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Mission:
To protect, promote & improve the health of all people in Florida through integrated state, county & community efforts.

Ron DeSantis
Governor

Joseph A. Ladapo, MD, PhD
State Surgeon General

Vision: To be the **Healthiest State** in the Nation

Sent via Electronic Delivery and Certified U.S. Mail

11/22/2024

The Heirs of Moton Hopkins Sr.
c/o Vijay S. Choksi
777 South Flagler Drive
Suite 1700 West Tower
West Palm Beach, Florida 33401
VChoksi@foxrothschild.com

Re: Application for *Pigford/BFL* MMTC License

Dear Mr. Choksi:

On March 25, 2022, the Department received Moton Hopkins Sr.'s (Hopkins) application for a *Pigford/BFL* MMTC license under section 381.986(8)(a)2.b., Florida Statutes. The Department notified you of its intent to deny Hopkins' application by letter dated September 20, 2022 (Denial Letter). In the Denial Letter, the Department identified the following bases for denial:

> First, you advised us in your September 5 letter that Mr. Hopkins has passed away and provided proof by way of death certificate. The Department cannot award a license to a deceased person. Moreover, any interest Mr. Hopkins' had in the MMTC application ceased upon Mr. Hopkins' death, as the licensure qualifications are personal to Mr. Hopkins and do not flow to third parties.
>
> Second, and notwithstanding Mr. Hopkins' death, the applicant failed to demonstrate that the following owners, officers, board members, or managers have passed a background screening as required by section 381.986(8)(b)8., Florida Statutes, and Emergency Rule 64ER21-16 and incorporated Application Instructions: Dr. Kelly King, manager (Background Screening Determination).

The Department's Denial Letter was challenged by petition filed on October 11, 2022 and by amended petition filed on November 9, 2022. Additionally, the Department's Background Screening Determination was challenged by petition. The amended petition challenging the Denial Letter was adjudicated by Final Order, which is attached as Exhibit A. The petition challenging the Department's Background Screening Determination was also resolved by Final Order, which is attached as Exhibit B.

During the 2024 legislative session, the Florida Legislature enacted Chapter 2024-246, Laws of Florida. Pursuant to section 11, paragraph (3)(b) of that law, the Department must consider all deficiencies with an applicant's application to be cured if the sole remaining deficiency cited is:

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> The applicant died after March 25, 2022. In the case of the death of applicant under this paragraph, the department must issue the license to the heirs of the applicant.

Id. Pursuant to this provision, the sole remaining basis for denial of Hopkins' application for MMTC licensure is cured as a matter of law.

The Department cannot, however, award a single MMTC license to more than one person. Hopkins' application for the *Pigford/BFL* MMTC license identifies two heirs: Algene Hopkins and Moton Hopkins, Jr. Accordingly, pursuant to Chapter 2024-246, Laws of Florida, you have ninety (90) days to: 1) advise the Department which of the two heirs identified in Hopkins' application should be issued the MMTC license, and 2) submit the attestations attached as Exhibits C and D. The heir designated to receive the MMTC license must complete the attestation attached as Exhibit C, and the heir who is *not* designated to receive the MMTC license must complete the attestation attached as Exhibit D.

Prior to issuance of the license, the heir designated to receive the MMTC license must pass a background screening, as required by section 381.986(8)(b)8., Florida Statutes, and Emergency Rule 64ER21-16 and the incorporated Application Instructions.

Upon designation of the heir, submission of the completed attestations, and successful completion of the required background screening, the Department will issue final approval for licensure, as provided in Department rules.

The deadline for your submission is ninety (90) calendar days from the date on which this letter was emailed to you. Your response must be hand delivered to the Department's Agency Clerk no later than 5:00 on the deadline. The delivery address for your response is:

Agency Clerk
Florida Department of Health
2585 Merchants Row Blvd.
Tallahassee, Florida 32399

Should you have any questions, please contact ommulicenseoperation@flhealth.gov.

Sincerely,

Christopher Kimball

Christopher Kimball
Director
Office of Medical Marijuana Use

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NOTICE OF RIGHTS

A party whose substantial interest is affected by this agency action may petition for an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes. A petition must be filed in writing and must be in conformance with Rule 28-106.201, 28-106.2015, or 28-106.301, Florida Administrative Code, as applicable. The petition must be in writing and received by the Agency Clerk for the Department within 21 days from receipt of this notice. The petition must be submitted by one of the following delivery methods:

By Mail:
Agency Clerk, Florida Department of Health
4052 Bald Cypress Way, BIN #A-02
Tallahassee, Florida 32399-1703;

By Hand Delivery:
Agency Clerk, Florida Department of Health
2585 Merchants Row Blvd.
Prather Building
Tallahassee, Florida;

By facsimile: 850-413-8743; or

By E-Filing: https://agency_clerk-fdh.mycusthelp.com/WEBAPP/_rs/supporthome.aspx?&lp=3

Mediation is not available.

Failure to file a petition within 21 days shall constitute a waiver of the right to a hearing on this agency action. If this notice becomes a Final Order, an adversely affected party is entitled to judicial review pursuant to section 120.68, Florida Statutes. The Florida Rules of Appellate Procedure govern review proceedings. Review is initiated by filing, within 30 days of the date of the Final Order, a Notice of Appeal with the appropriate Court of Appeal in the appropriate District Court, accompanied by the filing fees required by law, and filing a copy of the Notice of Appeal with the Agency Clerk, Department of Health.

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RECEIVED
DEPARTMENT OF HEALTH
2023 MAY -9 PM 4:07
OFFICE OF THE CLERK

STATE OF FLORIDA
DEPARTMENT OF HEALTH

MOTON HOPKINS, by and through MOTON HOPKINS, JR., as PERSONAL REPRESENTATIVE OF THE ESTATE OF MOTON HOPKINS and as TRUSTEE OF THE MOTON HOPKINS, SR. FAMILY TRUST, MOTON HOPKINS, JR., in his individual capacity, ALGENE HOPKINS, in her individual capacity, and HATCHETT CREEK FARMS, LLC,

EXHIBIT A

Petitioners,

vs.

