



## AlaFile E-Notice

03-CV-2023-000231.00

Judge: JAMES H ANDERSON

To: WILLIAM GLASSELL SOMERVILLE III  
wsomerville@bakerdonelson.com

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC V. STATE OF ALABAMA MEDICAL CANNABIS COMMISSION  
03-CV-2023-000231.00

The following matter was FILED on 10/6/2023 5:37:40 PM

**C001 ALABAMA ALWAYS LLC**  
MOTION FOR PRELIMINARY INJUNCTION  
[Filer: SOMERVILLE WILLIAM GLASSE]

Notice Date: 10/6/2023 5:37:40 PM

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CIRCUIT COURT OF  
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**STATE OF ALABAMA**  
Unified Judicial System  
03-MONTGOMERY

Revised 3/5/08

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District Court  Circuit Court

**CIVIL MOTION COVER SHEET**

ALABAMA ALWAYS, LLC V. STATE OF ALABAMA  
MEDICAL CANNABIS COMMISSION

Name of Filing Party: C001 - ALABAMA ALWAYS LLC

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

WILLIAM GLASSELL SOMERVILLE III  
1901 Sixth Avenue North, Suite 2600  
BIRMINGHAM, AL 35203  
Attorney Bar No.: SOM005

Oral Arguments Requested

**TYPE OF MOTION**

**Motions Requiring Fee**

**Motions Not Requiring Fee**

- Default Judgment (\$50.00)  
Joinder in Other Party's Dispositive Motion  
(i.e. Summary Judgment, Judgment on the Pleadings,  
or other Dispositive Motion not pursuant to Rule 12(b))  
(\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative  
Summary Judgment (\$50.00)  
Renewed Dispositive Motion (Summary  
Judgment, Judgment on the Pleadings, or other  
Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other \_\_\_\_\_  
pursuant to Rule \_\_\_\_\_ (\$50.00)

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other \_\_\_\_\_  
pursuant to Rule \_\_\_\_\_ (Subject to Filing Fee)

\*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0 \_\_\_\_\_

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees)

Date:  
10/6/2023 5:35:27 PM

Signature of Attorney or Party  
/s/ WILLIAM GLASSELL SOMERVILLE III

\*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.  
\*\*Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA**

ALABAMA ALWAYS, LLC, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ALABAMA MEDICAL CANNABIS )  
 COMMISSION; WILLIAM SALISKI, JR. )  
 D.O., SAM BLAKEMORE, DWIGHT )  
 GAMBLE, ANGELA MARTIN, M.D., DR. )  
 ERIC JENSEN, LOREE SKELTON, REX )  
 VAUGHN, CHARLES PRICE, TAYLOR )  
 HATCHETT, JAMES HARWELL, JERZY )  
 SZAFIARSKI, M.D., Ph. D, and DION )  
 ROBINSON, in their official capacities as )  
 members of the State of Alabama Medical )  
 Cannabis Commission, )  
 )  
 Defendants. )

Case No. CV-2023-231

**PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

Alabama Always, LLC (Alabama Always) moves the Court for a temporary restraining order and preliminary injunction to (1) prevent the Commission from relying in any way on the illegal scoring system that it has heretofore utilized to make licensure decisions; (2) require the Commission to unredact all application information, except personal identifying information, personal financial information, and legitimate trade secrets; (3) require the Commission to award licenses based on criteria set forth in the Darren Wesley “Ato” Hall Compassion Act (the Compassion Act) and properly adopted regulations, with particular emphasis on requiring applicants to submit to site visits and demonstrate that they can commence cultivation within 60 days and reach full production capacity expeditiously; and (4) require the Commission to enforce the Compassion Act’s requirement that licensees have obtained a \$2 million performance bond.

**Introduction**

The clear intent of the Compassion Act was to make medical cannabis available to the

people who need it as quickly as possible. Indeed, the Compassion Act requires that, to obtain an integrated facility license or cultivator license, an applicant must “[d]emonstrate” its ability to commence cultivation within 60 days after receiving a license. Ala. Code § 20-2A-62(b)(3).

Initially, the Commission appeared determined to avoid the production delays that plagued medical cannabis in other states, telling applicants that it would enforce the 60-day requirement, and saying that applicants would not be granted a license if they did not have a facility that could get product to market quickly. To that end, the Commission adopted regulations that required the Commission to award licenses based on how quickly an applicant could commence operations and begin operating at full capacity. *See* Ala. Admin. Code 538-X-3-.11(3).

Based on the statute, the regulations, and the Commission’s representations, Alabama Always began constructing a state-of-the-art integrated production facility and assembled an all-star management team with extensive experience in medical cannabis production.

But, in the fall of 2022, the Commission improperly changed the rules. The Commission’s staff released—without complying with the Alabama Administrative Procedure Act’s (AAPA) mandatory public notification requirements for adopting rules—an application guide containing detailed application scoring requirements. Not only did these scoring requirements violate the AAPA’s public-notice-and-comment requirements, but they also violated the Compassion Act, because they did not award points to applicants who were able to commence cultivation within 60 days and commence operations and reach full capacity quickly. Instead, the scoring system, which relied on anonymous graders who were not accountable to any legal authority, rewarded applicants who submitted detailed paper

applications, rather than those who demonstrated their ability to commence cultivation within 60 days and reach full capacity.

