. Laws § 21-28.11-7 provides in part as follows:

(h) Every individual cannabis plant possessed by a licensed cannabis cultivator shall be catalogued in a seed-to-sale inventory tracking system. The commission shall review the current seed-to-sale tracking system utilized pursuant to chapter 28.6 of this title and promulgate new or additional regulations, as it deems appropriate. As of December 1, 2022, any cannabis tags issued to provide seed-to-sale inventory and tracking shall be issued without charge to patient cardholders and/or primary caregivers authorized to grow medical cannabis.

Section 1.6.1 of the Regulation provides as follows:

Medical Marijuana Program Tracking System

A. Upon direction by the DBR and in accordance with R.I. Gen. Laws §§ 21-28.6-12(g)(3), and 21-28.6-16(d) each compassion center and licensed cultivator shall be required to utilize the state approved Medical Marijuana Program Tracking System to document and monitor compliance with the Act and all regulations promulgated thereunder. Applicable licensees may be required to pay costs associated with use of the Medical Marijuana Program Tracking System which may be assessed on an annual, monthly, per use, or per volume basis and payable to the state or to its approved vendor.

B. All information related to the acquisition, propagation, cultivation, transfer, manufacturing, processing, testing, storage, destruction, wholesale and/or retail sale of all marijuana and medical marijuana products possessed by licensees and/or distributed to registered cardholders in accordance with the Act must be kept completely up-to-date in the Medical Marijuana Program Tracking System, including but not limited to:

1. Planting and propagation of plants;
2. Transition of immature to mature plants;
3. Harvest dates with yield documentation;
4. Destructions of immature plants, mature plants and medical marijuana products;
5. Transportation of immature plants, mature plants, and medical marijuana products;
6. Theft of immature plants, mature plants, and medical marijuana products;
7. Adjustment of product quantities and/or weights;
8. Conversion of product types including waste documentation;
9. Required test results as reported by a cannabis testing laboratory;
10. Retail and wholesale transaction data;
11. Product compliance data;
12. A complete inventory including, but not limited to:
    a. Batches or lots of useable marijuana;
    b. Batches or lots of concentrates;
    c. Batches or lots of extracts;
    d. Batches or lots of marijuana infused products;
    e. Immature plants,
    f. Mature plants;
    g. Marijuana waste; and
13. Any other information or technical functions DBR deems appropriate.

See also §1.6.2(B) (Tagging of Plants and Medical Marijuana Products); §1.6.4(C) (requirement to use tracking system); §1.6.16(E) (must maintain accurate and comprehensive records regarding waste material and waste activity through the tracking system); §1.7(G) (designation as medical marijuana may be denied if product fails to satisfy any provision of statute or Regulation); and §1.11(A) (testing requirements) of the Regulation.

III. Legislative Intent

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.,* 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. DEM,* 553 A.2d 541 (R.I. 1989) (citation omitted). In cases where a statute may contain ambiguous language, the Rhode Island Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998).

IV. Arguments

The Department argued the Respondent's motion is akin to a stay request, and it fails under the stay requirements set forth in *Narragansett Elec. Co. v. Harsch*, 367 A.2d 195 (R.I. 1976). It argued the Virtual Quarantine does not prevent the Respondent from participating in regulated and compliant transfers, but the Respondent continues to be noncompliant. It argued that just allowing the Respondent to use the Metrc system does not ensure compliance as the Respondent had been entering incomplete and inaccurate information which undermines the regulated market because it then cannot be ensured that noncompliant products are not being sold. Finally, the Department relied on a recent Superior Court case that found the Department has authority to issue a Virtual Quarantine.

The Respondent argued the Virtual Quarantine violated its due process rights as it failed to notify the Respondent as to the facts, allegations, statutes involved, and legal basis for the Virtual Quarantine. It argued the Department failed to afford it a hearing after its appeal of the Virtual

Quarantine and failed to comply with the notice provision in the Administrative Procedures Act, R.I. Gen. Laws § 42-35-9, in its notice issuing the Virtual Quarantine. It argued the facts do not support the Virtual Quarantine in terms of the Department's allegations regarding the Metrc entries and security cameras. It argued the *Harsch* factors for a stay cannot be met by the Department, and contrary to the Department's assertion, the recent Superior Court case is not controlling.