Rendition No.: DOH-23-0310-FOI-HO
Case No.: 2022-0210

DEPARTMENT OF HEALTH,

Respondent,

and

TERRY DONELL GWINN,

Intervenor.

______________________________/

FINAL ORDER OF DISMISSAL

This matter is before the Florida Department of Health for consideration of the Petitioners' *Amended Petition for Formal Administrative Hearing* ("Amended Petition").

Preliminary Statement

On September 20, 2022, the Department issued a notice of intent to deny Moton Hopkins, Sr.'s ("Hopkins Sr.") application for licensure as a medical marijuana treatment center ("MMTC") ("Notice of Intent to Deny"). As stated in the Notice of Intent to Deny, the Department denied Hopkins Sr.'s application because, among other

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things, Hopkins Sr. died while his application was pending and being processed by the Department.

On October 11, 2022, Moton Hopkins, Jr. ("Hopkins Jr.") filed a *Petition for Formal Administrative Hearing* purporting to challenge the Notice of Intent to Deny Hopkins Sr.'s application. Hopkins Jr. filed the petition in his capacity as the personal representative of Hopkins Sr.'s estate and as the Trustee of the Moton Hopkins Sr. Family Trust.

On October 21, 2022, the Department issued an *Order of Dismissal With Leave to Amend*. In the order, the Department concluded that the petition was not in substantial compliance with Florida Administrative Code Rule 28-106.201(2)(b) and (g) because it failed to set forth how Hopkins, Jr. had standing, either in a representative capacity or individually, to seek an administrative hearing regarding the denial of a license to Hopkins Sr., a deceased person. Accordingly, the Department dismissed the petition with leave to file an amended petition that remedied the pleading deficiencies.

On November 9, 2022, Petitioners timely filed the Amended Petition. The Amended Petition challenges the Department's denial of Hopkins Sr.'s application and also alleges that the Department's denial of the application was based on an unadopted rule in violation of section 120.54(1)(a) and section 120.57(1)(e), Florida Statutes. Specifically, Petitioners allege that the Department's statements in the Notice of Intent to Deny constitute agency statements of general applicability that must be adopted as rules.

After filing the Amended Petition, Petitioners separately and independently filed an unadopted rule challenge petition with the Division of Administrative Hearings asserting that the Department's statements in the Notice of Intent to Deny constitute

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agency statements of general applicability that must be adopted as rules. *See Moton Hopkins et al., v. Dep't of Health*, DOAH Case No. 23-0188RU. The rule challenge petition contained the same unadopted rule allegations as those in the Amended Petition. The DOAH Rule Challenge Petition is attached as Exhibit A. That matter was assigned to an administrative law judge, who, on February 14, 2023, issued a Final Order (the DOAH Final Order) dismissing the matter. The DOAH Final Order is attached as Exhibit B.

As explained below, the undisputed materials facts, along with the DOAH Final Order, compel dismissal of this matter.

Regulatory Background

I. The Constitutional Amendment

In November 2016, Florida voters approved what became article X, section 29 of the Florida Constitution (the Amendment). The Amendment authorizes the Department to register MMTCs to "acquire, cultivate, possess, process . . . , transfer, transport, sell, distribute, dispense, or administer marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers." Art. X, § 29(b)(5), Fla. Const. The Amendment requires the Department to "issue reasonable regulations necessary for the implementation and enforcement" of its provisions to "ensure the availability and safe use of medical marijuana by qualifying patients." Art. X, § 29(d), Fla. Const. Among the regulations the Department is required to issue are "[p]rocedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension, and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety." Art. X, § 29(d)(1)c., Fla. Const. Additionally, the Amendment recognizes the

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legislature's authority to enact laws implementing its provisions. Art. X, § 29(e), Fla. Const.

The Amendment does not itself establish the regulatory framework for medical marijuana. Instead, it tasks the Department and legislature with developing "a carefully regulated system for providing access to marijuana for certain patients suffering from debilitating medical conditions." *Fla. Dep't of Health v. Florigrown*, 317 So. 3d 1101, 1106 (Fla. 2021).

II. The 2017 Law

In a 2017 special session, the legislature established a regulatory structure to implement the Amendment (the 2017 Law). *See, e.g.*, Ch. 2017-232, Laws of Fla. The 2017 Law establishes qualifications for MMTC licensure. Most relevant here is subsection (8)(a)2.b. (the Pigford Provision):

> As soon as practicable, the department shall license **one applicant that is a recognized class member** of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011). An applicant licensed under this sub-subparagraph is exempt from the requirement of subparagraph (b)2. An applicant that applies for licensure under this sub-subparagraph, pays its initial application fee, is determined by the department through the application process to qualify as a recognized class member, and is not awarded a license under this sub-subparagraph may transfer its initial application fee to one subsequent opportunity to apply for licensure under subparagraph 4.

(Emphasis added). Recognized class members of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), and *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011), included natural persons, like Hopkins Sr. and Intervenor Terry Donell Gwinn.

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The legislature also directed the Department to adopt rules for license applications[1]:

> An applicant for licensure as a medical marijuana treatment center shall apply to the department on a form prescribed by the department and adopted in rule. The **department shall adopt rules pursuant to ss. 120.536(1) and 120.54 establishing a procedure for the issuance and biennial renewal of licenses**, including initial application and biennial renewal fees sufficient to cover the costs of implementing and administering this section, and establishing supplemental licensure fees for payment beginning May 1, 2018, sufficient to cover the costs of administering ss. 381.989 and 1004.4351. The department shall identify applicants with strong diversity plans reflecting this state's commitment to diversity and implement training programs and other educational programs to enable minority persons and minority business enterprises, as defined in s. 288.703, and veteran business enterprises, as defined in s. 295.187, to compete for medical marijuana treatment center licensure and contracts. Subject to the requirements in subparagraphs (a)2.-4., the department shall issue a license to an applicant if the applicant meets the requirements of this section and pays the initial application fee. The department shall renew the licensure of a medical marijuana treatment center biennially if the licensee meets the requirements of this section and pays the biennial renewal fee. However, the department may not renew the license of a medical marijuana treatment center that has not begun to cultivate, process, and dispense marijuana by the date that the medical marijuana treatment center is required to renew its license. **An *individual* may not be an applicant,** owner, officer, board member, or manager **on more than one application for licensure as a medical marijuana treatment center. An *individual* or entity may not be awarded more than one license as a medical marijuana treatment center.**

§ 381.986(8)(b), Fla. Stat. (emphasis added). The statute then sets forth several statutory criteria that must be satisfied to be eligible for licensure. *See* § 381.986(8)(b)1. – 10., Fla. Stat.