As a result, relying on the illegal scoring system, the Commission has twice—on June 12 and August 10—“awarded” licenses to applicants who are incapable of satisfying the Compassion Act’s requirements that licenses be issued to those who demonstrate their ability to cultivate and reach capacity quickly.

Owing to the repeated miscues in the licensure process, the Compassion Act’s directive to get medical cannabis to the people who need it has been frustrated. The Commission and its staff blame Alabama Always and other litigants for the delays, but the real blame lies with the Commission and its failure to follow the law.

The only way to get the process back on track, and to ensure that medical cannabis is expeditiously made available to the people who need it, is for the Court to order the Commission to dispense with the illegal scoring system, and instead award licenses according to the requirements of the Compassion Act and the Commission’s own regulations.

**A. The Commission has failed to comply with the requirement that applicants “demonstrate the ability to commence cultivation” within 60 days.**

The Compassion Act requires that an applicant “*shall*” “demonstrate the ability to commence cultivation within sixty (60) days of application approval notification.” *See* Ala. Code § 20-2A-62(c) (emphasis added). “Cultivation” is defined as “[t]he growing of cannabis until the time of harvest. Cultivation may occur on the premises of a licensed cultivator or a licensed integrated facility.” *See* Ala. Admin. Code r. 80-14-1-02.<sup>1</sup> The Compassion Act mandates that all cultivation be in an “enclosed structure,” defined as:

A permanent structure to cultivate cannabis using artificial light exclusively or as a supplement to natural sunlight. The term may include a greenhouse or

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<sup>1</sup> The Compassion Act defines a “cultivator” as an entity licensed by the Department of Agriculture and Industries to grow cannabis. Ala. Code § 20-2A-3(4). The Department of Agriculture and Industries is charged with licensing and regulating “the cultivation of cannabis.” *Id.* § 20-2A-50(b).

similar structure that protects plants from variable temperature, precipitation, wind, and other elements. The enclosed structure must meet the security requirements of 20-2A-1, et. seq., Code of Alabama 1975.

Ala. Admin. Code r. 80-14-1-.02.

It is well-nigh impossible to demonstrate the ability to cultivate within 60 days without having a substantially completed facility. Applicants who relied on a detailed paper application, but who have not actually begun construction, simply will not be able to commence cultivation within 60 days. They will have to hire architects and engineers, submit for complete building permits (with a four to six month review period to obtain approved permits for construction), begin construction procurement (*e.g.*, obtain high amperage electrical panels, commercial grade HVAC systems, and specialty grow lights, any of which have had recent lead times ranging from 12 to 18 months or more), and starting construction of an integrated medical cannabis production facility that is capable of commencing cultivation and production within 60 days. (*See* Affidavit of James Eaton, attached as **Exhibit B**, at ¶ 7.)

The Commission and its staff understood the necessity of having a facility that was ready to hit the ground running on receiving a license. Indeed, applicants were told by members of the Commission staff, including the Director and Deputy Director, that no licenses would be awarded unless a facility was ready to cultivate. For example, in the summer of 2022, Director McMillan told Alabama Always representatives that licenses would not be awarded to applicants that did not have facilities ready to commence cultivation. (*See id.* at ¶ 5.) Director McMillan added that temporary low-level methods like hoop houses and grow tents would not be acceptable. (*Id.*) He further said that companies without the ability to produce enough product to meet the demands of the state should not apply. (*Id.*) And Director McMillan made clear that Alabama would not be like other states that took years to

roll their programs out. (*Id.*)

The statute and the regulations adopted by the Commission make clear that licenses to produce and distribute medical cannabis would be issued to applicants who were able to commence cultivation, production, and distribution quickly. Consistent with the Compassion Act's 60-day cultivation requirement, the regulations require that, in awarding licenses, the Commission must take into account "[t]he anticipated time within which an Applicant projects being able to commence operations and/or reach full capacity as to its operations," Ala. Admin. Code 538-X-3-.11(3)(i), as well as "[t]he extent to which an Applicant, if awarded a license, anticipates fully utilizing its license authorization and/or the number of its permitted facilities," *id.* at 538-X-3-.11(3)(h). And, to ensure that applicants were equipped to quickly commence production and produce at capacity, and to do so in reality and not just on paper, the Compassion Act requires that the Commission engage in site visits before issuing licenses. *See* Ala. Code § 20-2A-53(4).

**B. Alabama Always made the commitment to Alabama and will be ready to commence cultivation within 60 days.**

Based on these statutory and regulatory directives, and in reliance on the Commission's representations that it would enforce these directives, Alabama Always raised money, began constructing a facility, set up a distribution network (including dispensaries), and engaged a team of experienced professionals, with a single goal in mind: to produce high-quality medical cannabis on a large scale and get into the hands of the Alabama patients who need it as soon as possible. (*See* Ex. A at ¶ 6.) Alabama Always has considerable experience developing, constructing, and operating cannabis facilities.

Alabama Always is one of the few applicants who invested the time, money, and other resources necessary to meet the explicit directives of the Compassion Act (*e.g.*, cultivate within 60 days) and the expectations set by the Director (and others) before applications were

even available. Alabama Always estimated that it would take approximately 60 weeks to plan, design, construct, and install equipment necessary for a functioning facility that would meet the statutory requirements. (*Id.* at ¶ 7.)