V. Authority to Issue Virtual Quarantine

The Respondent argued that the Department did not have the authority to issue a Virtual Quarantine. However, while it is not called a Virtual Quarantine, there is statutory authority in both medical marijuana act and the adult use cannabis act for such an order.

R.I. Gen. Laws § 21-28.6-9 provides in part as follows:

> Enforcement. *** (e)(1) Notwithstanding any other provision of this chapter, if the director of the department of business regulation, or his or her designee, has cause to believe that a violation of any provision of this chapter or the regulations promulgated thereunder has occurred by a licensee or registrant under the department's jurisdiction, or that any person or entity is conducting any activities requiring licensure or registration by the department of business regulation under this chapter or the regulations promulgated thereunder without such licensure or registration, or is otherwise violating any provisions of this chapter, the director, or his or her designee, may, in accordance with the requirements of the administrative procedures act, chapter 35 of title 42:
>
> (i) With the exception of patient and authorized purchaser registrations, revoke or suspend any license or registration issued under chapter 26 of title 2 or this chapter;
>
> (ii) Levy an administrative penalty in an amount established pursuant to regulations promulgated by the department of business regulation;
>
> (iii) Order the violator to cease and desist such actions;
>
> (iv) Require a licensee or registrant or person or entity conducting any activities requiring licensure or registration under this chapter to take those actions as are necessary to comply with this chapter and the regulations promulgated thereunder; or
>
> (v) Any combination of the above penalties.
>
> (2) If the director of the department of business regulation finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in his or her order, summary suspension of license or registration and/or cease and desist may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

R.I. Gen. Laws § 21-28.11-18 provides in part as follows:

> Enforcement. (a)(1) Notwithstanding any other provision of this chapter, if the commission has cause to believe that a violation of any provision of chapters 21-28.6 or 21-28.11 or any regulations promulgated thereunder has occurred by a licensee that is under the commission's jurisdiction pursuant to chapters 21-28.6 or 21-28.11, or that any person or entity is conducting any activities requiring licensure or registration by the commission under chapters 21-28.6 or 28.11 or the regulations promulgated thereunder without such licensure or registration, the commission may, in accordance with the requirements of the administrative procedures act, chapter 35 of title 42:
>
> (i) With the exception of patients and authorized purchasers, revoke or suspend a license or registration;
>
> (ii) Levy an administrative penalty in an amount established pursuant to law or regulations promulgated by the cannabis control commission;
>
> (iii) Order the violator to cease and desist such actions;
>
> (iv) Require a licensee or registrant or person or entity conducting any activities requiring licensure or registration under chapters 21-28.6 or 21-28.11 to take such actions as are necessary to comply with such chapter and the regulations promulgated thereunder; or
>
> (v) Any combination of the penalties authorized by this section.
>
> (2) If the commission finds that emergency action imperative to public health, safety, or welfare is required, and incorporates a finding to that effect in its order, summary suspension of license or registration and/or cease and desist may be ordered pending proceedings for revocation or other action. Any such proceedings shall be promptly instituted and determined pursuant to the provisions of § 21-28.11-5(a)(32).

The adult cannabis statute, R.I. Gen. Laws § 21-28.11-18(a)(2), requires that if such emergency action is taken, such proceeding must be promptly instituted by the Cannabis Control Commission (R.I. Gen. Laws § 21-28.11-4) pursuant to R.I. Gen. Laws § 21-28.11-5(a)(32).[2] However, said Commission is not fully functioning as it has not issued final regulations at which point, the Department's authority will transfer to it pursuant to R.I. Gen. Laws § 21-28.11-10.1(g).

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[2] R.I. Gen. Laws § 21-28.11-5(32) provides as follows:

> Powers and duties of the commission. *** (32) Issue temporary emergency orders, directives or instructions, with or without prior notice or hearing, in an instance in which the public health or safety is in substantial or imminent danger as it relates to the activities, conduct or practices of a licensee or as a result of a defective or dangerous product offered for sale by a licensee. If a temporary emergency order, directive or instruction without notice or a hearing is issued by the commission then the order, directive or instruction shall expire after ten (10) days unless a hearing is noticed by the commission within the ten (10) day period, and the hearing is scheduled to be conducted within twenty (20) days of the issuance of the order, directive or instruction.