III. The Pigford Application Rule

The Pigford Provision has been implemented in Department Emergency Rule 64ER21-16, which explains and details the MMTC licensure application process for the

[1] Given the nature of the medical marijuana program, the legislature has granted the Department specials powers for emergency rulemaking. *See* Ch. 2022-157, § 18, Laws of Fla.

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Pigford/BFL MMTC license. 47 Fla. Admin. Reg. 200 (Oct. 14, 2021) (the Application Rule). The Application Rule plainly states that a natural person *or* an entity that is a recognized class member may apply and be awarded a license. *See License Application Instructions, Requirements, and Forms for Pigford/BFL Applicants*, pp. 6, 15, 35-38.[2] The Application Rule does not allow an applicant to apply as both a natural person *and* an entity, and requires certain information and documentation to be included in the application, depending upon whether the applicant is a natural person or whether the applicant is an entity. For example, the Application Instructions require natural persons who are applicants to provide, among other things, a completed Form 3(B) (Individual Applicant Acknowledgment and Statement of Understanding). *Id.* at 69. Applicants who are entities, on the other hand, are required to provide Form 3(A) (Entity Applicant Acknowledgement and Statement of Understanding). *Id.* at 68. Distinctions between a natural person applicant and an entity applicant were addressed in the Application Instructions in other instances as well. *See id.* at 6, 15, 35-38. At bottom, an applicant could have been either a natural person or an entity, but not both. *See id.* at 37.

It is material who the named applicant is because the applicant himself or itself, as the case may be, is required to meet all the predicate requirements for licensure. *See* § 381.986(8)(b), Fla. Stat. For example, the applicant must provide his or its certified financial statements. § 381.986(8)(b)7., Fla. Stat.; *see also TropiFlora, LLC v. Fla. Dep't of Health,* 346 So. 3d 1271, 1277 (Fla. 1st DCA 2022). And in the context of the *Pigford/BFL* MMTC license, the predicate requirement of proving class membership is particularly critical as the Department is only authorized to issue a license to "**one**

[2] The *License Application Instructions, Requirements, and Forms for Pigford/BFL Applicants* (Application Instructions) are incorporated by reference in Emergency Rule 64ER21-16.

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applicant that is a recognized class member" of *Pigford* or *BFL*. § 381.986(8)(a)2.b., Fla. Stat.

Undisputed Facts

Hopkins Sr. submitted an application for the *Pigford/BFL* MMTC license. DOAH Final Order, ¶ 3; Am. Pet., p. 1. Hopkins Sr. was the named applicant for licensure. DOAH Final Order, ¶ 4. Hopkins was a recognized class member of *BFL*. DOAH Final Order, ¶ 1. While his application was being processed by the Department, Hopkins Sr. died. Am. Pet., ¶ 17. After Hopkins Sr. died, his legal counsel supplied the Department a copy of Hopkins Sr.'s death certificate. DOAH Final Order, ¶ 6. The Department received Hopkins Sr.'s death certificate while the license application remained pending. DOAH Final Order, ¶ 6; *see also* Am. Pet., ¶ 125. On September 20, 2022, the Department issued its Notice of Intent to Deny Hopkins Sr.'s application. *See* attachment to the Am. Pet. The Notice of Intent to Deny states that Hopkins Sr.'s application was denied because, among other things, Hopkins Sr. died while his application was pending and being processed by the Department. *See id.*

Hopkins Jr., Algene Hopkins, and Hatchett Creek Farms were not the named applicants in the *Pigford/BFL* MMTC license Application. *See* DOAH Final Order, ¶ 4. There is no allegation in the Amended Petition to the contrary. Additionally, Hopkins Jr., Algene Hopkins, and Hatchett Creek Farms are not recognized class members of *Pigford* or *BFL*. DOAH Final Order, ¶ 2. There is no allegation to the contrary in the Amended Petition.

Hatchett Creek Farms was, however, identified in the application as "the proposed MMTC," which was the corporation Hopkins Sr. apparently planned to use to operate if he was awarded the *Pigford/BFL* MMTC license. *See* Am. Pet. ¶ 9. Hopkins

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Jr. and Algene Hopkins allege that each has ownership interests in Hatchett Creek Farms. Am. Pet. ¶ 13.

CONCLUSIONS OF LAW

A. Standing is a threshold, jurisdictional issue.

Standing is a jurisdictional, threshold issue in a chapter 120 administrative proceeding, the equivalent of subject matter jurisdiction. *See, e.g., Abbott Labs. v. Mylan Pharmaceuticals, Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); *Grand Dunes, Ltd. v. Walton Cnty.*, 714 So. 2d 473, 475 (Fla. 1st DCA 1998). For this reason, where the petitioner lacks standing, a tribunal not only is prohibited from ruling on the merits of the suit, but also is obligated to dismiss the suit. *See Abbott Labs.*, 15 So. 3d at 651 n.2; *Grand Dunes*, 714 So. 2d at 475 ("This court has the right and the obligation to remand a cause for dismissal where the party seeking relief did not have the initial right to institute the suit.").