Alabama Always has already spent in excess of \$7,000,000 on its production facility. (*Id.*) Alabama Always has \$9,000,000 in its dedicated bank account, and it has already procured a \$2,000,000 surety bond as required by the Compassion Act, *see* Ala. Code § 20-2A-67(c). (*Id.* at ¶ 8.)

Alabama Always is far ahead of other applicants in satisfying the regulations adopted by the Commission, including but not limited to the criterion of being able to get to market with product quickly. It will actually be ready to commence planting *within 15 days of receiving a license* and will be ready to provide medical cannabis to medication to Alabama citizens who need it through its Montgomery dispensing site, where it already has a business license to dispense, upon awarding of a state license within 120 days, a timeline that is constrained primarily by the roughly 90 day growth and flowering cycles of the cannabis plant. (*Id.* at ¶ 9.) Opening of its additional four dispensary locations will commence shortly thereafter. (*Id.*)

**C. The Commission improperly changed the rules with its anonymous scoring system and application guide.**

But the Commission improperly changed the rules. In fact, the Commission improperly changed the entire playing field. At its October 13, 2022 meeting, the Commission discussed the creation of “application guides” containing a “scoring” process that deviated from the statute and regulations. The Commission then voted to “release” the applications and application guides effective October 24. The applications and application guides were not adopted in accordance with the AAPA.



Instead of placing a premium on early cultivation and production, the application guide and its scoring process rewarded applicants who submitted overly-detailed information on irrelevant minutiae, such as trucks/vehicles (200 points), commercial drivers' licenses (200 points), "fleet summary" (200 points), vehicle maintenance (200 points), route plans (200 points), and other things. (*See Application Guide at 16.*) These items together constituted 1,000 total points out of just over 6,000 available points, or approximately 17% of the total points. Meanwhile, the application guide awarded zero points for critical statutory items, such as the ability to commence cultivation within 60 days, a clear indication that the statutory requirement was not even a factor.

Another example of the flawed application process is the now well-known 10MB and workaround issue. Although no statute, regulation, or guidance by the Commission specified a maximum 10MB file size for each exhibit of an application, the Commission's application portal introduced such a limit without notice to applicants. And even when the Commission was made aware by applicants of significant problems with uploading data in mid-December of 2022, the Commission did nothing to fix the problem although it did provide "workarounds" for a select few applicants. Alabama Always did not receive this workaround and the quality of some of its exhibits (for example, its engineering plans) were rendered practically illegible due to the repeated compression efforts in order to get the file size under 10MB.

Alabama Always offers these examples of a flawed process, while noting that a detailed dive into the minutiae of the scoring guide is not necessary, since the Commission's adoption of the scoring process itself violated the AAPA. But it is illustrative of the overall picture, which is that an over-complicated process violated both the AAPA and the Compassion Act's express statutory mandates.

The application guide and scoring process appear, in fact, to be intended to favor out-of-state companies who are experienced at compiling applications with detailed information

on irrelevant details, like trucks and commercial drivers' licenses. What the application guide does *not* do is award points for an applicant's demonstrated ability to cultivate within 60 days, commence operations, and produce and distribute medical cannabis at full capacity.

As a result, the applicants that received high scores from the scoring process were *not* the ones that were able to commence cultivation within 60 days and quickly scale up to full capacity. And meeting the requirement of commencing cultivation within 60 days was *not* even a factor in scoring either of the initial attempted awards.

**D. The application guide, scoring system, and other Commission actions violate the Alabama Administrative Procedure Act.**

The Compassion Act requires the Commission to comply with the AAPA. *See* Ala. Code § 20-2A-20(p); *see also id.* § 20-2A-57(c). The application guide and scoring system adopted by the Commission are invalid because they violate the AAPA. The application guide and scoring system constitute “rules” within the meaning of the AAPA, and the AAPA prescribes a procedure that governmental bodies such as the Commission must follow when they adopt “rules.” The Commission violated the AAPA in two fundamental ways: (1) applicants were not properly apprised of the procedures for filing applications; and (2) the applications did not elicit information sufficient to allow the Commission to select applicants who satisfied the Compassion Act's statutory and regulatory requirements.

In order to be effective and binding, a government agency rule must be published for public inspection. *See* Ala. Code §41-22-4. Prior to the adoption or amendment of any rule, the agency must give at least 35 days' notice of its intended action. *See id.* § 41-22-5. The express intent of the AAPA includes increasing public accountability of agencies, increasing public participation in the formulation of administrative rules, and increasing the fairness of agencies in their conduct of contested case proceedings. *See id.* § 41-22-2. The AAPA defines a “rule” as:

Each agency rule, regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule or by federal statute or by federal rule or regulation[.]

*Id.* § 41-22-3(9).