Both statutes allow that an emergency action in the form and a cease and desist order can be taken "pending proceedings for revocation or other actions." Certainly, the Virtual Quarantine is a cease and desist order by the Department pending its proceedings for revocation. The Department placed all inventory, plants, and products under a virtual quarantine and ordered all physical plants and inventory onsite must be immediately quarantined. The Virtual Quarantine allowed the Respondent access to the premises to tend to the quarantine plants but ordered the Respondent to contact the Department prior to any harvesting or destruction of plants or products.

In its January 10, 2024 email to the Respondent and in its brief, the Department relied on §1.11 and §1.13 of the Regulation for the authority to issue the Virtual Quarantine

Section 1.11 provides in part as follows:

> 1.11 Quarantined Marijuana Products, Retests, Remediation and Recalls
> A. All marijuana products must undergo and comply with all required testing as stated in the DOH Testing Regulations in order to be designated as medical and be offered for sale by a licensed compassion center. Until the product is designated as medical or upon a recall of a medical product, all marijuana and marijuana products shall be quarantined in accordance with §1.11 of this Part.
> ***
> G. Recalls
> 1. DBR or DOH may require a licensee to recall any marijuana or marijuana product that the licensee has sold or transferred upon a finding that circumstances exist that pose a risk to public health, safety and welfare.
> a. The recall must be initiated by the licensee immediately as determined by their approved recall plan; and
> b. The licensee must comply with any additional instructions made by DBR.
> 2. A recall may be based on, without limitation, evidence that the marijuana, marijuana product, or medical marijuana product:
> a. Contains unauthorized pesticide(s);
> b. Failed a mandatory test and was not mitigated pursuant to testing protocols;
> c. Is contaminated or otherwise unfit for human use, consumption or application;
> d. Is not properly packaged or labeled;
> e. Was not cultivated, processed or manufactured by a licensee or otherwise is not in accordance with the Act, DBR regulations or DOH regulations; or

f. Otherwise poses a threat to public health or safety as determined by DBR or DOH.

3. DBR may at any time require the destruction of medical marijuana product or marijuana product upon a finding that circumstances exist that pose a risk to public safety and health.

4. If DBR finds that a recall is required, DBR:

a. Must notify the public and licensees of the recall;

b. Must affect an administrative hold on all affected medical marijuana and/or medical marijuana products in the tracking system;

c. May require a licensee to place all marijuana, marijuana product, medical marijuana and medical marijuana product in quarantine itself or with a third-party custodian at the licensee's expense.

d. May require a licensee to notify all individuals to whom such medical marijuana or a medical marijuana product was sold; and

e. May require that the licensee destroy the recalled product.

Section 1.13 of the Regulation provides in part as follows:

A. Inspections and Audits

1. Marijuana establishment licensees are subject to reasonable inspection by DBR.

2. DBR and its authorized representatives have authority to enter a marijuana establishment licensee's premises at reasonable times to inspect in a reasonable manner the premises and all equipment, materials, containers, and other things therein, including without limitation all records, files, financials, sales, transport, pricing and employee data, research, papers, processes, controls and to inventory any stock of marijuana, labels, containers, packages, paraphernalia and other materials and products.

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C. Discipline and Penalties

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4. Possession of Marijuana in Violation of the Act or the DBR Regulations

a. Pursuant to R.I. Gen. Laws § 21-28.6-15(b)(3), if any patient cardholder, primary caregiver cardholder, licensed cooperative cultivation, compassion center, licensed medical marijuana cultivator, or any other person or entity is found to have marijuana plants or marijuana material without valid medical marijuana plant tag certificates or which are not tracked in accordance with the DBR Regulations, DBR shall impose an administrative penalty in accordance with the DBR Regulations on the patient cardholder, primary caregiver cardholder, licensed cooperative cultivation, compassion center, licensed medical marijuana cultivator, or any other person or entity for each untagged marijuana plant or unit of untracked marijuana material.

