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December 11, 2015

VIA HAND DELIVERY

Agency Clerk
Office of General Counsel
Florida Department of Health
2585 Merchants Row Blvd., Suite 110
Tallahassee, FL 32399

Re: *San Felasco Nurseries, Inc. v. State of Florida, et al.; Petition for Formal Administrative Hearing regarding the Department of Health's agency action relating to low-THC cannabis Northeast Region licensure*

Dear Agency Clerk,

Enclosed please find a petition, pursuant to sections 120.569 and 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code, challenging the November 23, 2015 notices issued by the Department of Health, Office of Compassionate Use, denying San Felasco Nurseries, Inc.'s application to serve as the dispensing organization for low-THC cannabis in the Northeast Region and granting the application of Chestnut Hill Tree Farm, LLC to serve as the dispensing organization for the Northeast Region.

The Department's notice of agency action expressly recognizes the right of San Felasco to challenge the Department's agency actions noted above. Because the intended award of a license to Chestnut Hill would result in San Felasco being denied a license, the Department must refrain from taking any action during the pendency of the protest that would prejudice San Felasco's right to receive a Northeast Region license if its petition is successful. *See Ashbacker Radio Com, v. FCC*, 326 U.S. 327 (1945) (recognizing due process considerations and establishing the right of a competitor to seek a comparative hearing when a governmental entity selects between competing applicants); *see also Bio-Medical Applications of Clearwater, Inc. v. Dep't of HRS*, 370 So. 2d 19 (Fla. 2d DCA 1979) (applying *Ashbacker* in Florida and holding that failure to conduct a comparative hearing constituted a material error in procedure requiring that the matter be remanded for further agency action in accordance with Florida's Administrative Procedure Act). Failure to do so will render the administrative points of entry provided by the Department illusory, and deny San Felasco its rights under chapter 120 and constitutional due process.

Accordingly, please confirm the Department has stayed all action related to the Northeast Region license and will not take any action that would prejudice San Felasco's right to receive a Northeast Region license if its petition is successful.

If you have any questions regarding the enclosed, please contact our office.

Sincerely,

James A. McKee

cc:

Department of Health General Counsel
Mike Glazer
Steve Menton

STATE OF FLORIDA
DEPARTMENT OF HEALTH

SAN FELASCO NURSERIES, INC. d/b/a Grandiflora, a Florida corporation,

Petitioner,

vs.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, OFFICE OF COMPASSIONATE USE and CHESTNUT HILL TREE FARM, LLC, a Florida limited liability company,

Respondents.
_____/

PETITION FOR FORMAL ADMINISTRATIVE HEARING

Petitioner, San Felasco Nurseries, Inc. ("San Felasco"), by and through its undersigned attorneys, and pursuant to sections 120.569 and 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code ("F.A.C."), files this Petition for Formal Administrative Hearing challenging the November 23, 2015 notices issued by the Florida Department of Health, Office of Compassionate Use (the "Office") denying San Felasco's application to serve as the dispensing organization for low-THC cannabis in the Northeast Region (the "Application") and granting the application of Chestnut Hill Tree Farm, LLC to serve as the dispensing organization for the Northeast Region. *See* Exhibits A and B. In support of this Petition, San Felasco states as follows:

PRELIMINARY STATEMENT

1. San Felasco was the highest ranked applicant in the Northeast Region, and was determined to be the applicant best suited for the important purpose of providing low-THC medical use cannabis to patients with debilitating diseases. Pursuant to the applicable statutory

scheme and administrative rules, the Office was required to award San Felasco, the number one ranked applicant, the sole Northeast Region dispensing organization license. Due to an erroneous decision to disqualify San Felasco after the scoring process had already been finalized, the Office disqualified San Felasco, instead awarding the sole license to the second place applicant, Chestnut Hill. The Office's disqualification decision is based upon an erroneous determination that one of the individuals listed in San Felasco's application failed a background screening. However, the individual at issue has no background record that would justify the Office's disqualification of San Felasco under Florida law, and is neither a manager or owner of San Felasco. Additionally, Chestnut Hill, the second place applicant which was selected to receive the license, fails to meet the minimum requirements of the statute and is not eligible to receive a license. Accordingly, for the reasons described in detail below, the Office's decision to disqualify San Felasco must be reversed, and as the highest-scored qualified applicant, San Felasco must be awarded the Northeast Region dispensing organization license.

THE PARTIES

2. San Felasco is a Florida corporation incorporated in 1973, has been registered as a nursery in Florida since October of 1973, and satisfies each of the requirements enumerated in section 381.986(5)(b), Florida Statutes. San Felasco submitted a timely application to the Office to serve as the dispensing organization for the Northeast Region, was the highest scored applicant in the Northeast Region, and should have been awarded the dispensing organization license for the Northeast Region pursuant to the statutes and rules governing the Office.

3. For purposes of this proceeding, San Felasco's address is that of the undersigned attorneys.

4. Respondent, the Department of Health, Office of Compassionate Use is an agency of the State of Florida with its principal business address located at 2585 Merchants Row Boulevard, Tallahassee, Florida 32399.

5. Respondent, Chestnut Hill Tree Farm, LLC ("Chestnut Hill"), is a Florida limited liability company formed in August of 2005, that has been registered as a nursery in Florida since July of 2015. Chestnut Hill Tree Farm, LLC is the successor by merger to Chestnut Tree Farm, Inc., which was incorporated in 1999. The principal business address of Chestnut Hill is located at 15105 N.W. 94th Avenue, Alachua, FL 32615. Chestnut Hill was the second place applicant in the Northeast Region, and the Office has noticed its intent to award the low-THC cannabis dispensing organization license in the Northeast Region to Chestnut Hill.

PROCEDURAL BACKGROUND

6. This proceeding arises from a competitive licensure process conducted by the Office intended to award one license in each of five regions authorizing the license recipient to operate as a dispensing organization for low-THC, medical use cannabis in the region in which it receives a license.

I. Statutory Scheme

7. During the 2014 legislative session, the Florida Legislature passed Senate Bill 1030 entitled the "Compassionate Medical Cannabis Act of 2014," chapter 2014-157, Laws of Florida (the "Act").

8. The Act represents an historic and momentous change for the State of Florida regarding the regulation and use of cannabis, previously a Schedule-1 drug in all forms. To provide relief for patients with debilitating diseases, the Act allows for the use of low-THC cannabis by qualified patients for medical use when ordered by a Florida physician.

9. The Act authorizes licensed physicians to order low-THC cannabis beginning January 1, 2015, for qualified patients under specified conditions, primarily those suffering from cancer or severe and persistent seizures and muscle spasms.

10. The Act charges the Department of Health (the "Department") with the vast majority of responsibilities associated with implementation. The Department was required to establish a compassionate-use registry by January 1, 2015. The Department was also required to establish the Office of Compassionate Use within the agency and work with the state university system to bring FDA-approved investigational new drugs for the treatment of refractory epilepsy to Florida. The Act appropriated $1 million to the Department's Biomedical Research Council to further state university research related to cannibidiol and its effect on childhood epilepsy. Finally, the Act required the Department to authorize, by January 1, 2015, the establishment of five dispensing organizations to grow, refine, and dispense low-THC cannabis to qualified Florida patients.

11. As contemplated by the Act, one dispensing organization is to be licensed in each of five regions throughout the state. The Department initially attempted to promulgate rules awarding licenses through a lottery system. However, the Department's proposed rules were challenged and the proposed lottery system was rejected. As concluded by Judge Watkins in *Costa Farms, LLC v. Department of Health*, Case No. 14-4296RP at ¶93 (Fla. DOAH Nov. 14, 2014), the Act "requires selecting the most dependable, most qualified dispensing organizations to cultivate, process, and dispense low-THC cannabis as prescribed by physicians." The Office's Application recognizes this principle, stating:

> This Application for Low-THC Cannabis Dispensing Organization Approval (Application) is designed to allow the Florida Department of Health, Office of Compassionate Use (OCU) to fulfill its statutory duty to select the five Dispensing Organizations

> meeting the requirements of section 381.986(5)(b), F.S. (Statute), best able to further the statutory objective of ensuring accessibility and availability of Low-THC cannabis to patients. This has been further clarified to mean that OCU must choose the most dependable, most qualified dispensing organizations that can consistently deliver high-quality Derivative Products.

(Emphasis added).

12. The Act also provides certain minimum requirements that must be met by applicants, including:

> 1. The technical and technological ability to cultivate and produce low-THC cannabis. The applicant must possess a valid certificate of registration issued by the Department of Agriculture and Consumer Services pursuant to s. 581.131 that is issued for the cultivation of more than 400,000 plants, be operated by a nurseryman as defined in s. 581.011, and have been operated as a registered nursery in this state for at least 30 continuous years.
>
> 2. The ability to secure the premises, resources, and personnel necessary to operate as a dispensing organization.
>
> 3. The ability to maintain accountability of all raw materials, finished products, and any byproducts to prevent diversion or unlawful access to or possession of these substances.
>
> 4. An infrastructure reasonably located to dispense low-THC cannabis to registered patients statewide or regionally as determined by the department.
>
> 5. The financial ability to maintain operations for the duration of the 2-year approval cycle, including the provision of certified financials to the department. Upon approval, the applicant must post a $5 million performance bond.
>
> 6. That all owners and managers have been fingerprinted and have successfully passed a level 2 background screening pursuant to s. 435.04.
>
> 7. The employment of a medical director who is a physician licensed under chapter 458 or chapter 459 to supervise the activities of the dispensing organization.

§ 381.986(5)(b), Fla. Stat.

II. Application Process

13. In accordance with section 381.986, the Department adopted certain rules setting forth the process by which applications to serve as dispensing organizations would be selected, reviewed and evaluated, and the process by which the ultimate licensees would be selected. These rules are set forth in chapter 64-4, Florida Administrative Code.

14. The Department adopted Form DH8006-OCU-2/2015 as the application form to be submitted by applicants, and required certain documentation to be included with the application. The Department's rules required that completed applications be submitted to the Agency Clerk of the Department no later than 5:00 PM Eastern Time, 21 calendar days after the effective date of the rule – making applications due on July 8, 2015. Rule 64-4.002(5), Fla. Admin. Code.

15. Twenty-eight applications were received by the Office seeking dispensing organization licenses, with each application identifying the region for which the applicant was applying. Five applicants submitted applications in the Northeast Region: San Felasco; Chestnut Hill; Bill's Nursery; Hart's Plant Nursery; and Loop's Nursery and Greenhouses.

III. Evaluation Process

16. Following the receipt of applications, the Department's rules provided that the Office would first review the applications to determine whether the applicant satisfied the mandatory minimum requirements set forth in section 381.986(5)(b), Florida Statutes, and would then proceed to score only the qualified applications which satisfied those requirements. Rule 64-4.002(4), Florida Administrative Code, states:

> Failure to submit the $60,063.00 application fee or documentation sufficient to establish the Applicant meets the requirements of Section 381.986(5)(b), F.S., **shall result in the application being denied prior to any scoring** as contemplated in Section (5) of this rule.