The Commission's entire process of reviewing and scoring applications violates the AAPA. Aside from the published regulations, almost no other attempt at rulemaking complies with the AAPA's notice-and-comment requirements. As noted in Alabama Always's second amended complaint, the Commission has implemented several purported rules that were not subject to the AAPA's notice-and-comment requirements and thus were not properly adopted under the AAPA. These rules mysteriously appeared during the licensing process. These rules are therefore invalid under the AAPA. *Id.* § 41-22-5(d). These invalid rules include but are not limited to the following:

- a. The Commission's online license application form which attended each applicant's original application;
- b. The Commission's 10MB size limit on application exhibits;
- c. The Commission's "workaround" under which it permitted some—but not all—applicants to work around the 10MB limit by submitting uncompressed applications later to the Commission and to submit their applications in the portal after the deadline for submission;
- d. The Commission's grading standards, which are not included in any validly promulgated regulation, and conflict with the Compassion Act and the Commission's regulations;
- e. The Commission's application guide for integrated facility applications, which contains an intricate and complicated scoring system and grading criteria that has not been adopted as a rule under the AAPA;
- f. The Commission's evaluation worksheets used by graders of applications;
- g. The Commission's "Evaluator Handbook";
- h. The Commission's application form for a public investigative hearing

provided to the applicants and completed through the Commission's website, including the 1,500-character limit (which includes spaces);

- i. The Commission's investigative hearing "process" in which the Commission has not set forth any rules of practice for the hearing;
- j. The Commission's hiring and use of administrative law judges during the public investigative hearing; and
- k. The Commission's requirement that any aggrieved license applicant pay a nonrefundable fee (\$50,000 for integrated facility applicants) to the Commission to challenge the denial of its application.

**E. Even if they were properly adopted, the application guide and scoring system still conflict with the Compassion Act and other Commission rules.**

Neither the application guide nor the scoring guide requires site visits pre-issuance, as is required by the Compassion Act. While applicants can receive points for having a commercial driver's license (a requirement not even contained in the regulations or the Compassion Act), they receive no points for demonstrated ability to commence cultivation within 60 days.

While the application asks applicants to state when they expect to "commence operations" (which is not the same as demonstrating the ability to commence cultivation within 60 days), the application guide and scoring system do not award any points for that prediction.

And while Exhibit 31 of the application guide requires the applicant to provide a "timetable" for facility completion and commencement of operations, that requirement is only one of nine parts of that exhibit that together account for only 400 total points out of 6,000 possible points. Accordingly, the applicant's own timeline as to facility completion and commencement of operations accounts for only 44 possible points out of a total of 6,000, and nowhere are Commissioners or scorers required to assess an applicant's ability to commence cultivation, commence operations, or reach full capacity.

Another manifest problem with the scoring system is the wide disparity between the scores awarded by different graders. The Commission simply had two scorers grade each application, or certain parts of each application, and then averaged the scores for each section. The scores in many cases were widely divergent. For example, for “business leadership credentials,” one scorer gave Alabama Always 21 points out of a possible 100, while the other gave Alabama Always 85 points, and Alabama Always received the average, which was 53. Thus, the score that Alabama Always received for this category was smaller than the difference between the two graders’ scores, which calls into question the validity of both scores. Either Alabama Always had terrible business leadership credentials, if the 21 score is to be believed, or it had excellent business leadership credentials, if the 85 score is to be believed. But to assign a score of 53 as the average of a terrible score and an excellent one is statistically indefensible.

It also appears that the Commission’s rules and application guide have improperly neutralized the Compassion Act’s bond requirement. While the Commission is authorized to prescribe the form of acknowledgement that a surety company must provide to demonstrate that it will issue a \$2,000,000 performance bond, the regulation does more than just prescribe the form of acknowledgement. The Commission accomplished this by adding, in Alabama Administrative Code r. 538-X-9-.03, a parenthetical phrase modifying “form of acknowledgement”: (*i.e.*, executed bond documents, proof of capital in the required amount, or similar verifying documentation).

On information and belief, a number of applicants did not obtain a performance bond, but merely showed that they had a certain amount of money in a bank account or in the account of an investor. This is not the same thing as a bond issued by a surety company. Being able to obtain a \$2,000,000 performance bond from a rated surety company is an indication of responsibility that far exceeds merely having a bank statement that shows a

\$2,000,000 balance at the end of the month.

By way of analogy, this Court frequently requires parties to post security for injunctions. The Court requires either cash deposited into Court or a bond issued by a reputable surety. The Court would not accept a mere demonstration that the party posting security has “sufficient capital” in a bank account. The Commission should not be permitted to accept that, either.

**F. Inappropriate and excessive redactions in applications prohibit proper comparisons among applicants.**

Many of the applicants, including some who received initial awards, heavily redacted their applications, hiding such critical information as their facility location, so that members of the Commission, other applicants, the press, and public could not verify whether they were actually able to satisfy the statutory and regulatory criteria.

Additionally, the Compassion Act requires integrated facility applicants to provide “[a] letter of commitment or other acknowledgement, as determined by commission rule, of the applicant's ability to secure a performance bond issued by a surety insurance company approved by the commission in the amount of two million dollars (\$2,000,000).” *See* Ala. Code § 20-2A-67(d)(1). Because of the redactions allowed by the Commission, it is not clear which applicants satisfied this requirement and showed that they could secure a \$2,000,000 bond.

What’s more, any applicant who was denied a license has no comparative information to address in an investigative hearing or other appeal/review process. This excessive redaction allowed by the Commission staff contradicts the express language of a Commission rule, which provides:

(4) Public Records and Applicants’ Confidential or Proprietary Information. In general, information contained in applications filed by Applicants are public records. Applicants may, *through a process to be outlined on the [Commission] website at or before the time for filing applications*, redact portions of the Application to protect from public view in order to protect confidential or proprietary information. Failure to include a redacted version of the

application at the time of filing will result in the entire application being made public.