In *STJ, LLC v. State of Rhode Island*, KC 2023-0722 (9/15/23), the Department imposed "a full quarantine and administrative hold" (p. 6) - a virtual quarantine - on a medical and recreational cannabis licensed cultivator, and the licensee sought injunctive relief in the Superior Court. The Court found that pursuant to §1.11 (G)(1) of the Regulation that "cultivators must tailor their production to prevent risks to 'public health, safety and welfare.'" *Id*. And more "[s]pecifically," the Court cited §1.11 (G)(4)(c) that "[i]f DBR finds that a recall is required. . . [DBR]: [m]ay require a licensee to place all marijuana, marijuana product, medical marijuana and medical marijuana product in quarantine itself or with a third-party custodian at the licensee's expense." *Id*. The Court concluded that "given that DBR observed the Plaintiff committed numerous violations of inventory-tracking laws, DBR retained the authority to issue the order to quarantine Plaintiff's inventory." *Id*.

The Department argued that *STJ* supported the imposition of the Virtual Quarantine since the Court found that both the medical marijuana act and cannabis act require licensed cultivators to partake in the seed-to-sale inventory with the Department charged with enforcement, and that charge necessarily includes the ability of the regulator to step in press "pause" when noncompliant activities threaten to undermine the reliability of regulated material and allow for a full evaluation. The Respondent argued the Court relied on the recall provision of the Regulation to uphold the Department's authority, and this situation is not a recall matter. It also argued that matter is differentiated in that the *STJ* licensee bypassed the administrative process by going to Superior Court first and not first exhausting administrative remedies.

While *STJ* may have cited to the recall provision in upholding a full quarantine, it found that the Department has the authority to impose a full virtual quarantine as the matter was about a full quarantine. Indeed, it may be in some circumstances, the full quarantine is required to

determine what products might be recalled or not and to prevent products from having to be recalled if noncompliant. *STJ* found that the Department had authority to quarantine the plaintiff's inventory because of allegations of numerous violations of the inventory tracking system. Nonetheless, the statutory cease and desist order is not limited to specific recall provisions.

Pursuant to §1.11 of the Regulation, R.I. Gen. Laws § 21-28.6-9, and R.I. Gen. Laws § 21-28.11-18, the Department has the authority to impose a Virtual Quarantine. *STJ* found that under the Regulation "cultivators must tailor their production to prevent risks to 'public health, safety and welfare.'" *Supra*. The statutes and Regulation provide the authority for a virtual quarantine – a cease and desist order - in order for the Department to ensure the seed-to-sale of products is made pursuant to the statutory and regulatory requirements, and the integrity of the system and products are maintained.

VI. Notice and Due Process

R.I. Gen. Laws § 42-35-9 provides in part as follows:

> Contested cases — Notice — Hearing — Records. (a) In any contested case, all parties shall be afforded an opportunity for a hearing after reasonable notice.
> ***
> (b) The notice shall include:
> (1) A statement of the time, place, and nature of the hearing;
> (2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
> (3) A reference to the particular sections of the statutes and rules involved;
> (4) A short and plain statement of the matters inserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved and detailed statement shall be furnished.

In relation to the required APA notice, *Correia v. Norberg*, 391 A.2d 94, 98 (R.I. 1973) found as follows:

> Section 42-35-9(b)(3) provides that reasonable notice of an administrative hearing shall include 'a reference to the particular sections of the statutes and rules involved.' Section 42-35-9(b)(4) adds to this the requirement of 'a short and plain

> statement' of the issues involved. These and similar requirements are obviously intended to assure that a party is apprised of the nature of the hearing so that he can adequately prepare.

In terms of a hearing, the fundamental due process requirement is the opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 US 319, 333 (1976). See also *Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1 (R.I. 2005); and *In re Cross*, 617 A.2d 97 (R.I. 1992). R.I. Gen. Laws § 42-35-14(c)[3] allows the emergency suspension of licenses in certain limited situations, and in such situations, a post-deprivation hearing satisfies due process requirements. *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202, 210-11 (R.I. 1997). However, this is not an emergency suspension of a license, but rather the imposition of a Virtual Quarantine. However, it is akin to an emergency action so that a hearing may be held after the action was taken. As to timeliness, *El Gabri v. Rhode Island Bd. of Med. Licensure & Discipline*, 1998 WL 961165 (R.I. Super.) found that the nine (9) month "delay" in resolving a post-deprivation hearing of an emergency suspension of a license to practice medicine was not a *per se* due process violation.