(Emphasis added). The Application likewise recognizes the sequence of first determining qualifications and then scoring set forth in the rules, and re-emphasizes that failing to provide the information required would result in disqualification prior to scoring, thereby implying that scoring constitutes an acknowledgement that the applicant satisfied the minimum requirements. The Application states:

> The following information must be submitted and is required by the Statute. A failure to submit the information required by Part II **will result** in the application being denied **prior to** any scoring as contemplated in rule 64-4.002(5), F.A.C.

(Emphasis added).

17. Under the next phase of the process set forth in the rules, after determining applicants met the requirements of section 381.986(5)(b), the remaining "qualified" applicants would then be "substantively review[ed], evaluate[d], and score[d]" using the scorecard promulgated by the Department. Rule 64-4.002(5)(a), Fla. Admin. Code. This substantive review was to be completed by a three-member evaluation team consisting of the Director of the Office, a member of the Drug Policy Advisory Council appointed by the State Surgeon General, and a CPA appointed by the State Surgeon General. *Id.*

18. The evaluation team members were required to independently review and score the applications using the scorecard promulgated by the Department, and the scorecards from each reviewer were then to be combined to generate an aggregate score for each qualified applicant in each region. Rule 64-4.002(5)(b), Fla. Admin. Code.

19. Following the tabulations, pursuant to the Department's rules, "the Applicant with the highest aggregate score in each dispensing region [was to] be selected as the region's Dispensing Organization." *Id.* As described in detail herein, this did not occur in the Northeast

Region, where after the tabulation, San Felasco, the highest scored applicant, was erroneously disqualified and the license was awarded instead to the second-place applicant, Chestnut Hill.

IV. Pre-Scoring Review Process

20. Pursuant to the Department's rules, the Office reviewed the qualifications of each applicant. On or around July 29, 2015, or approximately three weeks following the application deadline, the Office transmitted letters to certain applicants (a) requesting additional information, (b) identifying issues which needed to be resolved or corrected, and (c) requesting clarifying information. Some of the Office's letters even invited applicants to replace non-compliant application information. For example, one applicant was asked by the Office to replace its non-audited financial information with audited financial information as required, while the Office permitted another applicant to remove a listed employee which it determined should not have been included in the application. In multiple instances, the Office accepted additional or substitute information from applicants regarding certain of the topics addressed in its letters dated July 29, 2015.

21. The Office's July 29th letter to San Felasco requested additional information necessary to complete the level 2 background screenings for certain individuals identified in San Felasco's application. San Felasco provided such information to the Office and additionally requested information to be transmitted directly to the Office from the appropriate clerks of court. A complicating factor which may be the source of some of the confusion associated with the erroneous disqualification was that the Office directed that the additional information be sent directly from the applicable court clerk, and not from San Felasco, or even the person subject to the background check. Presumably this was required by the Office to protect the integrity of the background process. Because of that direct process, San Felasco had no method of ensuring receipt by the Office of the information requested and did not know precisely what was being

sent to the Office by the court clerk. This may be the sole source of the confusion which resulted in the erroneous disqualification. Therefore, with this in mind, in each of the letters sent from San Felasco to the Office, San Felasco specifically requested that the Office advise if any deficiency remained with regard to its application or if any additional information was required:

A. In correspondence dated September 4, 2015, San Felasco provided the requested information regarding the individual now in question and requested that the Office "[p]lease confirm that this deficiency has been resolved."

B. In an email to counsel for the Office dated September 15, 2015, counsel for San Felasco made a second request for "an update of what deficiencies (if any) still remain" and requested "a list of which individuals still need clarity on their Level 2 clearances" while stating that San Felasco believed that the information needed to clear up the background screening of the individual in question had been provided.

C. In correspondence sent to the Office dated September 24, 2015, San Felasco stated that it understood that its application had been deemed complete and that any deficiencies had been resolved, and specifically requested that the Office "advise [it] immediately" if that understanding was incorrect.

D. San Felasco's counsel followed up on the above correspondence via telephone calls to the Office's counsel to ensure that no deficiencies remained in San Felasco's application.

22. Notwithstanding four separate attempts during the month of September, 2015 to seek clarification regarding the information requested by the Office, the Office (a) never requested more information, (b) never gave any indication that it lacked information, and (c)

never indicated to San Felasco that any of the individuals listed in its application had not passed level 2 background screening.[1]

23. At some time on or before September 16, 2015, the Office deemed certain applications complete and advanced those applications that had satisfied the statutory minimum requirements, including San Felasco's application, to the scoring phase. Accordingly, in compliance with the Department's rules, the Office determined that San Felasco complied with the requirements of section 381.986(5)(b), including the requirement that all owners and managers pass a level 2 background screening. Stated differently, the Office's actions in advancing San Felasco to scoring confirms that the Office had concluded that all owners and managers for San Felasco had passed level 2 background screening, as San Felasco would not have been permitted under the Office's rules to advance to the scoring phase absent such a determination.

24. Scoring of the applicants was conducted by a three member evaluation panel consisting of Ellyn Hutson, Christian Bax, and Patricia Nelson.

25. In the Northeast Region, the five applicants were scored as follows:

Applicant	**Aggregate Score**	**Rank**
San Felasco	3.9750	1
Chestnut Hill	3.7917	2
Loop's	3.5708	3
Hart's	2.4375	4

[1] San Felasco notes that the Office and certain personnel from the Department General Counsel's office experienced personnel changes during the pendency of the application process. This personnel change could have contributed to the issues discussed herein.

Bill's	1.2250	5

26. Thus, per the Office's rules, San Felasco – as the Northeast Region applicant receiving the highest aggregate score – was required to be named the licensee for the Northeast Region.

V. The Office's Decision Letters

27. Instead of awarding the Northeast Region Dispensing Organization license to San Felasco as required by the Department's rules, the Office apparently improperly revisited its earlier decision that San Felasco had met the requirements of section 381.986(5)(b), and reversed its decision, determining instead that San Felasco's application would be disqualified. Accordingly, having already determined that San Felasco met the requirements of the statute, the Office did not reverse its determination and conclude that San Felasco should be disqualified until after scoring had been completed and the Office knew that San Felasco was to be issued the Northeast Region Dispensing Organization license. This plainly violates the procedural sequence of the Office's rules.

28. On November 23, 2015, the Office transmitted letters to the applicants advising them of the results of the licensure process. In the Northeast Region, the Office transmitted a letter to Chestnut Hill, the second ranked applicant, advising it had been selected for licensure. Loop's, Hart's, and Bill's each received letters advising that, as they were not the highest scored applicant in the Northeast Region, their application had been denied.

29. San Felasco, the highest ranked applicant in the Northeast Region, received a different letter. The letter transmitted to San Felasco recited that the Office had previously requested additional information from San Felasco regarding certain individuals necessary to complete the level 2 background screening for those individuals, and that San Felasco "did not

cure the deficiency and therefore failed to meet the mandatory requirements of section 381.986(5)(b), Florida Statutes. Specifically, [X.X.][2] failed to pass the level 2 background screening as an owner and/or manager, therefore your application is denied." That letter was the first indication to San Felasco that it had not "cured" any application deficiency, notwithstanding San Felasco's multiple requests for information from the Office.

30. As indicated above, however, San Felasco timely provided to the Office the information it requested, and further requested in repeated follow-up letters, electronic correspondence, and telephone calls that the Office advise if any deficiency remained. As mentioned earlier, because of the process required by the Office that remediating information be provided directly by the court clerk, San Felasco had no ability to verify the receipt of requested follow up information by the Office absent a communication from the Office. The Office did not indicate to San Felasco that any deficiency remained, and never advised San Felasco that any individual had failed to pass a level 2 background screening. To the contrary, the Office advanced San Felasco to the scoring phase after receipt of the requested information, thus evidencing that the Office had determined San Felasco to meet the requirements of section 381.986(5)(b). Had San Felasco been timely informed of any remaining deficiency or purported failure of a level 2 background check, it could have availed itself of mitigating remedies, such as applying for an exemption relative to X.X. as provided by statute, clarifying X.X.'s employment position, and other remedies. After being advanced, San Felasco prevailed at the scoring phase.

31. Also by letter dated November 23, 2015, the Department advised that X.X. purportedly failed to pass a level 2 background screening, and that the Office reviewed his background screening information and determined that a June 3, 2004, Kansas misdemeanor

[2] Identified herein as X.X. for confidentiality purposes.

charge of Possession of Depressant/Stimulants/Hallucinogenics/Steroids constituted an offense that is disqualifying under section 435.04, Florida Statutes, and therefore X.X. had not passed the level 2 background screening. The letter further included a notice of rights providing that the determination was agency action for purposes of section 120.569, Florida Statutes, which could be challenged within 21 days of receipt of the letter. X.X. is, by a separately filed petition, challenging the Office's determination that he did not pass the level 2 background screening.

32. The November 23, 2015, letter to San Felasco likewise included a notice of rights providing that the notice constituted agency action and that a party whose substantial interests are affected by the action may petition for an administrative hearing. This Petition is timely filed within the time frame for seeking a formal administrative hearing set forth in the Notice of Rights.

SUBSTANTIAL INTERESTS

33. As the highest ranked applicant in the Northeast Region, San Felasco was entitled to be awarded the dispensing organization license for the Northeast Region. The Office instead disqualified San Felasco based on mistaken facts and an erroneous interpretation of law, and awarded the Northeast Region license to the second-ranked vendor, Chestnut Hill. As San Felasco was entitled to an award of the Northeast Region license, but was denied that award based upon the Office's erroneous decision, San Felasco's interests are substantially affected by the Office's actions in improperly disqualifying the application of San Felasco and in improperly awarding the competitive issuance license to Chestnut Hill, an applicant which was ranked below San Felasco and which itself failed to meet the requirements of section 381.986(5)(b).

STATEMENT OF ULTIMATE FACTS ALLEGED

34. Based upon the statutes and rules governing the Office, and the process followed by the Office, the application submitted by San Felasco was the highest scoring eligible application submitted in the Northeast Region, and San Felasco was entitled to be awarded the dispensing organization license for the Northeast Region. The Office's decision to instead deny the application of San Felasco and grant the Northeast Region license to Chestnut Hill fails to comply with the statutes and rules governing the Office, and was arbitrary and capricious and contrary to competition and general principles of fairness applicable to the Office in conducting this competitive licensing process.

I. Disqualification of San Felasco was Improper

35. Based upon the Office's scoring of the Northeast Region applications, San Felasco was the highest scored applicant in the Northeast Region, was entitled to be awarded the dispensing organization license for the Northeast Region, and would have won the dispensing organization license for the Northeast Region but for the Office's erroneous decision, after scoring, to reject San Felasco's application on the basis that X.X. purportedly failed to pass a level 2 background screening.

36. The November 23, 2015, letter from the Office notifying San Felasco that its application had been denied provided that the application had been denied solely because "[X.X.] failed to pass the level 2 background screening as an owner and/or manager[.]" No other basis for the denial of San Felasco's application was identified by the Office.

37. The Office's July 29, 2015, correspondence notified San Felasco that additional information was required as to certain individuals, including X.X., in connection with the level 2 background screening of those individuals. In addition, X.X. received correspondence directly from the Office dated August 7, 2015, stating that the Office was "unable to complete its review"

because a charge of "Possession of Depressant/Stimulants/Hallucinogenics/Steroids" from Junction City, Kansas was "on the record and the level is unclear or no disposition is reported." The letter further requested that X.X. "provide documentation and explanation of each charge and the final disposition," with documentation being required to "come directly to the Office from the agency or court that has the charge record or disposition," and requested that X.X. "address the following in your explanation: the level of the offense and the final disposition."