Ala. Admin. Code r. 538-x-3-.10(4) (emphasis added). In addition, this excessive redaction is either a “rule” under the AAPA, or, conversely, the Commission failed to appropriately promulgate a rule.

**G. No exhaustion of administrative remedies is required here.**

It would be futile to require Alabama Always to exhaust administrative remedies, because there are no administrative remedies in the Compassion Act or the regulations that comply with the AAPA. Although the Compassion Act and the regulations contain a provision for an “investigative hearing” following denial of a license, that provision is illegal for several reasons.

First, neither the Compassion Act nor the regulations provide a means for giving denied applicants notice of why they were denied a license.

Second, the regulations improperly require a nonrefundable payment of \$50,000 to invoke the hearing process. This requirement violates the plain language of the Compassion Act, as well as the AAPA and the Alabama and U.S. Constitutions.

Third, the electronic portal for filing an investigative hearing request limits the request to 1,500 characters, with spaces counting as characters. This is not enough space to effectively preserve applicants’ legal rights and remedies, and moreover has not been published in accordance with the AAPA.

Fourth, the Compassion Act makes clear that the Commission is not limited to considering evidence presented at the hearing but is required to consider all evidence in its possession, even presumably evidence not made available to the applicant.

Fifth, there is no provision for a mandatory stay of the issuance of licenses pending the investigative hearing. If the issuance of licenses is not stayed, then the investigative

hearing is at most an illusory remedy, because the Commission cannot issue more than five integrated licenses. Once the licenses are issued, neither the Commission nor any court will be able to cause more to be issued.

Accordingly, no relief will be available for the Commission's violations of the AAPA and the Compassion Act.

\* \* \*

As detailed in this motion and explained in Alabama Always's second amended complaint, the Commission has repeatedly violated the AAPA. Both declaratory and injunction relief are appropriate for violations of the AAPA. *See* Ala. Code § 41-22-10. The AAPA permits this Court to stay enforcement of an agency rule "by injunctive relief." *Id.* § 41-22-10.

Injunctive and declaratory relief are appropriate here. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury. (*See* Ex. A at ¶ 10.) Furthermore, the harm that Alabama Always faces is not susceptible of being compensated with money damages. (*Id.*) Alabama Always has no adequate remedy at law. And there is no remedy for the Commission's failure to judge all applications fairly and in compliance with its own rules and regulations. Without the requested injunctive relief, Alabama Always will suffer irreparable harm in the form of interference with its business. (*Id.*) Alabama Always is likely to succeed on the merits of its claim, for the reasons explained in its second amended complaint, including because the Commission failed to substantially comply with the AAPA's rulemaking procedures. Any hardship imposed on the Commission by the requested injunction does not outweigh the benefit to Alabama Always in receiving the requested injunction. Immediate and irreparable injury, loss, or damage will result to Alabama Always before the Commission can be heard in opposition. (*Id.*)



Most importantly, not issuing the injunction would severely harm the public. The Compassion Act exists to help ensure that the best entities dispense the best medical cannabis to Alabama residents suffering from medical conditions whose symptoms could be alleviated by medical cannabis. The public is deprived of potentially obtaining the best integrated facility (and other) licensees when the Commission, by act or omission, violates the AAPA, as it has in this case, and causes ongoing and irreparable harm to the licensing process.

### **Prayer for Relief**

For these reasons, in addition to the relief request above and in Alabama Always's second amended complaint, Alabama Always prays that the Court enter an order as follows:

1. Declaring the Commission's awards of licenses at its June 12 and August 10 meetings null and void;
2. Enjoining the use of the scoring process, including exhibits from the applications, because the entire scoring process created an unnecessarily complicated and daunting system that frustrated the requirements of the Compassion Act;<sup>2</sup>
3. Enjoining the use of the scores resulting from the process and instructing the Commission to ignore prior scores related to the scoring process;
4. Requiring that the Commission devise and follow a system that properly effectuates the Compassion Act's intent, including the critical requirement that the licensees demonstrate the ability to commence cultivation within 60 days;
5. Requiring that the Commission, all other things being equal, award

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<sup>2</sup> Only the application form, which consists of about 15 pages, and which was actually scored by Commission members, can be used.

- licenses to applicants who in its judgment, demonstrate the ability to commence operations and reach full capacity the earliest;
6. Declaring invalid the “rules” set out in the second amended complaint, including but not limited to the Commission’s 10MB limitation, workaround and its inconsistent application to various applicants, the application guides, scoring system, scoring guide, evaluation materials, the fee to obtain a public investigative hearing, the engagement of administrative law judgments, the request for an investigative hearing, and investigative hearing procedures;
  7. Requiring the Commission to adopt rules and regulations in compliance with the AAPA, including § 41-22-4 of the AAPA and the AAPA’s contested case provisions;
  8. Requiring the Commission to enforce the Compassion Act’s requirement that licensees have obtained a \$2,000,000 performance bond;
  9. Requiring the Commission to unredact all application information except personal identifying information, personal financial information, and legitimate trade secrets;
  10. Prohibiting any future meetings of the Commission, including discussions of applicants and applications in open or closed sessions, that fail to comply with the AAPA’s contested case provisions; and
  11. Awarding Alabama Always costs, interest, and any other equitable and/or legal relief to which it is entitled.