B. Standing is limited to persons whose "substantial interests" are affected by the proposed agency action.

Agencies are not courts, and parties do not have a constitutional right of access to administrative proceedings. *Cf.* Art. I, § 21, Fla. Const.; *P'ship for Cmty. Health, Inc. v. Dep't of Children & Families*, 93 So. 3d 1191, 1193 (Fla. 1st DCA 2012) (declaring that constitutional access to justice provision protects only those rights that existed at common law or by statute prior to enactment of Florida Constitution's Declaration of Rights and noting that right to administratively challenge state agency contract award did not exist until subsequent adoption of Administrative Procedure Act in 1974). Unlike a court of general jurisdiction, a party may avail itself of an agency's decision-making powers only to the extent access is permitted by statute. In the licensure

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context, those statutes are section 120.569 and 120.57, which set forth who may challenge a decision denying a license application.

Under section 120.569, Florida Statutes, only persons whose "substantial interests" will be affected by an agency's licensing decision have standing. § 120.569(1), Fla. Stat. (setting forth provisions that "apply in all proceedings in which the substantial interests of a party are determined by an agency"); *see also* § 120.52(13) (defining "party" as a "person . . . whose substantial interests will be affected by proposed agency action . . ."). To establish that its "substantial interests" will be affected, a party must show (1) that the decision will result in a real or immediate injury in fact and (2) that the alleged interest is within the zone of interest to be protected or regulated. *See Agrico v. Dep't of Envtl. Reg.*, 406 So. 2d 478 (Fla. 1981).

A "real or immediate injury in fact" does not include an alleged injury that is abstract, conjectural, speculative, or hypothetical. *See Village Park Mobile Home Ass'n, Inc. v. State of Fla., Dep't of Bus. Regulation*, 506 So. 2d 426, 433 (Fla. 2d DCA 1987). Rather, a petitioner must allege to have sustained or be in immediate danger of sustaining some direct injury as a result of the agency action. *Id.* Put differently, the petitioner's allegations must be of sufficient immediacy and reality to confer standing. *Id.* (citing *Fla. Dep't of Offender Rehab. v. Jerry*, 353 So. 2d 1230, 1236 (Fla. 1st DCA 1978) (*disapproved on other grounds by Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec.*, 412 So. 2d 351 (Fla. 1982)).

C. Hopkins Jr. does not have standing as trustee or personal representative.

Hopkins Jr. lacks standing as the trustee and personal representative of Hopkins Sr.'s estate. *See Agrico v. Dep't of Envtl. Reg.*, 406 So. 2d 478 (Fla. 1981). Once a

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person dies, a license held by that person is terminated as a matter of law. *See* Att'y Gen. Op. 62-110 (1962) (concluding that "a license to pursue a given occupation or business is terminated by the holder's death." (*quoting* 53 C.J.S. Licenses, § 43) (emphasis omitted)); *see also Lund v. Department of Health*, 708 So. 2d 645, 646 (Fla. 1st DCA 1998) (determining that an appeal of a final order of discipline is moot when "the licensee dies during the pendency of an appeal from a disciplinary action."). Indeed, this has been the common law in the United States for more than 100 years. *See, e.g., In re Grimms Estate*, 37 A. 403, 405 (Pa. 1897) (holding that liquor "license granted to the decedent was a personal privilege, which ended with his life" and "did not go to his personal representatives" nor was it "an asset of his estate."); *In re Buck's Estate*, 39 A. 821, 822 (Pa. 1898) (the privilege to sell liquor "is personal" and does not "go to the personal representatives in case of death"); *State v. Bayne*, 75 N.W. 403, 404 (Wis. 1898) (a liquor license "is personal to the licensee, is not assignable, [and] does not pass to personal representatives"); *Hartingh v. Bay Circuit Judge*, 142 N.W. 585, 587 (Mich. 1913) (liquor licenses, which are not an assignable property right but merely allow a holder to do that which would otherwise be "illegal and punishable," terminate upon death of licensees); *In re Applications of Harris*, 15 Alaska 250, 250 (Alaska 1954) (the liquor "license, being a personal privilege, expired with the licensee").

There is no provision in section 381.986, Florida Statutes, providing otherwise, or providing for the inheritance of an MMTC license or the transfer of a license through probate. The Department therefore does not have statutory authority to issue the *Pigford/BFL* MMTC license to a deceased person's estate, his heirs, or any other person claiming an interest in his application for licensure.

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Additionally, an applicant for licensure has no greater interest in the license application than the person would have in the license itself. *See Davidson v. City of Coral Gables*, 119 So. 2d 704, 709 (Fla. 3d DCA 1960) ("Since a liquor license creates no vested interest, an application for such a license cannot rise to a higher level than that of the license it could produce."). Accordingly, upon the death of a license applicant, the application is terminated by operation of law just as the license would terminate upon the death of the license holder. Thus, whatever interest (however defined) that Hopkins Sr. had in his application, that interest terminated upon his death. There is no license or application interest for Hopkins Jr. (or anyone else) to pursue as a trustee, personal representative, or in any other capacity. Stated more succinctly, the estate's substantial interests are not affected, and the estate lacks standing under the Administrative Procedure Act (APA). Therefore, the trustee and personal representative of the estate lack standing as well.

In the absence of a legislative directive, the heir, spouse, or child of a licensee such as a roofer, electrician, plumber, engineer, doctor, lawyer, MMTC, or other licensee in a highly regulated industry, does not simply become a licensee by inheritance. Indeed, if obtaining a license by inheritance was possible, the state could have innumerable persons who did not apply and who are unqualified for licensure possessing licenses in highly regulated fields, thereby placing the public health, safety, and welfare at risk. The situation here is especially compelling where the manufacture, distribution, and sale of marijuana remains federally illegal and illegal in Florida except in strict compliance with the specific requirements of section 381.986, Florida Statutes, and Department rules and regulations. The legislature has not provided for the inheritance of an MMTC license, let alone an MMTC license *application*. Accordingly,

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there is nothing to inherit, and the estate of Hopkins Sr. and Hopkins Jr., as the trustee and representative of the estate, lack standing to pursue this action.