38. In response to this letter, San Felasco provided an explanation stating that the level of the offense was a misdemeanor, and the final disposition was a plea of nolo contendere, and provided a copy of the disposition records to the Office. San Felasco additionally requested that the final disposition be sent directly to the Office from the clerk of the District Court of Geary County, Kansas. San Felasco thus fully complied with both the July 29th and August 7th requests. In addition, San Felasco repeatedly asked the Office if additional information was needed to resolve any level 2 background screening issues, to identify what, if any, level 2 background screening issues remained, and to identify whether any individuals still required clarity on their level 2 background screenings. At no time prior to the issuance of the Office's intended licensing decisions on November 23, 2015, was San Felasco advised that X.X. had not passed a level 2 background screening.

A. Disqualification was Improper Because There was no Level 2 Disqualifying Offense

39. Pursuant to section 435.04(2), Florida Statutes, an individual is disqualified in a level 2 background screening only if they "have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the [specifically

enumerated] provisions of state law **or similar law of another jurisdiction**. § 435.04(2), Fla. Stat. (Emphasis added).

40. X.X.'s offense, a misdemeanor, was not one of the offenses enumerated (and prohibited) by section 435.04(2), Florida Statutes. In fact, the only enumerated offense in section 435.04(2) even remotely resembling the charge identified regarding X.X. is set forth at section 435.04(2)(ss): "Chapter 893, relating to drug abuse prevention and control, only if the offense was a felony or if any other person involved in the offense was a minor." § 435.04(2)(ss), Fla. Stat. As section 435.04(2)(ss) makes clear, however, a violation of chapter 893 is a disqualifying offense "**only if the offense was a felony**." *Id.* (emphasis added).

41. While X.X. plead nolo contendere to a charge arising under K.S.A. 65-4162(a)(1), the article of the public health chapter of the Kansas Statutes relating to controlled substances, as the disposition expressly states, and as the explanation provided to the Office make clear, the offense was a misdemeanor. As section 435.04(2)(ss) provides that a violation of chapter 893 (or a "similar law of another jurisdiction") is a disqualifying offense "only if the offense was a felony," X.X.'s plea to a misdemeanor charge does not constitute a disqualifying offense within the meaning of section 435.04, Florida Statutes. Accordingly, the Office's determination that X.X. "failed to pass the level 2 background screening" was simply incorrect and the disqualification of X.X. and San Felasco taken in reliance on this determination was contrary to law.

42. While section 435.04 appears to provide unambiguously that a violation of chapter 893 or a similar law of another jurisdiction is disqualifying only if the offense "was a felony," at most the statute would be ambiguous. Were the statute ambiguous, the rule of lenity

would apply to dictate that the statute be narrowly construed to exclude only offenses where the conviction or plea was actually to a felony.

43. In Florida, the rule of lenity is codified in section 775.021, Florida Statutes, providing in relevant part that: "The provisions of this code **and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused**." § 775.021(1), Fla. Stat. (emphasis added). As the Florida Supreme Court has made clear, the rule of lenity is applicable not only in the criminal law context, but likewise applies when a civil case turns upon the interpretation of a criminal statute (such as chapter 893 of the Florida Statutes or K.S.A. 65-4162). *See North Carillon, LLC v. CRC*, 135 So. 3d 274, 280-281 (Fla. 2014) ("The rule of lenity . . . is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation.") (*quoting United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992)). This principle has likewise been set forth by the United States Supreme Court, which applied the rule of lenity to determine that a Florida conviction for DUI causing serious bodily injury did not constitute a "crime of violence" so as to render a permanent resident alien deportable. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor . . . it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.").

44. Moreover, the Division of Administrative Hearings has appropriately applied the rule of lenity in other situations when determining whether an act would serve to bar an applicant from licensure. *See Arroyo v. Comm'r of Educ.*, Case No. 11-2799 at ¶ 109 (Fla. DOAH May 31, 2012) (applying rule of lenity in determining whether applicant was guilty of a disqualifying act of moral turpitude that would bar issuance of teaching certificate to conclude that "any statutory ambiguity should be resolved in favor of Petitioner."). In addition, certain of Florida's sister jurisdictions have seen fit to apply the rule of lenity in determining whether an offense constitutes a disqualifying offense for purposes of licensure. *See Haywood v. State*, 193 P.3d 1203, 1206 (Alaska App. 2008) (applying rule of lenity to determine if offense constituted an offense that would result in disqualification from holding commercial driver's license).

B. Even if the Offense Could Constitute a Level 2 Disqualifying Offense, the Record Was Expunged and is Therefore Not a Disqualifying Offense.

45. Even if the cited offense constituted a disqualifying offense, the offense was expunged from X.X.'s record, and therefore cannot be considered for level 2 background screening purposes. Section 435.04(2) expressly includes as disqualifying offenses only offenses for which the record has not been sealed or expunged. Because the Kansas Court expunged X.X.'s record with regards to the offense cited by the Department, the offense cannot be considered a disqualifying offense pursuant to section 435.04.

46. Pursuant to the Kansas statutory scheme governing X.X.'s expungement, X.X. – subject to limited exceptions not applicable here – is to "be treated as not having been arrested, convicted or diverted of the crime[.]" K.S.A. 21-6614(i). Indeed, X.X., at the time the Office informed him that he had been deemed disqualified, would have been entirely within his rights under Kansas law to affirmatively state in "any application[s] for employment, licensure or other

civil right or privilege" (including his background screening pursuant to section 435.04) that "[he] has never been arrested, convicted or diverted of such crime." K.S.A. 21-6614(k)(1).[3]

47. Had the Office informed X.X. or San Felasco that it believed the Kansas nolo contendere plea to a misdemeanor constituted a disqualifying offense, X.X. and San Felasco could have, and would have, readily provided a copy of the expungement order to the Office had they known that it was necessary to do so. However, because the offense was a misdemeanor that on its face clearly does not constitute a disqualifying offense, and because the Office had in fact affirmatively advised counsel for San Felasco via email on September 18, 2015, that the application "ha[d] been deemed complete and no further information is required," San Felasco was lulled into a false sense of security that the Office had correctly determined that X.X. had no disqualifying offense and had passed his level 2 background screening such that the expungement order was not necessary to resolve the issue and that the application of San Felasco was being advanced to the scoring phase.

C. The Office Failed to Follow Department Rules in Disqualifying San Felasco

48. The Department's rules set forth the process by which the Office would review, evaluate, and score applications to be licensed as dispensing organizations in Rule 64-4.002(4), Florida Administrative Code. This rule provided as follows:

> Failure to submit the $60,063.00 application fee **or documentation sufficient to establish the Applicant meets the**

[3] Indeed, pursuant to the terms of the Kansas Statutes, had the level 2 background screening been run after the date that the expungement order was entered, the level 2 background screening would not have indicated any offense in the first instance, as Kansas law bars the custodian of the arrest and conviction records from disclosing the existence of such records subject to certain exceptions not applicable here. K.S.A. 21-6614(l). This fact further highlights the impropriety of the Office relying on an expunged charge to disqualify X.X., as the offense would not have even been reportable to Florida had a background screening been conducted at the time the disqualification determination was apparently made.

> **requirements of Section 381.986(5)(b), F.S., shall result in the application being denied prior to any scoring as contemplated in subsection (5) of this rule.**

Rule 64-4.002(4), Fla. Admin. Code (emphasis added). The Application reflects this same policy, stating:

> "The following information must be submitted and is required by the Statute. A failure to submit the information required by Part II will result in the application being denied **prior** to any scoring as contemplated in rule 64-4.002(5), F.A.C."

(Emphasis added). Rule 64-4.002(5), in turn, provided the process by which the Office would score applicants who were eligible for scoring, and provided that "[t]he Applicant with the highest aggregate score in each dispensing region shall be selected as the region's Dispensing Organization." Rule 64-4.002(5)(b), Fla. Admin. Code.

49. It is thus clear that, under the Department's rules, applications were first to be evaluated during an evaluation phase to determine if the applicant satisfied the requirements of section 381.986(5)(b), Florida Statutes, prior to the scoring of any application. Section 381.986(5)(b)6. provided, as one such requirement, that an applicant demonstrate "[t]hat all owners and managers have been fingerprinted and have successfully passed a level 2 background screening pursuant to s. 435.04." § 381.986(5)(b)6., Fla. Stat. Thus, if an applicant had not demonstrated that all owners and managers had passed a level 2 background screening, that applicant's application was not to be scored. Put another way, had the Department's rules been followed, the scoring of an applicant would constitute proof that the Office had determined that the applicant satisfied all requirements of section 381.986(5)(b), including the requirement that all owners and managers pass a level 2 background screening.

50. The evidence indicates that the Office actually did make such determinations as to all applicants who were scored. In September 16, 2015, correspondence to legal counsel for San

Felasco, an attorney for the Office advised that the Office was processing applications pursuant to section 120.60, Florida Statutes, and that the applications were "considered complete" at that time. Pursuant to section 120.60(1), an application is not deemed "complete" until the correction of any errors or omissions in the application that the applicant was timely notified of: "An application is complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired." § 120.60(1), Florida Statutes. Thus, based upon the representations of the Office's own counsel, the Office had determined no later than September 16, 2015, that the San Felasco application contained no omissions or errors, satisfied the requirements of section 381.986(5)(b), and was eligible to proceed to the scoring phase – and to be awarded the license if it attained the highest score. The fact that the Application was considered complete, and subsequently advanced to the scoring phase, can lead to no other reasonable conclusion but that the Application had been deemed qualified by the Office at the point it was considered to be "complete" and the scoring commenced.

51. Indeed, San Felasco specifically wrote the Office to confirm that the applications had been deemed "complete" in accordance with the above meaning and that no deficiency remained in the San Felasco application. On September 24, 2015, undersigned counsel wrote to counsel for the Office, stating in part as follows:

> [Counsel for San Felasco] contacted you on September 15, 2015, after transmission of her September 4th correspondence to request an update on the status of the Department's information requests and determine whether the Department had received all information requested. On September 16, 2015, [counsel for San Felasco] requested a meeting with you. You declined to meet, and on September 16, 2015, you represented to [counsel for San Felasco] that the applications had been deemed complete and were being evaluated. As noted above, we interpret this response as meaning that no deficiencies remained in San Felasco's

> application. This interpretation is consistent with section 120.60, Florida Statutes, which states in part "An application is complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired."
>
> Given the clear meaning of the term "complete" in the section 120.60, Florida Statutes, context, we interpret your written statements to [counsel for San Felasco] as indicating that the Department has received all requested information, and that any errors or omissions in San Felasco's application have been corrected.

The September 24th correspondence further stated "**If San Felasco's interpretation of your correspondence (that San Felasco's application has been determined by the Department to be complete and that no deficiencies remain) is incorrect, please advise us immediately.**" (Emphasis added). Despite this request, the Office never notified San Felasco until the November 23rd licensing decisions were issued that it believed X.X. to be disqualified and the San Felasco application to thus be deficient.