Respectfully submitted,

/s/ William G. Somerville  
 WILLIAM G. SOMERVILLE  
 MICHAEL A. CATALANO  
 JADE E. SIPES

**OF COUNSEL:**

BAKER, DONELSON, BEARMAN,  
CALDWELL & BERKOWITZ, PC  
1901 Sixth Avenue North, Suite 2600  
(205) 328-0480  
[wsomerville@bakerdonelson.com](mailto:wsomerville@bakerdonelson.com)  
[mcatalano@bakerdonelson.com](mailto:mcatalano@bakerdonelson.com)  
[jsipes@bakerdonelson.com](mailto:jsipes@bakerdonelson.com)

**CERTIFICATE OF SERVICE**

I hereby certify that this has been served electronically via this Court's electronic filing system on the following on October 6, 2023:

/s/ Jade E. Sipes  
Of Counsel

**Exhibit A****Proposed Order****PRELIMINARY INJUNCTION**

Based upon Plaintiff Alabama Always, LLC's motion for preliminary injunction, and upon the evidence before the Court, this Court finds that, absent the issuance of an injunction, Plaintiff is in imminent danger of suffering irreparable harm in the form of injury to the public's interest in having the State's business conducted in public, interference with Plaintiff's business, damage to its reputation, loss of business opportunities, and the lack of any other viable remedy if the Commission issues the five integrated facility licenses, for all of which there is no adequate remedy at law.

This Court specifically finds that the requirements for granting a temporary restraining order have been established by Plaintiff. Plaintiff has demonstrated that it has a substantial likelihood of success on the merits on several of its claims. Plaintiff has shown that the Commission established rules in violation of the Alabama Administrative Procedures Act (AAPA), as more fully described in Plaintiff's motion.

Without issuance of a temporary restraining order, Plaintiff will suffer immediate and irreparable harm for which there is no adequate remedy at law. The Darren Wesley "Ato" Hall Compassion Act (the Compassion Act) and the public policy of the State of Alabama require that the State's business be conducted in accordance with the AAPA.

Moreover, the Court finds that Defendant will suffer no hardship if the temporary restraining order is granted or, in the alternative, that a large part of any hardship claimed is a result of the Commission's own actions. As one clear example, the Commission knew of the 10MB issue in December 2022 and failed to correct its own problem at that time, which likely would have negated much of the issues raised in the

current and other litigation. This Court has pushed all Parties to attempt to work out a process that will expedite the delivery of quality medical cannabis to the patients in Alabama. However, this Court understands that the current conundrum cannot be resolved by continuing on the same failed path. The Court hopes that the Parties will work together to expedite a fair, transparent, and efficient process to resume the path towards delivery of medical cannabis as soon as practically possible, understanding that due to the 9 months of delay caused by the Commission's inappropriate rulemaking are at the heart of this delay.

Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED** by the Court as follows:

- (1) All prior awards of licenses (including those awarded in June and August) are set aside;
- (2) The Commission is enjoined from using the scoring process, including exhibits from the applications;
- (3) The Commission is enjoined from using the scores resulting from the process and must ignore prior scores relating to the scoring process;
- (4) The Commission shall devise and follow a system that properly effectuates the Compassion Act's intent, including the critical requirement that the licensees demonstrate the ability to commence cultivation within 60 days;
- (5) The Commission shall, all other things being equal, award licenses to applicants who, in its judgment, demonstrate the ability to commence operations and reach full capacity the earliest;
- (6) The following "rules" of the Commission are declared invalid:
  - a. The Commission's online license application form which attended

- each applicant's original application;
- b. The Commission's 10MB size limit on application exhibits;
  - c. The Commission's "workaround" under which it permitted some—but not all—applicants to work around the 10MB limit by submitting uncompressed applications later to the Commission and to submit their applications in the portal after the deadline for submission;
  - d. The Commission's grading standards;
  - e. The Commission's application guide for integrated facility applications;
  - f. The Commission's evaluation worksheets used by graders of applications;
  - g. The Commission's "Evaluator Handbook";
  - h. The Commission's application form for a public investigative hearing provided to the applicants and completed through the Commission's website, including the 1,500 character limit (which includes spaces);
  - i. The Commission's investigative hearing "process" in which the Commission has not set forth any rules of practice for the hearing;
  - j. The Commission's hiring and use of administrative law judges during the public investigative hearing; and
  - k. The Commission's requirement that any aggrieved license applicant pay a nonrefundable fee (\$50,000 for integrative facility applicants) to the Commission to challenge the denial of its application.
- (7) The Commission shall adopt rules and regulations in compliance with the AAPA, including § 41-22-4 of the AAPA and the AAPA's contested case provisions;
  - (8) The Commission shall enforce the Compassion Act's requirement that licensees have obtained a \$2,000,000 performance bond;
  - (9) The Commission shall unredact all application information except personal identifying information, personal financial information, and legitimate trade

secrets; and

- (10) The Commission is prohibited from holding any future meetings of the Commission, including discussions of applicants and applications in open or closed sessions, that fail to comply with the AAPA's contested case provisions.