The Virtual Quarantine was issued prior to the notice of revocation but was issued in the midst of the inspection from which the Department determined a notice of revocation should issue. The inspection was conducted on December 18 and 21, 2023. The Respondent argued that the Virtual Quarantine was issued prior to December 21, 2023 so the December 21, 2023 inspection cannot be a basis for the Virtual Quarantine. The Virtual Quarantine was issued on December 20,

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[3] R.I. Gen. Laws § 42-35-14(c) states as follows:

> No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency sent notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

2023 after the inspection commenced on December 18, 2023, but was not lifted after the completion of the December 21, 2023 inspection. However, those allegations from the inspection(s) were not reduced to writing in relation to the basis for issuing the cease and desist order for a virtual quarantine. Instead, a notice of revocation was issued so that the Department maintained the Virtual Quarantine due to its further inspection and decision to seek revocation. The Department's January 10, 2024 email referenced that the violations that triggered the "virtual Metrc quarantine" were preliminary identified during the "December 20, 2023" inspection (presumably December 21, 2023). The January 10, 2024 email stated that the Department was preparing an Order to Show Cause "which will identify in detail all the facts and information leading [to] the quarantine and license revocation."

The December 20, 2023 notice of the Virtual Quarantine did not cite to the Department's statutory and regulatory authority to impose a Virtual Quarantine. Nor did it make a finding regarding public health, safety, and welfare. The Department informed the Respondent that its appeal of the Virtual Quarantine would be included in the Order to Show Cause. The Order to Show Cause detailed the statutory and regulatory violations alleged by the Department as the basis of why the Department is seeking revocation. The Order to Show Cause also cited to a January 3, 2024 inspection. Based on January 10, 2024 Department's email, those are also the bases for the Virtual Quarantine. The reasons are also set forth in the Department in its objection to the Respondent's motion. The Order to Show Cause provided a date for a prehearing conference in anticipation for a date for a full hearing to be scheduled later.

The Department argued that the Respondent's licensed premises had over 500 cannabis plants and products that were not tracked in the mandatory Metrc system and over 50 other cannabis products that were not tagged and tracked. The Department argued the Respondent lacked

the requisite surveillance camera coverage on three (3) occasions. It argued that the integrity of Metrc and the track and trace system is predicated upon reliable and accurate self-reported data entry from seed, and Metrc cannot be used to manufacture the appearance of compliance after the fact and to do so would undermine the very foundation of the regulated cannabis market. It argued the discrepancies found at inspection between inventory and the self-reported Metrc needed to be investigated further and determined whether the Respondent had compliant product that could be cleared for sale. It argued the Respondent seeks to avoid using the Metrc system which all marijuana licensees must use. The Department argued that lifting the Virtual Quarantine would allow non-compliant cannabis products into the market. It argued that the Virtual Quarantine does not prevent the Respondent from participating in the regulated and compliant transfer of seeds, cultivation of cannabis clones and plants, and processing cannabis plants as long as they are all accurately recorded pursuant to statutory and regulatory requirements in Metrc.

The Department's arguments essentially are that public health, safety, or welfare imperatively required the emergency action – the cease and desist order - of a Virtual Quarantine. For some reason, such a fact finding was not included in the initial Virtual Quarantine order of December 20, 2023. Nor was an additional Virtual Quarantine issued with further findings after the inspection on December 21, 2023.

The Respondent argued that it had no notice of the bases and reasons for the Virtual Quarantine. It would behoove the Department to update its process so that when a Virtual Quarantine is issued, it is clear whether it is issued under the statutory cease and desist powers and/or the relevant provisions of the Regulation and the reasons for such an issuance. The Department should also update the issuance of a Virtual Quarantine, if needed.

However, the Respondent did receive notice by the Department's January 10, 2024 email of the regulatory basis and reasons for the Virtual Quarantine and was informed that would be included in the Order to Show Cause. It was not but an amended order should be forthcoming. Nonetheless, the Respondent received notice of the regulatory reasons and bases for the Virtual Quarantine. A prehearing conference was scheduled and held. The Respondent is now seeking interim relief on the Virtual Quarantine.