52. Moreover, records produced to San Felasco further indicate that the Office had made a determination as to San Felasco – specifically that the application satisfied all requirements of section 381.986(5)(b). While certain applicants in other regions were disqualified for failure to satisfy the minimum requirements of section 381.986(5)(b), not a single other such disqualified applicant was advanced to the scoring phase. Two applicants, O.F. Nelson & Sons and Ed Miller and Son Nursery, had their applications rejected from the outset for failing to timely submit the application in accordance with the rules. Two other applicants, Razbuton, Inc. and Tropiflora, LLC, were informed on November 23, 2015 that their applications had been rejected for failure to include the certified financial statements required by the statutes and rules. Pursuant to the Department's rules, none of these four applications were ever advanced to the scoring round and actually scored, as San Felasco was. Such facts

demonstrate that the Office in fact followed the Department's rules, disqualifying those applications that failed to meet the statutory requirements prior to scoring, and advancing to the scoring phase only those applicants whom the Office had already determined met the minimum qualification requirements.

53. Notwithstanding the fact that the Office thus had already determined San Felasco was a qualified applicant that satisfied the requirements of section 381.986(5)(b), and the fact that the Office acted in every conceivable manner as if San Felasco was a qualified applicant, the Office appears to have revisited the question only after the scoring process had already been completed and the results were known – and after the Office was well aware that San Felasco would be the prevailing applicant in the Northeast Region if its application was not disqualified. Only at this time, upon an *ex post facto* revisiting of this question, did the Office determine that San Felasco should be disqualified. Indeed San Felasco was first notified that it was being disqualified, and X.X. was first notified that the Office had determined that he did not pass a level 2 background screening, in correspondence dated November 23, 2015 – the same date the Office announced the selection of the winning applicants.

54. It is well settled under Florida law that qualification determinations in a competitive process must be made prior to scoring, or else the opportunity to manipulate the process and achieve the favored outcome – as well as the accompanying lack of public confidence that the government is conducting competitive processes in a fair and evenhanded manner – may arise. As Judge Van Laningham succinctly stated in the comparable procurement context:

> If the decision on materiality were made from a post facto perspective based on extrinsic factors, then the temptation would be great to base the determination on reasons that should not bear on the issue. In particular, the materiality of a deviation should not

> depend on whether the deficient proposal happens to be highest ranked. To see this point, imagine a close football game in which, at the start of the fourth quarter, one team scores a go-ahead touchdown -- if the receiver came down in bounds. Would anyone think it fair if the referees awarded the points provisionally and reserved ruling on whether the touchdown should count until after the end of the game? Of course not. **In a contest, potentially determinative decisions involving a competitor's compliance with the rules need to be made when the outcome is in doubt, when the effect of the decision is yet unknown; otherwise, the outcome may be manipulated.**

Syslogic Technology Servs., Inc. v. So. Fla. Water Mgmt. Dist., Case No. 01-4385BID at 61, n.19 (Fla. DOAH Jan. 18, 2002; SFWMD Mar. 6, 2002) (emphasis added); *see also Pro Tech Monitoring, Inc. v. Dep't of Corr.*, Case No. 11-5794BID at 67, n.4 (Fla. DOAH April 4, 2012; FDOC May 2, 2012) (same; noting that making qualification decisions only after the preliminary results of scoring are known "fosters an appearance and opportunity for preferential treatment that compromises the integrity of the competitive process").

55. The Office originally followed the process set forth in its rules and correctly determined that San Felasco satisfied the statutory requirements, after which it affirmatively advanced San Felasco to the scoring phase, where San Felasco received the highest score among the five applicants. The Office was not permitted to revisit this disqualification decision after rankings had been determined. To do so is anti-competitive and undermines confidence in the Office's processes. Even if the Office did have the right to revisit this issue after the scoring process, then at that time – because of the Kansas expungement in place – no disqualifying offense existed when the Office made its "revised" determination. Had the Office notified San Felasco that it was revisiting the disqualification decision, San Felasco would have shared the fact that the expungement was in place and that no disqualifying offenses existed. If, in fact, the Office had made its decision prior to scoring that no disqualifying event had occurred (which it seems to have done), then that decision of the Office should stand because it was improper to

revisit this decision. However, even if the Office had the right to revisit this decision after the scoring process, then – at that point in time – no disqualifying event existed.

D. Disqualification was Improper Because San Felasco was Never Informed of Issues Regarding X.X.'s Background Screening and Given an Opportunity to Timely Challenge the Office's Determination or Cure Any Actual or Perceived Deficiency.

56. While the Office informed certain other applicants that their applications failed to satisfy the statutory requirements and provided such applicants a chance to revise their application to "cure" their qualification issues – including by the amendment of applications to substitute certified financial statements for uncertified financial statements, or to remove certain individuals from the application, San Felasco was not given this same notice and ability to remedy. Because of the last minute and improper manner in which the Office determined that X.X. had not passed a level 2 background screening and notified San Felasco of that determination only at the time that San Felasco was disqualified, San Felasco was deprived of an opportunity to cure any deficiencies in its own application. While the Office advised San Felasco that it required additional information to complete the background screening for certain individuals, it gave no indication that any individuals named in San Felasco's application had not passed background screening – until the time that final licensure decisions were made. Accordingly, because the Office did not provide San Felasco any timely notice of the level 2 background screening issue, San Felasco was not provided an opportunity to challenge the Office's determination until after the Office issued its licensure decision, and was likewise not provided an opportunity to cure any such issues. In fact, numerous statutory routes by which San Felasco could have corrected the Office's determination or cured the purported issue regarding X.X. exist, but San Felasco was deprived of the opportunity to take advantage of any of those

avenues because the Office failed to follow the process established in Department rules, and likewise failed to comply with level 2 background screening statutes.

57. Indeed, the November 23, 2015, correspondence from the Office to X.X. informing him that he had not passed the level 2 background screening explicitly states that it constitutes a separate agency action, separately challengeable under chapter 120, providing as follows:

> This notice is agency action for purposes of section 120.569, Florida Statutes. You have twenty-one (21) days from the date of your receipt of this notice to petition for an administrative hearing pursuant to section 120.57, Florida Statutes, by sending a petition to the Agency Clerk, Department of Health, 4052 Bald Cypress Way, BIN #A-02, Tallahassee, FL 32399-1703 or by delivering a petition to the Agency Clerk, Department of Health, 2585 Merchants Row Blvd., Prather Building, Suite 110, Tallahassee, FL. Such petition must be filed in conformance with Florida Administrative Code Rules 28-106.201 or 28-106.301, as applicable. 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.

Had San Felasco and X.X. been timely notified of the Office's decision in this regard, it is clear that they would have had an opportunity to challenge the Office's decision at a time prior to the Office's notice of selection of Chestnut Hill. However, because the Office provided notice of this determination only contemporaneously with notice of its determination that San Felasco was to be disqualified, the Office has effectively provided only an illusory point of entry at this time. This is because the Office has taken further action (the disqualification of San Felasco's application together with the award to another applicant of the license that San Felasco was entitled to) in reliance on its proposed action deeming X.X. not to have passed a background screening prior to that action becoming final.

58. Moreover, section 435.07, Florida Statutes, provides a process by which an employee who would otherwise be disqualified pursuant to a level 2 background screening may

seek from the licensing agency an exemption from disqualification. X.X. would have qualified for such an exemption, as over 11 years have passed from the time of the offense that the Office deemed disqualifying, X.X. has no subsequent criminal record, X.X. has been fully rehabilitated, and the offense has been expunged in accordance with Kansas law. Indeed an exemption would have been particularly appropriate given that the alleged "disqualifying offense" as to X.X. should not have been deemed disqualifying in the first instance and because the offense was ultimately expunged. However, because the Office did not inform either San Felasco or X.X. that it had deemed him to have a disqualifying offense, no indication that an exemption would be necessary or should be applied for was ever given. The Office's actions, regrettably, thus denied San Felasco an opportunity to cure, and denied San Felasco and X.X. a meaningful administrative point of entry to challenge the Office's determination at a time when proper relief could have been easily provided. The denial of level 2 background screening exemption is specifically challengeable under a separate chapter 120 proceeding, pursuant to section 435.07(3)(c), Florida Statutes, and such a hearing frequently resolves the question of whether the offense that the agency deemed disqualifying was actually a disqualifying offense. *See, e.g., L.W. v. Dep't of Children and Families*, Case No. 04-4359 (Fla. DOAH March 14, 2005) (in hearing on exemption recommending that agency withdraw disqualification because offense was not a disqualifying offense); *James Jones v. Dep't of Children and Families*, Case No. 02-1417 (Fla. DOAH July 18, 2002) (recommending that exemption be granted because offense was not a disqualifying offense).

59. Moreover, section 435.06(c), Florida Statutes, provides that, in the event that an employee is found not to comply with level 2 background screening standards, the employer may either terminate the employment of the employee or place the employee in a position for which

background screening is not required. San Felasco could have easily done so, had it been timely informed that X.X. was found not to comply with level 2 standards. Even if San Felasco was not permitted to replace X.X. on its application, X.X. could have either been removed from the application and the application scored without him, or San Felasco could have relocated X.X. into a position which does not require level 2 background screening under the statute. In actuality, X.X. was never in a position which required a level 2 background screening as he was never an owner nor a manager – a fact that San Felasco could have easily clarified had it been given the same opportunity other applicants were given. Further, the Office's counsel advised San Felasco's counsel that managers could be removed from applications. Upon inquiry from San Felasco's counsel regarding the effect of individuals failing to pass a background screening, counsel for the Office advised San Felasco that, while the failure of an *owner* to pass level 2 background screening would result in disqualification of an application as the ownership interest could not be divested, if a *manager* did not pass level 2 background screening the applicant would have the opportunity to remove the manager from their application and proceed without that individual. Moreover, at least one other applicant was permitted to remove a named individual from its application. Tree-King Tree Farm initially disclosed William Rubin as a member of its Advisory Board and a government advisor, however after Mr. Rubin's attorney notified the Office that he was not a lobbyist of record for Tree-King, Tree-King was given the opportunity by correspondence dated August 3, 2015, to "clarify[] Mr. Rubin's involvement in Tree-King Tree Farm, Inc.," which Tree-King responded to by removing Mr. Rubin from its application. Tree-King was not disqualified, but instead was merely notified on November 23 that its application was being denied as it was not the highest scored applicant in the Northwest Region.

E. Disqualification of San Felasco was Arbitrary and Capricious

60. The Office's decision to disqualify San Felasco on the basis of purported background screening issues was arbitrary and capricious, and was anticompetitive, in light of the manner in which the Office resolved issues relating to other applicants.

i. San Felasco was not Treated in the Same Manner as Other Applicants

61. Initially, as described above, San Felasco was not provided with the same opportunity to cure as were other vendors. While San Felasco was notified that additional information was necessary to complete the level 2 background screenings of certain individuals, it was never timely notified that any such individuals had not passed level 2 background screenings. This deprived San Felasco of the opportunity to take appropriate cure steps, including exercising its chapter 120 rights to challenge the Office's determination, requesting an exemption, or removing or re-positioning the employee in question. Other applicants, however, were timely notified not only that additional information was required, but that their applications failed to comply with the requirements of statute or rule, including through the provision of uncertified financials rather than certified financials, and – unlike San Felasco – were given the opportunity to affirmatively cure these qualification issues.