It is further **ORDERED, ADJUDGED, and DECREED** that this order is binding on the Commission, its officers, agents, servants, employees, and attorneys and other persons acting in active concert or participation with them who receive notice of this order by service or otherwise.

This order is conditioned on Plaintiff posting security in the amount of \$100.00 with the Clerk of Court in a form satisfactory to the Clerk.

**DONE AND ENTERED this \_\_\_\_ day of October, 2023.**

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**CIRCUIT COURT JUDGE**

EXHIBIT B

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ALABAMA MEDICAL CANNABIS )  
 COMMISSION; WILLIAM SALISKI, JR. )  
 D.O., SAM BLAKEMORE, DWIGHT )  
 GAMBLE, ANGELA MARTIN, M.D., DR. )  
 ERIC JENSEN, LOREE SKELTON, REX )  
 VAUGHN, CHARLES PRICE, TAYLOR )  
 HATCHETT, JAMES HARWELL, JERZY )  
 SZAFLARSKI, M.D., Ph. D, and DION )  
 ROBINSON, in their official capacities as )  
 members of the State of Alabama Medical )  
 Cannabis Commission, )  
 )  
 Defendants. )

Case No. CV-2023-231

AFFIDAVIT OF JAMES EATON

STATE OF FLORIDA )  
 )  
 COUNTY OF LEON )

Before me, the undersigned notary public, appeared James Eaton, who being by me first duly affirmed, deposes and states as follows:

1. My name is James Eaton. I am over the age of twenty-one years and am otherwise qualified to testify in the above-referenced action. I make this affidavit in support of Alabama Always’s motion for preliminary injunction.

2. I am the Chief Executive Officer of Alabama Always, LLC (Alabama Always). I have personal knowledge of the facts set forth in this affidavit.

3. The information in this affidavit is based on my personal knowledge and my review of Alabama Always’s business records. I have personal knowledge of Alabama Always’s procedures for creating and maintaining its documents and records. As part of my job responsibilities, I am familiar with the type of documents and records maintained by



Alabama Always. Alabama Always's business records are (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record or from information transmitted by persons with personal knowledge; (b) kept in the course of Alabama Always's regularly conduct business activities; and (c) it is the regular practice of Alabama Always to make and maintain such records.

4. In advance of applying for an integrated facility license in Alabama, Alabama Always reviewed the statutory and regulatory directives of the Darren Wesley "Ato" Hall Compassion Act (the Compassion Act).

5. In addition, in the summer of 2022, I and another Alabama Always representative met with the Director of the Alabama Medical Cannabis Commission, John McMillan, to discuss the medical cannabis licensing process. Director McMillan told us that licenses would not be awarded to applicants that did not have facilities ready to commence cultivation. Director McMillan added that temporary low-level methods like hoop houses and grow tents would not be acceptable. He further said that companies without the ability to produce enough product to meet the demands of the state should not apply. And Director McMillan made clear that Alabama would not be like other states that took years to roll their programs out.

6. Based on the Compassion Act's statutory and regulatory directives, and in reliance on the Commission's representations that it would enforce those directives, Alabama Always raised money, began constructing a facility, set up a distribution network (including dispensaries), and engaged a team of experienced professionals, with a single goal in mind: to produce high-quality medical cannabis on a large scale and get it into the hands of the Alabama patients who need it as soon as possible.

7. Alabama Always estimated that it would take approximately 60 weeks to plan, design, construct, and install equipment necessary for a functioning facility that would meet

the Compassion Act's requirements. To illustrate, several aspects of preparing a functioning facility required significant lead time, like hiring architects and engineers, submitting information to obtain complete building permits (with a four to six months' review period to obtain approved permits for construction), beginning construction procurement (*e.g.*, obtaining high amperage electrical panels, commercial grade HVAC systems, and specialty grow lights, any of which have had recent lead times ranging from 12 to 18 months or more), and starting construction of an integrated medical cannabis production facility that is capable of commencing cultivation and production within 60 days. So, Alabama Always started diligently working. To date, Alabama Always has already spent in excess of \$7,000,000 on its production facility, which is nearly complete.

8. Alabama Always also has \$9,000,000 in its dedicated bank account, and it has already procured a \$2,000,000 surety bond as required by the Compassion Act.

9. Alabama Always will be able to commence planting within 15 days of receiving a license, and it will be ready to provide medication to Alabama citizens who need it through its Montgomery dispensing site, where it already has a business license to dispense, upon awarding of a state license within 120 days, a timeline that is constrained primarily by the roughly 90-day growth and flowering cycles of the cannabis plant. Opening of its additional four dispensary locations will commence shortly thereafter.

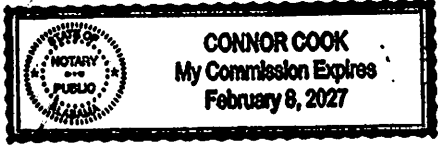
10. Alabama Always has filed a motion asking the Court to enter a temporary restraining order and preliminary injunction. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury. The harm that Alabama Always faces is not susceptible of being compensated with money damages. Without the requested injunctive relief, Alabama Always will suffer irreparable harm in the form of interference with its business. Immediate and irreparable injury, loss, or damage will result to Alabama Always before the Commission can be heard in opposition.