Hopkins Jr. also lacks standing in particular under the Pigford Provision because that provision requires that the applicant "is" a recognized class member. First, and as noted by ALJ Early in his Final Order, "by his unfortunate passing prior to the issuance of a license, [Hopkins Sr.] no longer 'is' a class member entitled to hold the license." DOAH Final Order, ¶ 21. He further correctly noted that an "applicant must presently exist when the license is issued." *Id.* Accordingly, the applicant and recognized class member is no longer a person, and his heirs cannot pursue issuance of a license either to Hopkins Sr. or his estate.

D. Non-applicants lack standing to challenge the denial of a licensure application.

The First District Court of Appeal has determined that non-applicants for MMTC licensure lack standing to complain about the Department's actions and inactions relating to a licensure application. *See TropiFlora, LLC v. Fla. Dep't of Health,* 346 So. 3d 1271 (Fla. 1st DCA 2022). *TropiFlora* involved the Department's denial of a license to TropiFlora, LLC, a nursery that applied for dispensing organization (DO) licensure under the 2014 version of the medical marijuana statute. *Id.* at 1273-74; *see also TropiFlora, LLC v. Fla. Dep't of Health,* No. 2016-CA-1330, p. 11 (Fla. Cir. Ct. March 23, 2020) (Final Judgment).[3] TropiFlora was an entity owned by Dennis and Linda Cathcart, and Dennis Cathcart was identified as the operating nurseryman in the licensure application TropiFlora submitted to the Department. *See Final Judgment,* p. 11. TropiFlora's licensure application also referenced MariJ Agricultural, Inc. (MariJ), a

[3] The circuit court's final judgment, which was—in all respects—affirmed by the First DCA in *TropiFlora*, is attached as Exhibit C.

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separate legal entity that intended to purchase TropiFlora stock upon TropiFlora's attainment of a DO license from the Department. *Id.* After the Department denied TropiFlora's application for DO licensure, TropiFlora filed a complaint in circuit court "as agent for" MariJ and the Cathcarts. *TropiFlora,* 346 So. 3d at 1274. The complaint challenged the Department's denial of TropiFlora's application for DO licensure and sought a declaratory judgment that TropiFlora, MariJ, and the Cathcarts, collectively, were entitled to MMTC licensure based on certain provisions in section 381.986. *Id.* at 1274-75.

The circuit court concluded that MariJ and the Cathcarts lacked standing to pursue the action, and the First DCA agreed. Because neither the Cathcarts nor MariJ were the applicants for licensure—and because none individually satisfied the requirements for licensure—the Court concluded they lacked standing to challenge the denial of TropiFlora's application:

> Here, TropiFlora sought to act as a nominal plaintiff, bringing the declaratory judgment action *on behalf of or as the agent for* MariJ and the Cathcarts. But the undisputed evidence showed that MariJ and the Cathcarts are not the real parties in interest. TropiFlora was the entity that applied for DO licensure in 2015, not MariJ or the Cathcarts. Neither MariJ nor the Cathcarts ever applied for a license. Nor could they, because they did not and cannot satisfy the requirements for either DO or MMTC licensure. Thus, individually, MariJ and the Cathcarts have no personal and individual stake in DO licensure, and the trial court correctly concluded that TropiFlora cannot sue on their behalf.

Id. at 1276 (emphasis in original).

The First DCA's analysis in *TropiFlora* is applicable here. Hopkins Jr., Algene Hopkins, and Hatchett Creek Farms were not the applicants for the *Pigford/BFL* MMTC license. Nor could they apply because they did not and cannot satisfy the requirements for the *Pigford/BFL* MMTC license. To the contrary, it is undisputed that Hopkins Sr.

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applied for licensure as a natural person and *BFL* class member—not the Petitioners. It is also undisputed (nor is it alleged in the Amended Petition) that Hopkins Jr., Algene Hopkins, and Hatchett Creek Farms are not recognized class members of *Pigford* or *BFL*. Because class membership in *Pigford* or *BFL* is a mandatory, predicate criterion for the *Pigford/BFL* MMTC license, Petitioners do not and could not qualify for the *Pigford/BFL* MMTC license that they seek. Therefore, pursuant to the First DCA's holding in *TropiFlora*, Petitioners "have no personal or individual stake in [MMTC] licensure" and accordingly lack standing to pursue their claim. *TropiFlora*, 346 So. 3d at 1276.

Notably, *TropiFlora* involved a claim for declaratory judgment in state court and not a claim under the APA. But standing under the APA is *more limited* than standing in state court for a declaratory judgement. *Compare* § 86.021, Fla. Stat. *with* § 120.569, Fla. Stat. Indeed, courts repeatedly recognize that the declaratory judgment statutes must be liberally construed to extend relief to "any person claiming to be interested or who may be in doubt" regarding his rights, status, and other equitable or legal relations. § 86.021, Fla. Stat.; *see also Olive v. Mass*, 811 So. 2d 644, 648 (Fla. 2002) (*superseded by statute on other grounds, as recognized in Eleventh Judicial Cir. of Fla. v. State of Fla.*, 115 So. 3d 261, 272 (Fla. 2013)). The same is not true for proceedings under section 120.569. *See Fla. Soc. of Ophthalmology v. State Bd. of Optometry*, 532 So. 2d 1279, 1284 (Fla. 1st DCA 1988) (recognizing that "not everyone having an interest in the outcome of a particular dispute over an agency's interpretation of the law submitted to its charge, or the agency's application of that law in determining the rights and interests of members of government or the public, is entitled to participate as a party in an administrative proceeding to resolve that dispute"). In short, the First DCA's

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determination in *TropiFlora* necessarily requires the Department to determine that Petitioners lack standing to complain about the denial of Hopkins Sr.'s Application here.