VII. Standard for a Stay and the Department's Authority

Under *Narragansett Electric Company v. William W. Harsch et al.*, 367 A.2d 195, 197 (1976), a stay will not be issued unless the party seeking the stay makes a "'strong showing'" that "(1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest." Despite the ruling in *Harsch*, the Supreme Court in *Department of Corrections v. Rhode Island State Labor Relations Board*, 658 A.2d 509 (R.I. 1995) found that *Harsch* was not necessarily applicable in all agency actions and the Court could maintain the *status quo* in its discretion when reviewing an administrative decision pursuant to R.I. Gen. Laws § 42-35-15(c).

The Respondent argued that the Virtual Quarantine should be lifted because of due process violations and lack of notice. As discussed above, the Department certainly could and should draft its Virtual Quarantine orders better and update them as warranted, but the Respondent received notice from the Department as to its regulatory authority and reasons for its Virtual Quarantine order, and the Respondent has been able to challenge the Virtual Quarantine.

The Department argued that the Respondent's motion was akin to request a stay be lifted. The Respondent argued that the Department cannot make a strong showing that it will succeed on

the merits of revoking the Respondent's licenses. However, the issue is not the likelihood of success on the merits of the revocation action, but the imposition of the Virtual Quarantine. Even if after hearing, the Respondent's licenses are not revoked, the Department has established concerns with the Respondent's use of the Metrc system so that it can make a strong showing that it will succeed on proving that a Virtual Quarantine was necessary to ensure noncompliant products did not enter the market. The Respondent argued that even if the Department proves minor discrepancies, those will not be enough to revoke the licenses; however, such discrepancies can be enough to necessitate a Virtual Quarantine which seeks to ensure that only compliant products come to market.

The Department is charged with the enforcement of the statutory and regulatory requirements for cannabis licensing. To allow the lifting of the Virtual Quarantine would prevent the Department from ensuring only compliant products are placed into the cannabis market. The same is true for the substantial harm to the public. The public has an interest in ensuring that the proper cannabis regulations are followed and that the products are compliant with all licensing requirements. The Respondent argued that the Virtual Quarantine has resulted in the shuttering of the entire business. However, based on the parties' pleading, there has been attempts to ensure compliance with the Metrc system by the Respondent, and the Department will allow compliant products to enter the market. Thus, there is no irreparable harm to the Respondent, but there will be substantial harm to the public if the safety of the cannabis regulatory system is compromised.

As stated above, *STJ* found that "given that DBR observed the Plaintiff committed numerous violations of inventory-tracking laws, DBR retained the authority to issue the order to quarantine Plaintiff's inventory." *Id.* *STJ* found that plaintiff did not meet the stay standard and upheld the Department's authority to issue a Virtual Quarantine.

VIII. Conclusion and Recommendation

Based on the foregoing, the undersigned recommends that the Appellant's motion for interim relief be denied. However, the Department shall issue the amended Order to Show Cause within ten (10) days of this order.[4]

Dated: April 29, 2024

Catherine R. Warren
Hearing Officer

INTERIM ORDER

I have read the Hearing Officer's Recommended Order in this matter, and I hereby take the following action with regard to the Recommendation:

__X__ ADOPT
_____ REJECT
_____ MODIFY

Dated: 5/1/2024

Elizabeth Kelleher Dwyer, Esquire
Director

NOTICE OF APPELLATE RIGHTS

THIS ORDER CONSTITUTES AN INTERLOCUTORY ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-15. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS

[4] The Department suggested as an alternative to the Virtual Quarantine, a Department approved outside monitor could be appointed to ensure the Respondent makes accurate and up-to-date entries in the Metrc system. The parties may, if they so desire, agree to such an arrangement.

CERTIFICATION

I hereby certify on this 1st day of May, 2024 that a copy of the within Order and Notice of Appellate Rights was sent by first class mail and by electronic delivery to the following: Jeffrey Padwa, Esquire, Padwa Law LLC, One Park Row, 5th floor, Providence, R.I. 02903 and Joseph A. Keogh, Jr., Keough + Sweeney, Ltd., 41 Mendon Avenue, Pawtucket, R.I. 02861 and by electronic delivery to Hannah Pfeiffer, Esquire, and Sara Tindall-Woodman, Esquire Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, R.I. 02920.

Megan Mihara