62. Moreover, as discussed above, at least one applicant – Tree-King Tree Farm – was permitted to remove an individual from its application and proceed to scoring after questions arose about that individual's affiliation with the applicant. Because San Felasco was not provided the same opportunity after the Office (erroneously) determined that X.X.'s ability to pass a background screening was in doubt, the Office's decision was arbitrary and capricious.

63. Moreover, upon information and belief, certain other applicants included in their applications individuals with level 2 background screening issues, including individuals whose

records included potentially disqualifying offenses. Despite this fact, these applicants were treated differently than San Felasco: while other applications raised the same issue that purportedly required the disqualification of San Felasco, those applications were accepted while only the application of San Felasco was disqualified.

ii. The Office Failed to Disqualify Vendors who Were Statutorily Ineligible for Selection

64. While the Office disqualified San Felasco on the basis of a purported level 2 background screening issue that it asserts required that San Felasco be eliminated from consideration, the Office treated other applicants differently, and did not disqualify other applicants who were plainly ineligible for selection under basic minimum requirements of section 381.986(5), Florida Statutes.

65. By way of example, Bill's Nursery, Inc., d/b/a Almond Tree Nursery ("Almond Tree Nursery") applied for licensure in both the Northeast and Southeast Regions. Almond Tree Nursery has plainly not been operated as a Florida registered nursery in the State of Florida for at least 30 continuous years, a clearly stated minimum requirement of section 381.986(5)(b), yet the Office did not disqualify Almond Tree Nursery in either region in which it applied, and instead advanced Almond Tree Nursery to scoring and stated that it was denying Almond Tree Nursery's application solely because it "was not the highest scored applicant" in either region.

66. The records of the Florida Division of Agriculture and Consumer Services ("DACS"), demonstrate that Almond Tree Nursery allowed its registration as a Florida registered nursery to lapse for the period from approximately August 22, 2011, until approximately August 7, 2014, a period of nearly three years. On August 22, 2011, Steve Garrison, the owner of Almond Tree Nursery, reported to DACS that Almond Tree Nursery was "no longer in business as Almond Tree Nursery." In accordance with this notification, on August 29, 2011, DACS

transmitted a formal letter to Almond Tree Nursery terminating Almond Tree Nursery's registration as a Florida registered nursery. This letter states that the Division of Plant Industry had received notification that Almond Tree Nursery was no longer in the plant nursery business, and that Almond Tree Nursery and its registration number had accordingly been removed from the Division's list of certified nurseries. The letter further states that "[a]ll nursery inspection certificates and certifications under Almond Tree Nursery are no longer valid," and provides that if, in the future, Almond Tree Nursery "decide[s] to once again become a registered certified nursery with the Florida Department of Agriculture and Consumer Services," the nursery should notify its local Plant Protection Specialist or the office of the Division of Plant Industry. Thus, no later than August 29, 2011, Almond Tree Nursery's Certificate of Nursery Registration, number 00298050, ceased to be valid in accordance with the terms of the letter, and Almond Tree Nursery could no longer be operated as a registered nursery in the State of Florida at that time. It was not until August of 2014, nearly three years later, that Almond Tree Nursery again registered as a nursery in Florida.

67. DACS issued a letter to Almond Tree Nursery dated August 17, 2015, in connection with Almond Tree Nursery's application for licensure as a dispensing organization, stating:

> Per your request, please find attached a copy of your current Certificate of Nursery Registration. According to the Department's records, **your nursery** was initially registered with the department on June 11, 1965, and remained registered until it **was placed "out of business" on August 29, 2011. Your nursery registration was renewed on August 8, 2014, and remains current.** Your nursery has a current inventory of 401,825 plants. The plant inventory is also reflected on your Certificate of Nursery Registration in the form of the registration fee amount as provided in the fee schedule adopted in Rule 5B-2.002, Florida Administrative Code. (Emphasis added)

68. Almond Tree Nursery thus facially fails to meet the statutory requirements to qualify for licensure as a dispensing organization, as even DACS states that Almond Tree Nursery has been continuously operating as a Florida registered nursery for a period of less than two years commencing on August 8, 2014, far short of the 30 years required in order to qualify under the statutory minimum requirements. This fact, standing alone, should have facially disqualified Almond Tree Nursery from being considered for licensing as a dispensing organization.

69. In order to qualify as a dispensing organization, an applicant must be able to demonstrate that it "ha[s] been operated as a registered nursery in this state for at least 30 continuous years." § 381.986(5)(b)1., Fla. Stat. Given the absence of any definition for the term "continuous," such unambiguous term must be given its plain meaning: "marked by **uninterrupted** extension in space, time, or sequence." (emphasis added). Almond Tree Nursery cannot demonstrate that it satisfies this requirement, as its operation as a registered nursery in this state is marked by a nearly 3 year interruption in operations where Almond Tree Nursery was not a registered nursery. Accordingly, Almond Tree Nursery has been operated as a registered nursery in this state for a period of less than two continuous years, cannot satisfy the statutory requirement to have been operated as a registered nursery for at least 30 continuous years, is statutorily ineligible to serve as a dispensing organization, and should have been disqualified. Instead, the Office accepted Almond Tree Nursery's application, determined it to be a qualified applicant, and scored the application.

70. As described further below, qualifications issues existed even with regard to the applicants the Office approved licensure. By way of example, Chestnut Hill, the winning applicant in the Northeast Region where San Felasco attained the highest score, has likewise not

been operated as a Florida registered nursery for at least 30 continuous years, yet the Office accepted the Chestnut Hill application, deemed it qualified, scored it, and noticed its intent to issue a license to Chestnut Hill. The Office's decision to accept applications from, and notice its intent to award licenses to, vendors who fail to meet the statutory minimum requirements of section 381.986(5)(b), while simultaneously disqualifying San Felasco for a purported failure to meet the minimum requirements of the statute, reflects an arbitrary and capricious process and result.

F. Disqualification was Improper as X.X. is Neither an Owner nor a Manager

71. While San Felasco, out of an abundance of caution in the event that X.X. was ultimately placed into a management position, elected to have X.X. submit to level 2 background screening and identified X.X. in its application as a potential manager who had submitted fingerprints, as the body of San Felasco's application makes clear, X.X. was not actually placed into an ownership or managerial position. As such, X.X. was not required to successfully pass level 2 background screening. It is undisputed that X.X. is not an owner of San Felasco and, as set forth herein, he was likewise not a manager of San Felasco.

72. The Office's rules provide a definition of a "manager" at Rule 64-4.001(13), stating as follows: "Manager – Any person with the authority to exercise operational direction or management of the Dispensing Organization or the authority to supervise any employee of the Dispensing Organization."

73. X.X., however, lacked the ability to exercise operational direction or management of the Dispensing Organization, or the authority to supervise any employee of the Dispensing Organization. X.X. was identified as the R&D Director of San Felasco, a position that does not exercise operational direction or management over the dispensing organization or any employee. In addition, as further confirmed by the organizational chart included in San Felasco's

application, X.X. does not possess the authority to supervise any employee of the dispensing organization, as no individuals are located in a role falling under and supervised by X.X. in the organizational structure of San Felasco. Nothing in San Felasco's application refers to X.X. as a manager nor confers upon X.X. any authority or description that would meet the standards as defined by the Department's rule that defines a "manager." As the R&D Director, while X.X. would have certain responsibilities in a potential breeding program, X.X. would not be involved in the direction or management of San Felasco, or in the cultivation, processing, or dispensing of low-THC cannabis. X.X. would not be responsible for supervising any other employees of the dispensing organization, but would instead operate independently in a role that simply supports San Felasco's efforts without exercising control, direction or management of the organization or its operations.

74. In fact, two other individuals were likewise included in San Felasco's list of individuals who were subjected to fingerprinting despite that fact that such individuals were neither managers nor owners. In an abundance of caution, and to address the possibility that such individuals may subsequently be placed into a management role (which, ultimately, did not occur), San Felasco included these individuals on the list for Level 2 background screening, despite the fact that such individuals are not owners or managers. Specifically, Mike Tudor, who had originally been considered for the role of Compliance Manager (but was not ultimately placed in that role) is included within San Felasco's list of individuals who were subjected to level 2 background screening fingerprints despite the fact that he was not ultimately placed in a role requiring such screening. Similarly, Dr. Richard Tempel was included in the list of individuals subjected to level 2 background screening despite the fact that he does not currently serve as either an owner or manager. Dr. Tempel is simply the backup medical director for San

Felasco, and as such currently has no responsibilities in the organization. X.X., Mr. Tudor, and Dr. Tempel were included in the list of individuals who were subjected to level 2 background screening out of an abundance of caution because, at the time that fingerprints were submitted, it was not yet clear whether such individuals would be placed in a managerial role, but none of those three individuals were ultimately placed into a managerial role in San Felasco's application.

75. The fact that an individual who, under the applicable statutes and rules, was not required to pass level 2 background screening in the first instance (and indeed was not actually required to undergo level 2 background screening *at all*) did not pass an entirely unnecessary background screening cannot properly result in the disqualification of San Felasco's application.

76. The disqualification of San Felasco on this basis was improper given that at least one other applicant was provided with the opportunity to remove individuals from its list of owners and managers because such individuals did not actually serve in ownership or managerial roles. TropiFlora included two individuals on their list of owners and managers "in an abundance of caution and out of respect for the process" despite the fact that those individuals are neither owners nor managers. The Office requested clarification from TropiFlora that these individuals were not owners or managers, allowed TropiFlora the opportunity to remove those individuals from its application, and affirmatively asked TropiFlora if it had additional individuals who should be added to the list of owners and managers. The treatment of TropiFlora and San Felasco in this regard could not have differed more starkly: TropiFlora included two individuals who were not required to pass level 2 background screenings on its list of individuals subjected to screening, and the Office provided TropiFlora with an opportunity to remove those individuals from its list; San Felasco, on the other hand, included three individuals

who were not required to pass level 2 background screening on its list of screened individuals and, far from being given the opportunity to remove those individuals, San Felasco was disqualified on the basis that one of those individuals (who was not required to be background screened in the first place) had purportedly failed to pass his unnecessary background screening.

77. As discussed, the Office's rules provide a definition of a "manager" at Rule 64-4.001(13), stating as follows: "Manager – Any person with the authority to exercise operational direction or management of the Dispensing Organization or the authority to supervise any employee of the Dispensing Organization." The Office clearly demonstrated that a manager was to be determined by that individual's job description in the application. In one example, the Office inquired why an employee of Tree King was not subjected to level 2 screening when his job description implied he was in a management position. The fact that Tree King had not included him on the list of fingerprinted employees did not conclusively determine that this individual was *not* a manager. Rather, it was the Office's position that the determining factor was whether or not this individual had the "… authority to exercise operational direction or management of the Dispensing Organization or the authority to supervise any employee of the Dispensing Organization." In the case of Tree King, there was an employee who appeared to rise to this level but did not appear on their list of those who submitted to a level 2 screening. Tree King was given an opportunity to clarify or cure this discrepancy. In the case of San Felasco, the converse occurred wherein an individual did unnecessarily submit to a level 2 screening, but his job description did not rise to that of a manager. But San Felasco, unlike Tree King, was not given the ability to either clarify or cure this issue. The treatment of Tree King and San Felasco in this regard could not have differed more starkly.