E. Petitioners' alleged interests in Hopkins Sr.'s application are insufficient to confer standing.

Shareholders and other persons or entities with interests in an application—but who are not themselves an applicant for licensure—lack standing to challenge the denial of the application. This is apparent from the First DCA's holding in *TropiFlora*. But it is also apparent from a review of cases construing the "substantial interests" two-prong test under the APA.

First, because Petitioners were not themselves applicants for licensure—and because they cannot qualify for the *Pigford/BFL* MMTC license that they seek—their alleged interests in the denial of Hopkins Sr.'s application is conjectural, at best, and not of sufficient immediacy and reality to confer standing. *See International Jai-Alai Players Ass'n v. Fla. Pari-Mutuel Comm'n*, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990) (rejecting alleged injuries stemming from the denial of an application as too remote to establish standing). Moreover, Petitioners' alleged economic interests in Hopkins Sr.'s application are not within the zone interests protected under section 381.986(8). Petitioners' alleged economic injuries are therefore insufficient to confer standing. *See Fla. Soc. of Ophthalmology*, 532 So. 2d at 1284-85 (holding that non-applicants lacked standing to challenge decisions regarding a licensure application where the non-applicants' "alleged economic injury [did] not fall within the zone of interests intended to be protected by the applicable statutes"). Indeed, there is no provision in section 381.986 that is intended to protect the economic interests of persons with an alleged

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interest in an application for licensure, but who are not themselves applicants and are not recognized class members of *Pigford* or *BFL*.

In fact, DOAH has previously determined in the context of the Department's medical marijuana program that entities unqualified for licensure lack standing to challenge rules relating to the licensure application process, notwithstanding their ownership interests in a bona fide applicant. *See Baywood Nurseries Co., Inc. v. Dep't of Health*, No. 15-1694RP (Fla. DOAH Apr. 21, 2015) (Order Granting the Department's Motion for Summary Final Order of Dismissal Against Master Growers).[4] In *Baywood*, Master Growers—an alleged part owner of a prospective applicant for DO licensure—challenged the Department's proposed rules establishing the licensure application process for DOs. Master Growers conceded, however, that it did not itself satisfy the minimum statutory requirements for DO licensure, as set forth in section 381.986, Florida Statutes (2014). *Id.* at 1. Because Master Growers could not qualify for a DO license, the ALJ determined Master Growers lacked standing to challenge the proposed application rules at issue:

> Master Growers concedes that it does not qualify to become a dispensing organization pursuant to section 381.986. Without any possibility that Master Growers will be selected to become a dispensing organization, Master Growers' alleged injury is not real or immediate, but at most abstract, conjectural, speculative, or hypothetical. Moreover, the undersigned concludes that since master Growers does not qualify to become a dispensing organization (since it does not meet the three statutory prerequisites) its interests do not fall within the zone of interest to be protected by or regulated by the proposed rules under challenge.

Id. at 2.

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[4] Although Baywood involved a rule challenge proceeding, the ALJ applied the two-prong Agrico test in determining the petitioner lacked standing. *See id.*

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Similarly, here, there is no possibility that Hopkins Jr., Algene Hopkins, or Hatchett Creek Farms would (or could) be selected as the winning applicant for the *Pigford/BFL* MMTC license because they do not satisfy the minimum, statutory requirements for licensure. Without any possibility of licensure, their substantial interests are not affected by the denial of applications for the *Pigford/BFL* MMTC license notwithstanding their alleged economic interests in an application. Moreover, as non-class members, Petitioners lack any interest within the zone of interest regulated by section 381.986(8). *See id.* Each therefore lacks standing, as a matter of law, to challenge the Department's denial of the *Pigford/BFL* MMTC license application submitted by Hopkins Sr.

F. Hatchet Creek Farms could not be issued a license because it is not a recognized class member of Pigford or BFL.

Throughout the Amended Petition, Hatchet Creek Farms asserts that even though Hopkins Sr. was the named applicant, Hatchet Creek Farms was going to be the actual MMTC upon licensure. Assuming for argument's sake that this allegation is true, it is of no moment because Hatchett Creek Farms is not a recognized class member of *Pigford* or *BFL*. *See* DOAH Final Order, ¶ 2. Accordingly, the Department could not lawfully issue the Pigford license to Hatchet Creek Farms. Because there is no set of facts under which Hatchett Creek Farms could be issued the Pigford license given its lack of *Pigford* or *BFL* class member status, Hatchett Creek Farms lacks standing.

CONCLUSION

Based on the foregoing, the Department enters this Final Order dismissing the Petitioners' Amended Petition because the Petitioners lack standing.

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DONE AND ORDERED this 9th day of May 2023, at Tallahassee, Leon County, Florida.

JOSEPH A. LADAPO, MD, PhD
State Surgeon General

Kenneth A. Scheppke, MD, FAEMS
Deputy Secretary for Health
Florida Department of Health

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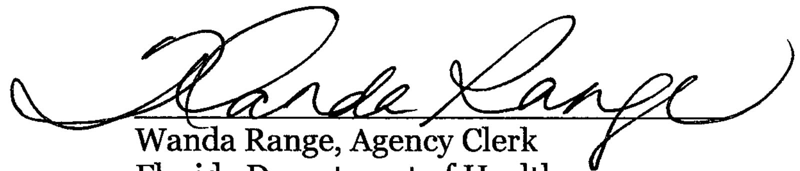
alysson.bradley@flhealth.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Order has be sent by regular U.S. mail, email, and/or by inter-office mail to the above-named persons this 9th day of May 2023.



Wanda Range, Agency Clerk
Florida Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, FL 32399-1703
Telephone: (850) 245-4005
Facsimile: (850) 413-8743

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS MUST BE INITIATED BY FILING A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A COPY OF THE NOTICE OF APPEAL, ACCOMPANIED BY THE FILING FEE, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF THE FILING OF THIS FINAL ORDER.

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STATE OF FLORIDA
DEPARTMENT OF HEALTH

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KELLY KING, M.D.,

EXHIBIT B

Petitioner,

v.