FURTHER AFFIANT SAYETH NOT.

James Eaton  
JAMES EATON *by Lang Darby*  
*Attorney-in-Fact*

Sworn to and subscribed before me on this the 6 day of October, 2023.

Connor Cook  
Notary Public  
My Commission Expires: 2/8/2027





**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA**

ALABAMA ALWAYS LLC, )  
CAPITOL MEDICAL, LLC, )  
FFD ALABAMA HOLDINGS, LLC, )  
FFD ALABAMA HOLDINGS, LLC ET AL, )  
Plaintiffs, )

V. ) Case No.: CV-2023-000231.00

)  
STATE OF ALABAMA MEDICAL CANNABIS )  
COMMISSION, )  
Defendant. )

**Order Granting Preliminary Injunction**

Based upon Plaintiff Alabama Always, LLC’s motion for preliminary injunction, and upon the evidence before the Court, this Court finds that, absent the issuance of an injunction, Plaintiff is in imminent danger of suffering irreparable harm in the form of injury to the public’s interest in having the State’s business conducted in public, interference with Plaintiff’s business, damage to its reputation, loss of business opportunities, and the lack of any other viable remedy if the Commission issues the five integrated facility licenses, for all of which there is no adequate remedy at law.

This Court specifically finds that the requirements for granting a temporary restraining order have been established by Plaintiff.

Without issuance of a temporary restraining order, Plaintiff will suffer immediate and irreparable harm for which there is no adequate remedy at law. The Darren Wesley “Ato” Hall Compassion Act (the Compassion Act) and the public policy of the State of Alabama require that the State’s business be conducted in accordance with the AAPA.

Moreover, the Court finds that Defendant will suffer no hardship if the temporary restraining order is granted or, in the alternative, that a large part of any hardship claimed is a result of the Commission's own actions. As one clear example, the Commission knew of the 10MB issue in December 2022 and failed to correct its own problem at that time, which likely would have negated much of the issues raised in the current and other litigation. This Court has pushed all Parties to attempt to work out a process that will expedite the delivery of quality medical cannabis to the patients in Alabama. However, this Court understands that the current conundrum cannot be resolved by continuing on the same failed path. The Court hopes that the Parties will work together to expedite a fair, transparent, and efficient process to resume the path towards delivery of medical cannabis as soon as practically possible, understanding that due to the 9 months of delay caused by the Commission's inappropriate rulemaking are at the heart of this delay.

Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED** by the Court as follows:

- (1) All prior awards of licenses (including those awarded in June and August) are set aside;
- (2) The Commission is enjoined from using the scoring process, including exhibits from the applications;
- (3) The Commission is enjoined from using the scores resulting from the process and must ignore prior scores relating to the scoring process;
- (4) The Commission shall devise and follow a system that properly effectuates the Compassion Act's intent, including the critical requirement that the licensees demonstrate the ability to commence cultivation within 60 days;

- (5) The Commission shall, all other things being equal, award licenses to applicants who, in its judgment, demonstrate the ability to commence operations and reach full capacity the earliest;
- (6) The following “rules” of the Commission are declared invalid:
- a. The Commission’s online license application form which attended each applicant’s original application;
  - b. The Commission’s 10MB size limit on application exhibits;
  - c. The Commission’s “workaround” under which it permitted some—but not all—applicants to work around the 10MB limit by submitting uncompressed applications later to the Commission and to submit their applications in the portal after the deadline for submission;
  - d. The Commission’s grading standards;
  - e. The Commission’s application guide for integrated facility applications;
  - f. The Commission’s evaluation worksheets used by graders of applications;
  - g. The Commission’s “Evaluator Handbook”;
  - h. The Commission’s application form for a public investigative hearing provided to the applicants and completed through the Commission’s website, including the 1,500 character limit (which includes spaces);
  - i. The Commission’s investigative hearing “process” in which the Commission has not set forth any rules of practice for the hearing;
  - j. The Commission’s hiring and use of administrative law judges during the public investigative hearing; and
  - k. The Commission’s requirement that any aggrieved license applicant pay a nonrefundable fee (\$50,000 for integrative facility applicants) to the Commission to challenge the denial of its application.

- (7) The Commission shall adopt rules and regulations in compliance with the AAPA, including § 41-22-4 of the AAPA and the AAPA's contested case provisions;
- (8) The Commission shall enforce the Compassion Act's requirement that licensees have obtained a \$2,000,000 performance bond;
- (9) The Commission shall unredact all application information except personal identifying information, personal financial information, and legitimate trade secrets; and
- (10) The Commission is prohibited from holding any future meetings of the Commission, including discussions of applicants and applications in open or closed sessions, that fail to comply with the AAPA's contested case provisions.

It is further **ORDERED, ADJUDGED, and DECREED** that this order is binding on the Commission, its officers, agents, servants, employees, and attorneys and other persons acting in active concert or participation with them who receive notice of this order by service or otherwise.

This order is conditioned on Plaintiff posting security in the amount of \$100.00 with the Clerk of Court in a form satisfactory to the Clerk.

**DONE this [To be filled by the Judge].**

**/s/[To be filled by the Judge]**  
**CIRCUIT JUDGE**