78. Further illustrating the arbitrary and capricious application of the Office's standards, Chestnut Hill's application twice described a "partnership" with Josh Stanley and much of the technical expertise claimed by Chestnut Hill is derived from this partnership. *Black's Law Dictionary* defines a partnership as, "A voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them." However, the Office did not question Chestnut Hill as to why Mr. Stanley was not subjected to a level 2 background check as either an owner or manager of Chestnut Hill.

II. Chestnut Hill is Ineligible to Receive the Northeast Region License

79. In addition to the foregoing, Chestnut Hill, the applicant selected by the Office to receive the Northeast Region license to which San Felasco is entitled, is itself ineligible to be selected as a licensee, as Chestnut Hill fails to meet the statutory minimum requirements of section 381.986(5)(d), Florida Statutes. Specifically, Chestnut Hill has not been continuously operated as a Florida registered nursery for a period of at least 30 continuous years.

80. Chestnut Hill's owner has previously been affiliated with a number of different corporate entities using variations of the "Chestnut Hill" name, some of which have ceased their existence, and others of which continue in operation. Distinguishing between the various business entities previously and currently affiliated with Chestnut Hill's owner (Robert Wallace) is important for purposes of determining whether the applicant entity satisfies the requirements of the statute.

81. Mr. Wallace first applied to the Florida Department of Agriculture (the predecessor agency to the current Florida Department of Agriculture and Consumer Services) for registration as a nursery on November 23, 1981. Mr. Wallace noted that his application was

submitted on behalf of "Chestnut Hill Nursery." Notwithstanding this fact, it does not appear any legal entity by the name of Chestnut Hill Nursery was in existence at the time Mr. Wallace submitted this application.

82. It appears that the first corporate entity affiliated with Mr. Wallace to be engaged in the conduct of business as a nursery was Chestnut Hill Nursery, Inc. The records of the Florida Department of State, Division of Corporations, reflect that Chestnut Hill Nursery, Inc. was formed on October 26, 1983, and was administratively dissolved on October 4, 2002, for failure to file an annual report. No action to reinstate Chestnut Hill Nursery, Inc. was taken following the dissolution, and the records of the Department of State reflect that Chestnut Hill Nursery, Inc. remains inactive and dissolved to the present date.

83. Mr. Wallace formed Chestnut Hill Orchards, Inc. on September 19, 1989. The records of the Department of State reflect that Chestnut Hill Orchards, Inc. was voluntarily dissolved by vote of the shareholders effective December 31, 1997.

84. Next, Mr. Wallace formed Chestnut Hill Tree Farm, Inc. on November 15, 1999. Mr. Wallace subsequently formed Chestnut Hill Tree Farm, LLC on August 29, 2005. On September 16, 2005, Chestnut Hill Tree Farm, Inc. was merged into Chestnut Hill Tree Farm, LLC, with Chestnut Hill Tree Farm, LLC remaining in existence as the surviving entity and Chestnut Hill Tree Farm, Inc. ceasing to exist as a separate entity.

85. In addition to these entities, Chestnut Hill Investments, Inc. was formed in 2001, Chestnut Hill Investments, L.L.C. was formed in 2005, and Chestnut Hill Investments, Inc. was merged with Chestnut Hill Investments, L.L.C. (with Chestnut Hill Investments, L.L.C. as the surviving entity) in 2005. Likewise, Chestnut Hill Nursery, LLC was formed in 2009, Chestnut Hill Farms, LLC was formed in 2012, and Chestnut Hill Orchards, LLC was formed in 2014.

A. Requirements of Section 381.986(5)(b), Florida Statutes

86. Section 381.986(5)(b), Florida Statutes, details a number of requirements that must be satisfied by applicants seeking to serve as a dispensing organization under Florida's compassionate use low-THC cannabis program. Specifically, section 381.986(5)(b)(1) requires that an applicant for approval as a dispensing organization must be able to demonstrate:

> The technical and technological ability to cultivate and produce low-THC cannabis. The applicant must possess a valid certificate of registration issued by the Department of Agriculture and Consumer Services pursuant to s. 581.131 that is issued for the cultivation of more than 400,000 plants, be operated by a nurseryman as defined in s. 581.011, and have been operated as a registered nursery in this state for at least 30 continuous years.

§ 381.986(5)(b)(1), Fla. Stat.

87. Consistent with the plain language of the statute, the Office itself has, through this process, properly interpreted the term "applicant" to refer only to the single corporate entity who has applied for approval as a dispensing organization.

88. In correspondence from the Office to Costa Nursery Farms, LLC dated August 6, 2015, the Office recites that Rule 64-4.001, Florida Administrative Code, defines an "applicant" as "[a] nursery that meets the requirements of Section 381.986(5)(b)1., F.S., applies for approval as a dispensing organization, and identifies a nurseryman as defined in Section 581.011, F.S., who will serve as the operator." (modifications in original). The letter further notes that Costa Nursery Farms, LLC (the applicant entity) is a wholly owned subsidiary of Costa Nursery Farms, Inc., but finds that the submission of an Independent Auditor's Report and related financial statements of Costa Nursery Farms, Inc. are insufficient to demonstrate the financial ability of Costa Nursery Farms, LLC to maintain operations, and thus the application failed to include certified financial statements from the applicant. Likewise, the August 6, 2015, correspondence from the Office to Tropiflora, LLC reiterates the administrative definition of an "applicant" and

concludes that the submission of certified financial statements for MariJ Agricultural, Inc. was deficient, as MariJ Agricultural, Inc. is not a nursery that meets the requirements of the statute and the application did not contain certified financials for Tropiflora, LLC (who was the "applicant" for purposes of the application). It appears that Tropiflora may have in fact been disqualified for not properly submitting financial statements for the appropriate corporate entity.

89. Thus, it is clear from the position of the Office in its deficiency letters that the Office has correctly interpreted the term "applicant" as having a narrow meaning, limited solely to the single corporate entity registered as a nursery in whose name the application has been submitted.

90. The use of such a definition in the context of evaluating the continuous operation of the applicant is particularly important: the fact that an applicant has operated as a registered nursery in this state for 30 continuous years demonstrates both stability in the applicant and an ability to successfully carry on the complex nursery business while meeting obligations. But in the counter example of the various Chestnut Hill renditions, the fact that a series of unaffiliated companies have been formed, closed, and then replaced by new, separate companies bearing no legal relationship to the predecessor, on the other hand, *does not* evidence the very stability that the statutory scheme intended to ensure.

B. Chestnut Hill has not been Operated as a Registered Nursery for 30 Continuous Years

91. In light of the above statutory language, to satisfy the experience requirements of the statute and rule, the applicant itself must be able to demonstrate that it has been operated as a registered nursery in the State of Florida for at least 30 continuous years. As the statute refers to the "applicant," it is not enough to demonstrate that an employee, officer, or owner of the entity has previously been affiliated with other, separate legal entities who, combined, may provide a

30 year time period of operation as a registered nursery. The reason for this is self-evident: the owner of the nursery is not the "applicant," nor are separate legal entities with no formal legal relationship and continuity with the applicant. Instead, the "applicant" is the legal entity that submits an application. The statute does not provide that it may be satisfied if the *land* utilized by the applicant has been continuously used as a registered nursery for 30 years, nor does it say that the employees or owners of the applicant working as nursery operators for 30 consecutive years would qualify. Instead it states that *the applicant* must have been continuously operated as a registered nursery for 30 years.

92. Accordingly, Chestnut Hill meets the 30 year statutory requirements only if it can demonstrate that Chestnut Hill Tree Farm, LLC has been operated as a registered nursery in the State of Florida for at least 30 years. As evidenced by the corporate records of the Florida Department of State, however, Chestnut Hill Tree Farm, LLC was only formed 10 years ago in 2005, thus it is evident that Chestnut Hill Tree Farm, LLC has not been operated as a registered nursery in the state for more than 30 years. Chestnut Hill Tree Farm, Inc., for whom Chestnut Hill Tree Farm, LLC is the successor by merger, likewise cannot satisfy the 30 year requirement, as it was formed in 1999. Thus, Chestnut Hill has been operated as a registered nursery in this state for, at most, 16 years.[4]

93. While Chestnut Hill Nursery, Inc. was incorporated in 1983, over 30 years prior to the application date, it ceased to operate as a registered nursery in Florida no later than 2002 when it was administratively dissolved for failing to file its annual report with the Department of

[4] While the records of DACS are unclear as to the exact date when Chestnut Hill Tree Farm, Inc. was first registered as a nursery with DACS, it is evident that such registration could not pre-date Chestnut Hill Tree Farm, Inc.'s corporate formation in 1999. Nor, as described below, can the earlier registration of unaffiliated "Chestnut Hill" entities bearing no legal relationship to Chestnut Hill Tree Farm, Inc. be imputed to it.

State. No other corporation or entity merged with Chestnut Hill Nursery, Inc., and at the time Chestnut Hill Nursery, Inc. was administratively dissolved, the 19 year continuous period of operation as a registered nursery in the state associated with it necessarily came to an end. Indeed once Chestnut Hill Nursery, Inc. was administratively dissolved, it became unlawful for Chestnut Hill Nursery, Inc. to continue operating as a registered nursery. *See* § 607.1421(3), Fla. Stat. (2002) ("A corporation administratively dissolved . . . may not carry on any business except that necessary to wind up and liquidate its business and affairs under s. 607.1405 and notify claimants under s. 607.1406.").

94. Neither could any of the other entities affiliated with Chestnut Hill's owners "step into the shoes" of Chestnut Hill Nursery, Inc. upon its dissolution. As stated above, Chestnut Hill Nursery, Inc. never merged with any of the other entities affiliated with Chestnut Hill's owners (indeed, had it desired to merge with another entity, Florida Statute sets forth specific requirements which were never satisfied, *see* §§ 607.1101 – 607.11101, Fla. Stat. (2002)), and following the administrative dissolution, Chestnut Hill Nursery, Inc. was permitted only to liquidate and distribute its assets to its shareholders pursuant to section 607.1405, Florida Statutes, not to allow another entity to simply begin holding itself out as the "new" version of the now dissolved corporation.

95. No other "Chestnut Hill" entities have any legal relationship with Chestnut Hill Nursery, Inc., thus the Office could not rely upon the prior registration of Chestnut Hill Nursery, Inc. to deem Chestnut Hill Tree Farm, LLC statutorily qualified. Chestnut Hill Tree Farm, LLC is a separately constituted entity, possessing both a separate corporate registration with the Florida Department of State and a separate FEIN number from the IRS. No merger, acquisition, or other action that may establish legal succession occurred; instead, the owner of Chestnut Hill

simply elected to stop doing business as Chestnut Hill Nursery, Inc. and allow that corporation to be dissolved, and then commenced instead doing business as an entirely new, separate, and unrelated corporate entity.