RENDITION NO.: DOH-23-0084-S-HO
DOH CASE NO.: 2022-0215

DEPARTMENT OF HEALTH, OFFICE OF MEDICAL MARIJUANA USE,

Respondent.
______________________________/

FINAL ORDER

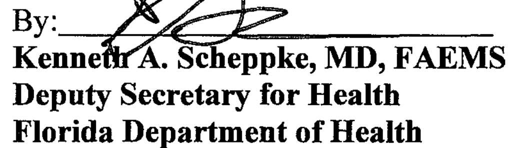
THIS MATTER came before the Department of Health ("Department") as a result of Petitioner's Petition filed on October 1, 2022. On January 25, 2023, the parties entered in a Joint Stipulation pursuant to section 120.57(4), Florida Statutes, which resolved all issues between the parties. A copy of the Joint Stipulation is attached hereto.

The Joint Stipulation is accepted and fully incorporated herein by reference into this Final Order.

Based on the foregoing, this proceeding is closed.

DONE AND ORDERED this 22nd day of February 2023 in Tallahassee, Leon County, Florida.

Joseph A. Ladapo, MD, PhD
State Surgeon General



By:______________________________
Kenneth A. Scheppke, MD, FAEMS
Deputy Secretary for Health
Florida Department of Health

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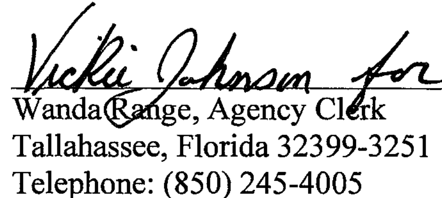
Alysson.Bradley@flhealth.gov

Counsel for the Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been furnished by U.S. Regular mail, inter-office mail, electronic transmission, or by hand-delivery to each of the above-named persons this 23 day of February, 2023.



Wanda Range, Agency Clerk
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STATE OF FLORIDA
DEPARTMENT OF HEALTH

KELLY KING, M.D.,

Petitioner,

v.

DOH CASE NO. 2022-0215

DEPARTMENT OF HEALTH, OFFICE
OF MEDICAL MARIJUANA USE,

Respondent.
_______________________________/

JOINT STIPULATION

Pursuant to Section 120.57(4), Florida Statutes, Kelly King, M.D. ("Petitioner") and the Department of Health, Office of Medical Marijuana Use ("Respondent"), collectively referred to as the Parties, enter into this Joint Stipulation ("Stipulation") as final disposition in this proceeding. The terms herein become effective upon the filing of a final order, which shall incorporate this Stipulation.

1. The Respondent has jurisdiction over this matter.

2. The Respondent is authorized to conduct background screenings pursuant to section 381.986(9), Florida Statutes, in connection with the medical marijuana program operated by the Respondent.

3. Section 381.986(8)(b)8., Florida Statutes, requires that an applicant for licensure as a medical marijuana treatment center ("MMTC") must demonstrate that all owners, officers, board members, and managers have passed a background screening pursuant to section 381.986(9), Florida Statutes.

4. Section 381.986(9), Florida Statutes, provides that an individual subject to background screening "must pass a level 2 background screening as provided under chapter

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435, which, in addition to the disqualifying offenses provided in section 435.04, shall exclude an individual who has an arrest awaiting final disposition for, has been found guilty of, regardless of adjudication, or has entered a plea of nolo contendere or guilty to an offense under chapter 837, chapter 895, or chapter 896 or similar law of another jurisdiction." § 381.986(9), Fla. Stat. (2022).

5. Section 435.04(3), Florida Statutes, provides:

> The security background investigations under this section must ensure that no person subject to this section has been arrested for and is awaiting final disposition of, been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense that constitutes domestic violence as defined in s. 741.28, whether such act was committed in this state or in another jurisdiction.

§ 435.04(3), Fla. Stat. (2022).

6. Petitioner submitted to Level 2 background screening in connection with an application for MMTC licensure under section 381.986(8)(a)2.b. ("MMTC Application").

7. Specifically, Petitioner completed a "Form 2: Waiver Agreement and Statement For Criminal History Record Checks" (Form 2) as provided in Emergency Rule 64ER21-16 which was submitted as part of the MMTC Application.

8. By executing Form 2, Petitioner acknowledged that her criminal background report would be sent to the Respondent and that her fingerprints may be retained by the Florida Department of Law Enforcement ("FDLE") and the FBI for purposes of providing subsequent arrest notifications to the Respondent.

9. Fingerprints submitted for purposes of level 2 background screening are retained by FDLE for the purpose of providing subsequent arrest notifications to the Respondent. *See* § 381.986(9)(c), Fla. Stat.

10. On or about March 11, 2022, Petitioner submitted for fingerprinting at a

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Livescan provider and provided to the Livescan provider the Respondent's ORI number so that the Respondent would be provided access by FDLE to Petitioner's background report for purposes of conducting a Level 2 background screening. The OMMU ORI number is part of the fingerprinting process so that FDLE is advised as to which state agency needs access to a particular person's report.

11. At the time Petitioner submitted for fingerprinting at a Livescan provider, Petitioner's background report did not contain a disqualifying offense.

12. The MMTC Application was submitted on March 25, 2022, and at that time, Petitioner's background report did not contain a disqualifying offense.

13. On or about May 22, 2022, Respondent received an "Arrest Notification" from the FDLE Information Notification System, reporting that Petitioner had been arrested and charged with Battery-Domestic Violence in Hillsborough County, Florida. That arrest and charge is a disqualifying offense pursuant to sections 381.986(9) and 435.04(3), Florida Statutes.

14. On September 20, 2022, the Respondent issued an agency decision letter stating, in part, that: "This criminal offense is disqualifying under section 435.04, Florida Statutes. Therefore, you have not passed the Level 2 background screening required by section 381.986(8)(b)8., Florida Statutes."

15. At the time the agency decision letter was issued on September 20, 2022, Petitioner's Battery-Domestic Violence charge was awaiting disposition and precluded her from passing a Level 2 background screening on that date pursuant to sections 381.986(9) and 435.04(3), Florida Statutes. The issue of whether Petitioner was an owner, officer, board member, or manager of the proposed MMTC required to pass a Level II background screening

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is not addressed or resolved by this Stipulation. Nothing herein shall limit or restrict the ability of the Respondent and other third parties from addressing that issue in another appropriate forum.

16. On October 1, 2022, Petitioner timely filed a petition challenging the Respondent's decision as reflected in the September 20, 2022 agency decision letter.

17. On December 1, 2022, and after the filing of Petitioner's petition, the Battery-Domestic Violence charge in Hillsborough County, Florida was disposed by *nolle prosequi.*

18. As a result of the *nolle prosequi,* as of December 1, 2022, and as of the date of this Stipulation, the Petitioner's background report does not reflect any disqualifying offense under section 381.986(9), Florida Statutes.

19. On September 20, 2022, the Department issued its notice of intent to award an MMTC license to Terry D. Gwinn as a Pigford applicant. That decision has been challenged, and as of December 1, 2022, and as of today, a final order regarding the Pigford MMTC license has not been rendered.

20. The Parties stipulate to the statements contained in paragraphs 1-19.

21. Additionally, the Parties stipulate to entry of a final order incorporating this Stipulation. The final order will contain no material terms other than those in this Stipulation. The final order shall operate to close DOH Case Number 2022-0215 and shall constitute final disposition and full resolution of the matters that were or could have been raised in this proceeding. This stipulation and final order resolves only those matters and issues expressly determined herein.

22. Petitioner expressly waives all rights under section 120.68, Florida Statutes, and waives all rights to further appeal or otherwise challenge or contest the validity of this

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Stipulation and the final order in which the Stipulation is incorporated.

23. The Parties waive the right to seek any attorney's fees or costs from each other in connection with this proceeding.

24. This Stipulation may be executed in any number of counterparts including, without limitation, scanned and facsimile copies, all of which together shall constitute a single document.

25. The Parties agree that this Stipulation represents a fair, appropriate and reasonable resolution to, and final disposition of, all disputes and matters made subject hereof.

26. The terms and provisions of this Stipulation are severable, and if any term or provision is declared or deemed void, invalid, illegal or otherwise unenforceable, then all remaining terms and provisions shall remain in full force and effect.

27. The signatories hereto are vested with the authority to execute this Stipulation on behalf of their respective principals, and as duly designated representatives, to fully bind such principals.

FLORIDA DEPARTMENT OF HEALTH
OFFICE OF MEDICAL MARIJUANA USE

By: Christopher Kimball

Name: Christopher Kimball

Title: Director, OMMU

Date: 1/25/2023

KELLY KING, M.D.

By: ______________________________

Name: ______________________________

Date: ______________________________

____

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connection with this proceeding.

24. This Stipulation may be executed in any number of counterparts including, without limitation, scanned and facsimile copies, all of which together shall constitute a single document.

25. The Parties agree that this Stipulation represents a fair, appropriate and reasonable resolution to, and final disposition of, all disputes and matters made subject hereof.

26. The terms and provisions of this Stipulation are severable, and if any term or provision is declared or deemed void, invalid, illegal or otherwise unenforceable, then all remaining terms and provisions shall remain in full force and effect.

27. The signatories hereto are vested with the authority to execute this Stipulation on behalf of their respective principals, and as duly designated representatives, to fully bind such principals.

FLORIDA DEPARTMENT OF HEALTH
OFFICE OF MEDICAL MARIJUANA USE

DocuSigned by:
By: Dr. kelly king

Name: ______________________

Title: ______________________

Date: ______________________

KELLY KING, M.D.

DocuSigned by:
By: Dr. kelly king
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Name: Dr. Kelly King

Date: 1/24/2023

____

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EXHIBIT C

Exhibit C – Acknowledgement and Statement of Understanding

I, __________________________, hereby represent and warrant that I am an heir of Moton Hopkins, Sr., an individual who applied for licensure as a medical marijuana treatment center (MMTC) pursuant to section 381.986(8)(a)2.b., Florida Statutes, and Emergency Rule 64ER21-16. I further attest to the following:

- I am one of two individuals identified as an heir of Moton Hopkins, Sr., in the MMTC application that Mr. Hopkins, Sr. submitted to the Florida Department of Health on March 25, 2022.
- I am an heir of Mr. Hopkins, Sr., and am designated to receive Moton Hopkins' MMTC license pursuant to chapter 2024-246, Laws of Florida.
- There are no other heirs of Moton Hopkins with a valid claim of entitlement to the MMTC license made available pursuant to chapter 2024-246, Laws of Florida.
- I will protect, defend, and hold the Department of Health harmless from any and all claims by other persons alleging to be heirs of Moton Hopkins, Sr. with purported entitlement to the MMTC license made available pursuant to chapter 2024-246, Laws of Florida.

Name (Printed): ____

Name (Signature): ______________________________________

Docusign Envelope ID: 27124B2F-9592-43C6-BFFF-0A9AAA821261

EXHIBIT D

Exhibit D – Acknowledgement and Statement of Understanding

I, ______________________________, hereby represent that I am an heir of Moton Hopkins,, Sr., an individual who applied for licensure as a medical marijuana treatment center (MMTC) pursuant to section 381.986(8)(a)2.b., Florida Statutes, and Emergency Rule 64ER21-16. I further attest to the following:

- I am one of two individuals identified as an heir of Moton Hopkins, Sr., in the MMTC application that Mr. Hopkins, Sr. submitted to the Florida Department of Health on March 25, 2022.

- Although I am an heir of Mr. Hopkins, Sr., I am not the heir designated to receive Moton Hopkins' MMTC license pursuant to chapter 2024-246, Laws of Florida.

- I waive any and all rights and claims of entitlement to MMTC licensure pursuant to chapter 2024-246, Laws of Florida, or otherwise resulting from Moton Hopkins' license application.

Name (Printed): ____

Name (Signature): ______________________________________