96. The simple fact that certain distinct corporate entities have, collectively, maintained registration with DACS using the same certificate of registration number for 30 consecutive years does not demonstrate that the statutory requirements to serve as a dispensing organization have been met. It is well-settled that a corporation has a separate legal existence from its owners. *See Beltran v. Miraglia*, 125 So. 3d 855, 858 (Fla. 4th DCA 2013). Likewise, a corporation is a separate legal entity from other corporations, even those that may have similarities in ownership or officers. While the DACS number currently utilized by Chestnut Hill Tree Farm, LLC has been active for over 30 years, Chestnut Hill has not been operated as a registered nursery in this state for at least 30 consecutive years. The entities that have held the registration are distinct and lack legal continuity. Having allowed Chestnut Hill Nursery, Inc. to be administratively dissolved, and having failed to properly merge or otherwise join Chestnut Hill Nursery, Inc. into any other business entity that survives to this day, Chestnut Hill cannot establish legal continuity so as to demonstrate that it has operated a registered nursery in this state for 30 years.

97. Indeed, Chestnut Hill's owner, Mr. Wallace, appears to have failed to notify DACS of corporate changes, and as a result has even allowed the registration with DACS to be held in the name of *non-existent* entities. It is not clear, based upon the records of the Department of Agriculture, that DACS was timely notified of the administrative dissolution of Chestnut Hill Nursery, Inc. Based on the prohibition of doing business following the administrative dissolution of a corporation, Mr. Wallace was plainly under an affirmative

obligation to cease doing business as Chestnut Hill Nursery, Inc. at the time of administrative dissolution, and could not lawfully represent to DACS (or now represent to the Office) that Chestnut Hill Nursery, Inc. was continuing to conduct business. Moreover, following the merger of Chestnut Hill Tree Farm, Inc. into Chestnut Hill Tree Farm, LLC in 2005, Chestnut Hill failed to update the registration with DACS for nearly 10 years – updating the registration only in July of this year.[5] As a result, the information reflected on the registration was incorrect and the registration was held in the name of a *non-existent* entity for nearly 10 years. In fact, Mr. Wallace signed a new application for registration in the name of Chestnut Hill Tree Farm, Inc. on July 9, 2014 – nearly 9 years after Chestnut Hill Tree Farm, Inc. ceased to exist as a legal entity.

98. Chestnut Hill and its owners cannot disregard or pierce its own corporate veil or those of other corporate entities to argue that Chestnut Hill Tree Farm, LLC, as a separate corporate entity, is the alter ego of and the same as either its owner and nurseryman individually, or the alter ego of the unrelated former Chestnut Hill Nursery, Inc. Likewise, even if Chestnut Hill's owner could demonstrate that he was the *nurseryman* of registered Florida nurseries for 30 continuous years, this fact would be meaningless for purposes of determining compliance with statutory requirements. The statute does not require that an applicant demonstrate that its *nurseryman* has 30 years of experience, it requires that the applicant demonstrate that it has itself been operated as a registered nursery for 30 consecutive years.

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[5] Following the merger of Chestnut Hill Tree Farm, Inc. into Chestnut Hill Tree Farm, LLC, Chestnut Hill Tree Farm, Inc. *ceased to exist as a corporate entity*. *See* § 608.4383(1), Fla. Stat. (providing that, upon a merger taking effect, "the separate existence of every . . . business entity that is a party to the merger, except the surviving entity, ceases."). The Plan of Merger and Articles of Merger on file with the Division of Corporations clearly provide that Chestnut Hill Tree Farm, LLC was to be the surviving entity and that the separate legal existence of Chestnut Hill Tree Farm, Inc. was to cease as of September 16, 2005.

99. It is well settled under Florida law that administrative bodies and tribunals lack the authority to disregard corporate form and pierce the corporate veil, as the distinct nature of corporate entities is accepted, well used, and highly regarded. *See Roberts' Fish Farm v. Spencer*, 153 So. 2d 718, 721 (Fla. 1963). Accordingly, as the Florida Supreme Court has consistently held, "only duly established courts of law or equity may pierce the corporate existence and look beyond it to the stockholders or to other entities," and even then may only do so after a full and fair hearing considering all of the relevant facts. *Id.* This principle has been readily applied by Florida's administrative law judges, who have declined to disregard the corporate form even when an entity attempts to do so in order to establish its credentials. In *Care Access PSN, LLC v. Agency for Health Care Administration*, Judge Van Laningham concluded as follows:

> In arguing that HCNF is a group of affiliated providers, however, AHCA and Prestige invite the undersigned, at least implicitly, to peer through the corporate veil, as if HCNF were nothing more than the set of its members, its corporate identity a trivial technicality. Their reasoning seems to be that, because HCNF's members are, as such, affiliated providers, it is reasonable to view HCNF as a group of affiliated providers, as though HCNF were a kind of group practice, despite the fact that HCNF is not itself a group practice or other type of provider. This is not a persuasive argument, and thus the invitation to ignore the corporate veil must be declined.
>
> **Indeed, the undersigned does not have jurisdiction to pierce a corporate veil, even if it were appropriate to do so under these circumstances, which it is not. Having elected to organize HCNF as a nonprofit corporation, presumably to enjoy the benefits of operating through such an entity, the members of HCNF themselves could not casually disregard the corporate form to avoid a burden attending to that legal identity.** There is, therefore, no justification for allowing AHCA and Prestige—neither of which is a member of HCNF—to disregard HCNF's corporate identity simply because it suits them to do so.

Care Access PSN, LLC v. Agency for Health Care Admin., Case No. 13-4113BID (Fla. DOAH Jan. 2, 2014) at ¶¶101-102 (emphasis added) (*citing Roberts' Fish Farm*, 153 So. 2d at 720) (rejected or modified in relevant part on other grounds based upon substituted interpretation of Medicaid statutes, Rendition No. AHCA-14-0085-FOF-BID, Jan. 31, 2014). Here, just as was recognized by Judge Van Laningham, the separate corporate existence of Chestnut Hill Nursery may not be disregarded as a mere trivial technicality by the Office in order to deem Chestnut Hill Tree Farm qualified as being a registered nursery for 30 consecutive years. It simply has not been so registered.

100. Moreover, given that the Office has taken the position that even a corporate parent entity of the wholly owned subsidiary submitting an application does not constitute the "applicant" for purposes of satisfying the statutory requirements, as set forth in the August 6, 2015, correspondence to Costa Nursery Farms, LLC, it is particularly clear that separate legal entities bearing no formal legal or corporate relationship to the entity submitting an application, as is the case with Chestnut Hill Nursery, Inc. and Chestnut Hill Tree Farm, LLC, may not properly be considered to be the "applicant."

101. Because Chestnut Hill has not been registered nursery in Florida for a period of at least 30 continuous years, Chestnut Hill was not eligible to be selected for licensure and its application was required to be rejected. The Office's decision to accept the application of Chestnut Hill and notice its intent to license Chestnut Hill, notwithstanding Chestnut Hill's statutory ineligibility, was erroneous and arbitrary and capricious, particularly in light of the Office's decision to simultaneously reject the application of the highest-scored applicant, San Felasco.

102. In determining Chestnut Hill to be qualified, the Office apparently relied solely upon a letter from DACS to Chestnut Hill, dated August 3, 2015, which provided as follows:

> Per your request, please find attached a copy of your current Certificate of Nursery Registration. According to the Department's records, your nursery has operated as a registered nursery since November 23, 1981 and has a current inventory of 406,337 plants. The plant inventory is also reflected on your Certificate of Nursery Registration in the form of the registration fee amount as provided in the fee schedule adopted in Rule 5B-2.002, Florida Administrative Code.

103. This letter, however, fails to distinguish between the various "Chestnut Hill" entities that have been registered with DACS at various times over the time period since November 23, 1981, and fails to speak to whether *the applicant entity* has been operated as a registered nursery for a period of at least 30 continuous years as required by the statute. This may be due to the fact that, as noted above, it is not clear that the various Chestnut Hill entities or their owner have adequately or timely apprised DACS of changes to the legal entity holding the registration, name changes, or corporate reorganizations, and appear to have failed to apprise DACS of the fact that the various distinct corporate entities operating under such registration have changed repeatedly and, in at least some cases, bear no legal relation to one another.

104. More fundamentally, however, the determination of whether a nursery is qualified to serve as a dispensing organization pursuant to the statute is not a determination that may be made by DACS, which is not assigned any role in the approval, evaluation, or licensure of applicants for licensure as a dispensing organization by section 381.986, Florida Statutes. Instead, the requirements that must be demonstrated by applicants, and evaluated and verified in order to approve an applicant, are explicitly set forth in the statutory subsection entitled "Duties of the Department," which sets forth actions to be taken *by the Department of Health*. §381.986(5), Fla. Stat.

105. Thus, the Department of Health possesses a statutory duty to independently evaluate the applicants and determine that they are qualified, and may not instead delegate such duties to DACS.[6] The Department's rules confirm this reading, placing the burden on the applicant (not DACS) to provide "[a]n explanation or written documentation, as applicable, showing how the Applicant meets the statutory criteria listed in Section 381.986(5)(b)", *see* Rule 64-4.002(2), Fla. Admin. Code, and acknowledging that "*the department*" is to "substantively review, evaluate, and score applications[.]" Rule 64-4.002(5)(a), Fla. Admin. Code (emphasis added).

106. The fact that Chestnut Hill was provided a letter from DACS stating that "Chestnut Hill" had been registered as a nursery for 30 years is not dispositive of this issue. Nowhere does the statute or the Chapter 64-4 of the Florida Administrative Code provide that an applicant must merely provide a letter from DACS as a requirement, or suggest that a letter from DACS is the sole evidence required to satisfy the requirement that an applicant demonstrate that it has been "operated as a registered nursery in this state for at least 30 continuous years." Instead, Rule 64-4.002(2)(b), Florida Administrative Code, requires that an applicant provide "[w]ritten documentation demonstrating that **the applicant** . . . has been operated as a registered nursery in this state for at least 30 continuous years." (Emphasis added). In the case of an

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[6] Had the Legislature intended to grant the Department of Health authority to delegate this function to another administrative agency, it is well aware of how to do so. *See, e.g.,* § 215.26(2), Fla. Stat. (authorizing the Chief Financial Officer to "delegate the authority to accept an application for refund to any state agency, or the judicial branch, vested by law with the responsibility for the collection of any tax, license, or account due."); *see also Fla. Exp. Tobacco Co. v. Dep't of Revenue*, 510 So. 2d 936, 945 (Fla. 1st DCA 1987) (recognizing explicit statutory authority of CFO to delegate ministerial function of receiving applications). The telling absence of such language from section 381.986 confirms that the Department of Health *may not* make such delegation, given that the Department of Health, as an administrative agency, is a creature of statute and, as such, "ha[s] only such powers as statutes confer." *Fla. Elections Comm'n v. Davis*, 44 So. 3d 1211, 1214 (Fla. 1st DCA 2010).

applicant, such as Chestnut Hill, where there exists evidence suggesting that this requirement has not been met, the Office was subject to an independent duty to verify compliance with the requirement, and additional written documentation demonstrating the continuity of registration and that *the applicant itself* has, in fact, been operated as a registered nursery for 30 continuous years as required by the statute was necessary.

107. Thus, the Office possessed a duty to independently evaluate such evidence and make an independent determination of the statutory qualifications of the applicant to determine whether such applicant meets the requirements to serve as a dispensing organization. Particularly in the face of evidence suggesting that the applicant is not qualified, the Office was not entitled to merely rely solely on a letter from DACS, which letter does not even opine upon the statutory qualifications of the applicant, but instead merely sets forth facts derived from the records of DACS, in lieu of fulfilling its own statutory duty to determine whether vendors are qualified. Had the Office undertaken to make such a determination, as it was required to do, it would have reached the inescapable conclusion that Chestnut Hill was ineligible for licensure.

DISPUTED ISSUES OF MATERIAL FACT

108. San Felasco incorporates Paragraphs 1-107 as fully stated herein. Disputed issues of material fact in this proceeding include, but are not necessarily limited to, those alleged above and the following:

A. Whether the Department's decision to disqualify San Felasco was arbitrary and capricious;

B. Whether the Department's decision to award a license to Chestnut Hill was arbitrary and capricious;

C. Whether the Department complied with its rules;

D. Whether the Department complied with section 381.986;

E. Whether the Department complied with section 435.04;

F. Whether X.X.'s level 2 background screening demonstrated a disqualifying offense pursuant to section 435.04, Florida Statutes;

G. Whether the charge of "Possession of Depressant/ Stimulants/ Hallucinogenics/ Steroids" from Junction City, Kansas is a level 2 background screening disqualifying offense;

H. Whether X.X.'s record was expunged;

I. When and how the Department determined San Felasco was qualified and could proceed to scoring;

J. When and how the Department determined San Felasco must be disqualified after having scored San Felasco as the highest ranked applicant in the Northeast Region;

K. Whether the Department waived any argument that anyone listed in San Felasco's application failed to pass a level 2 background screening;

L. Whether the Department provided San Felasco an opportunity to cure any deficiencies in its application;

M. Whether the Department provided other applicants an opportunity to cure any deficiencies in their respective application;

N. Whether X.X. was an owner of San Felasco;

O. Whether X.X. was a manager of San Felasco;

P. Whether X.X. exercised any operational direction or management of San Felasco;

Q. Whether X.X. had any authority to supervise any employee of San Felasco;

R. Whether Chestnut Hill was registered as a nursery for 30 years;

S. Whether Chestnut Hill was the applicant with the highest aggregate score in the Northeast Region;

T. Whether the Department failed to disqualify one or more applicants who failed to meet statutory requirements;

U. Whether the Department's disqualification of San Felasco, and failure to disqualify other applicants, was arbitrary and capricious.

BASIS FOR RELIEF; REMEDY REQUESTED

109. San Felasco is entitled to relief pursuant to sections 120.569, 120.57, 120.60, and 381.986, and chapter 435 of the Florida Statutes, and chapter 64-4, Florida Administrative Code, as alleged above, together with the established decisional law of the Florida courts and state agencies, because San Felasco was entitled to be awarded the Northeast Region dispensing organization license and the Office's decision to disqualify San Felasco and instead award a license to Chestnut Hill is contrary to the statutes and rules governing the Office and was arbitrary and capricious, contrary to competition, and contrary to general principles of fairness applicable to the Office in conducting this competitive licensing process.

110. San Felasco reserves the right to amend this Petition as, while it has made public records requests to the Office, the Office has not yet provided all records requested. Such records may reveal additional facts or other bases for challenge, and additional bases for challenge may hereafter become apparent through discovery.

WHEREFORE, based upon the foregoing, San Felasco respectfully requests:

A. That the Office stay all licensing and approval activity connected to low-THC cannabis dispensing organizations in the Northeast Region until this proceeding is resolved, *see Ashbacker Radio Com, v. FCC*, 326 U.S. 327 (1945); *see also Bio-Medical Applications of Clearwater, Inc. v. Dep't of HRS*, 370 So. 2d 19 (Fla. 2d DCA 1979);

B. That the Office rescind the notices disqualifying San Felasco and awarding the Northeast Region license to Chestnut Hill and notice new agency decisions selecting San Felasco as the applicant chosen for licensure in the Northeast Region;

C. That, alternatively, the Office rescind the notices disqualifying San Felasco and awarding the Northeast Region license to Chestnut Hill, disqualify Chestnut Hill for failure to meet the statutory requirements of section 381.986(5)(b), Florida Statutes, and rescore the Northeast Region without including X.X. in the application of San Felasco or allowing San Felasco to clarify that X.X. is acting as an employee without managerial duties;

D. That, alternatively, the Office rescind the notices issued in the Northeast Region and re-conduct the competitive licensure process for the Northeast Region;

E. That the Office refer this Petition to the Division of Administrative Hearings to conduct a formal administrative hearing; and

F. That San Felasco be granted such other and further relief as is just and proper.

Respectfully submitted this 11th day of December, 2015,

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Counsel for San Felasco Nurseries, Inc., d/b/a Grandiflora

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via hand delivery this 11th day of December, 2015 to:

General Counsel
Office of the General Counsel
Florida Department of Health
2585 Merchants Row Blvd
Tallahassee, FL 32399

Counsel for the Respondent

Agency Clerk
Office of the General Counsel
Florida Department of Health
2585 Merchants Row Blvd, Suite 110
Tallahassee, FL 32399

Chestnut Hill Tree Farm, LLC
15105 N.W. 94th Avenue
Alachua, FL 32615

Respondent

James A. McKee

November 23, 2015

Certified Mail No.:

San Felasco Nurseries d/b/a Grandiflora
7315 NW 126th Street
Gainesville, Florida 32653-2461

In Re: Low-THC Cannabis Dispensing Organization Application

Dear Applicant:

On July 8, 2015, the Department of Health (Department) received your application to become a dispensing organization under section 381.986, Florida Statutes. After a preliminary review of your application, the Department notified you on July 29, 2015, that your application did not contain documentation that all of the owners and/or managers had been fingerprinted and successfully passed a level 2 background screening as required by section 381.986(5), Florida Statutes.

In the July 29 letter to you, the Department requested that you cure the deficiencies in the application by submitting the appropriate documentation for identified owners and managers. In addition, the Department sent separate letters to the identified owners and/or managers requesting additional information. In responses dated August 5, September 4, and September 24, 2015, you did not cure the deficiency and therefore, failed to meet the mandatory requirements of section 381.986(5)(b), Florida Statutes. Specifically, [redacted] failed to pass the level 2 background screening as an owner and/or manager, therefore your application is denied.

Sincerely,

Dr. Celeste Philip
Deputy Secretary for Health

CB/cc

Cc: Office of the General Counsel

EXHIBIT A

NOTICE OF RIGHTS

This notice is agency action for purposes of section 120.569, Florida Statutes. A party whose substantial interest is affected by this 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 received by the Agency Clerk within twenty-one (21) days from receipt of this notice. The petition may be mailed to the Agency Clerk, Department of Health, 4052 Bald Cypress Way, BIN #A-02, Tallahassee, FL 32399-1703; hand delivered to the Agency Clerk, Department of Health, 2585 Merchants Row Blvd., Prather Building, Suite 110, Tallahassee, FL; or sent by facsimile to (850) 413-8743. Such petition must be filed in conformance with Florida Administrative Code Rules 28-106.201 or 28-106.301, as applicable.

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.

November 23rd, 2015

Chestnut Hill Tree Farm, LLC
15105 NW 9th Ave.
Alachua, FL 32615

Re: Low-THC Cannabis Dispensing Organization Application

Dear Applicant:

I am pleased to inform you that Chestnut Hill Tree Farm, LLC's Application to become a Low-THC Cannabis Dispensing Organization for the Northeast region has been substantively reviewed, evaluated, and scored by a panel of evaluators according to the requirements of Section 381.986, Florida Statutes and Chapter 64-4, of the Florida Administrative Code. As your application received the highest score for the Northeast region, your application is granted. Chestnut Hill Tree Farm, LLC is approved as the dispensing organization for the Northeast region of Florida.

Chestnut Hill Tree Farm, LLC has 10 business days to post a $5 million performance bond in accordance with Rule 64-4.002(5)(e), of the Florida Administrative Code. The original bond, payable to the Florida Department of Health, must be received by the Department no later than 5:00 PM EST on December 9th, 2015. If the performance bond is canceled and Chestnut Hill Tree Farm, LLC fails to file a new bond with the Department in the required amount on or before the effective date of cancellation, Chestnut Hill Tree Farm, LLC's approval shall be revoked.

Chestnut Hill Tree Farm, LLC must notify the Department that it is prepared to be inspected and seek authorization to begin cultivation, processing, and dispensing. The following deadlines, as outlined in Rule 64-4.005, of the Florida Administrative Code, apply.

Cultivation

Chestnut Hill Tree Farm, LLC has 75 days from this approval to request Cultivation Authorization. No less than 30 calendar days prior to the initial cultivation of low-THC cannabis Chestnut Hill Tree Farm, LLC shall notify the Department that it is ready to begin cultivation, is in compliance with Section 381.986, F.S., and Chapter 64-4, of the Florida Administrative Code, and is seeking Cultivation Authorization. Failure to meet the deadline to seek Cultivation Authority may result in the revocation of the Department's approval. Please note, no low-THC cannabis plant source material may be present in any Dispensing Organization facility prior to Cultivation Authorization.

EXHIBIT B

Chestnut Hill Tree Farm, LLC
November 23rd, 2015

Processing

No less than 10 calendar days prior to the initial processing of low-THC cannabis, Chestnut Hill Tree Farm, LLC must notify the Department that it is ready to begin processing, is in compliance with Section 381.986, F.S., and Chapter 64-4, of the Florida Administrative Code, and is seeking Processing Authorization.

Dispensing

Chestnut Hill Tree Farm, LLC must begin dispensing derivative product within 210 calendar days of being granted cultivation authorization. No less than 10 calendar days prior to the initial dispensing of derivative product, Chestnut Hill Tree Farm, LLC must notify the Department that it is ready to begin dispensing, is in compliance with Section 381.986, F.S., and Chapter 64-4, of the Florida Administrative Code, and is seeking Dispensing Authorization. Failure to meet the deadline to begin dispensing may result in the revocation of the Department's approval.

Finally, submission of an application for Dispensing Organization approval constitutes permission for entry by the Department at any reasonable time, into any Dispensing Organization facility to inspect any portion of the facility; review the records required pursuant to Section 381.986, F.S., or Chapter 64-4, of the Florida Administrative Code; and identify samples of any low-THC cannabis or Derivative Product for laboratory analysis, the results of which shall be forwarded to the Department.

Once again, congratulations on receiving approval to become the Low-THC Dispensing Organization for Northeast region. Should you have any questions about this approval, please contact the Florida Department of Health, Office of Compassionate Use.

Sincerely,

Dr. Celeste Philip
Deputy Secretary for Health

CB/cc
Cc: Office of the General Counsel

Chestnut Hill Tree Farm, LLC
November 23rd, 2015

NOTICE OF RIGHTS

This notice is agency action for purposes of section 120.569, Florida Statutes. A party whose substantial interest is affected by this 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 received by the Agency Clerk within twenty-one (21) days from receipt of this notice. The petition may be mailed to the Agency Clerk, Department of Health, 4052 Bald Cypress Way, BIN #A-02, Tallahassee, FL 32399-1703; hand delivered to the Agency Clerk, Department of Health, 2585 Merchants Row Blvd., Prather Building, Suite 110, Tallahassee, FL; or sent by facsimile to (850) 413-8743. Such petition must be filed in conformance with Florida Administrative Code Rules 28-106.201 or 28-106.301, as applicable.

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.