



AlaFile E-Notice

03-CV-2023-901727.00

Judge: JAMES H ANDERSON

To: WILLIAM GLASSELL SOMERVILLE III
wsomerville@bakerdonelson.com

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ALABAMA ALWAYS, LLC V. THE ALABAMA MEDICAL CANNABIS COMMISSION
03-CV-2023-901727.00

The following matter was FILED on 12/8/2023 3:38:19 PM

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

Notice Date: 12/8/2023 3:38:19 PM

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CIRCUIT COURT CLERK
MONTGOMERY COUNTY, ALABAMA
251 S. LAWRENCE STREET
MONTGOMERY, AL, 36104

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CIRCUIT COURT OF

MONTGOMERY COUNTY, ALABAMA

GINA J. ISHMAN, CLERK

STATE OF ALABAMA

Revised 3/5/08

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Unified Judicial System

03-MONTGOMERY

 District Court Circuit Court

CV21

CIVIL MOTION COVER SHEETALABAMA ALWAYS, LLC V. THE 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**

- 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)

*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 _____

Motions Not Requiring Fee

- 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)

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:

12/8/2023 3:37:48 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,)
)
 Defendant.)

Case No. CV-2023-901727

PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION

Alabama Always, LLC (Alabama Always) moves the Court for a temporary restraining order and preliminary injunction to prevent the Commission from relying in any way on the illegal ranking system that it intends to utilize for licensure decisions. In further support, Alabama Always states the following:

Background

Based on a staff recommendation, the Commission has adopted a voting procedure that gives a minority of Commission members the ability to effectively veto the judgment of the majority. This procedure is contained in an identical pair of rules, Alabama Administrative Code r. 538-X-3-.20 and 538-X-3-.20ER, adopted by the Commission at its October 12, 2023 meeting.¹ The procedure requires each Commissioner to rank all 36 applicants for integrated licenses in descending order. The staff will then average the rankings to obtain a single composite ranking, and the average ranking thus generated will determine the order in which the applicants are considered for licenses.

In order to determine the order in which Applicants should be considered, each Commissioner will be given an opportunity to submit, in an open meeting, *a written form providing an overall preliminary rank, in descending order, of each of the Applicants in the license category, giving due consideration to all*

¹ The rules are identical because 538-X-3-.20ER was adopted as an emergency rule, effective for no more than 120 days, and 538-X-3-.20 is the permanent version, adopted after notice and comment as required by the AAPA.

statutory and regulatory criteria. Such forms shall be tabulated and averaged by the Commission staff and used solely to determine the order in which individual Applicants are subsequently considered. In those instances where two or more applicants receive identical average rankings, the order shall be determined by a drawing. The Chair will call for a motion to approve or deny each application in the order established above. Following such motion, duly seconded, the Chair will provide an opportunity for further deliberations and a vote.

Ala. Admin. Code r. 538-X-3-.20 & -.20ER (emphasis added).

The Commission has twelve voting members. There are 36 applicants for the five available integrated licenses. According to the voting procedure designed by the Commission staff that is contained in the Rule, each Commissioner will rank each integrated applicant from 1 to 36.

This ranking and voting system was used last week by the Commission when other license categories were considered and licenses were awarded. (Attached as Exhibit A to the complaint is the composite of the ranking sheets for all four license categories published on the Commission's website.) While there is some rough consensus on some of the rankings for various applicants, in each "row" which captures the rankings of each Commissioner for that applicant, in almost all cases there is an outlier or two that gave the applicant a substantially higher number (which ranks them lower) than other Commissioners have done. In all cases, that higher number skews the applicants ranking and makes them less likely to get awarded a license. If there are two Commissioners who give them a substantially higher number, that would usually be enough to eliminate the applicant from consideration by the Commission.

In the case of the integrated license category the Commission is scheduled to consider, rank, and vote on next week, the Commissioners are being asked to rank all 36 applicants, even though roughly half the companies did not make live presentations to the Commission. To be clear, each Commissioner will be asked to rank all 36 companies in the order they consider them to be best qualified to perform as an integrated license holder. Each

Commissioner will rank each company, giving them a number from the most qualified which they will give a “1” ranking, to the least qualified which they will give a “36” ranking. They are asked to rank and award all 36 companies, regardless of whether they have information or even an opinion about some of the companies.

This ranking system allows individual Commissioners to “blackball” or eliminate some companies from further consideration if they give that company a very high ranking of 30 or more. There are only five licenses to be awarded. With the ranking system that is in place, the five companies selected will each have to a very low score, meaning they were ranked very highly qualified by all of the Commissioners or nearly all of the Commissioners. But if a small minority of Commissioners rated any of those applicants between “30” and “36” instead of closer to “1,” then that applicant’s average rating would be increased dramatically, even if 9 of the 12 Commissioners ranked that applicant as a “1.” That company would be eliminated from consideration by a minority of the Commissioners. Empowering individual Commissioners with the authority to “blackball” or eliminate some companies from consideration violates the principal that only a majority of the Commission is allowed to make decisions and award or not award these licenses.

Thus, assuming that all 12 Commissioners voted on an applicant, and nine of them awarded that applicant a first-place vote, the others could effectively veto the judgment of the majority by awarding that applicant a 36. In that event, the applicant would receive an average score of 9.75. Based on the results from last week, when the Commission used this procedure to award cultivator, processor, dispensary, testing lab, and secure transport licenses, a rating of 9.75 would disqualify an applicant from being considered by the Commission for a license, even though most Commissioners voted that applicant as most qualified.

To illustrate, the lowest rated cultivator license awarded last week had an average

score of 6.9; the lowest rated processor license awarded was 4.7273; the lowest rated dispensary license awarded was 5.5455; and the lowest rated secure transporter license awarded was 4. For the integrated category, the ability if one Commissioner to rank any applicant with a 36 could effectively serve to veto that applicant.

Argument

This ranking system has the potential to allow a minority of Commissioners, or even one Commissioner, to veto the judgment of the majority. This voting system is not exemplary of the concept of majority rule or the open deliberation intended under the Alabama Administrative Procedure Act (AAPA).

This is a contested case proceeding within the meaning of the AAPA, because the Commission's vote will result in both the grant and denial of licenses. *See* Ala. Code § 41-22-19(a) ("The provisions of this chapter concerning contested cases shall apply to the grant, denial, revocation, suspension, or renewal of a license.").

The Commission's final decision on the granting of integrated licenses will be a final agency action, and therefore must be by majority vote. *Id.* § 41-22-15 ("In a contested case, a majority of the officials of the agency who are to render the final order must be in accord for the decision of the agency to be a final decision.").

Alabama Always likely is the only applicant that meets all of the Darren Wesley "Ato" Hall Compassion Act's (the Compassion Act) requirements for integrated licenses. On information and belief, however, there is a small minority of Commissioners who, in conjunction with the Commission's staff and former Commissioner Stokes, intend to prevent Alabama Always from receiving a license.

The Commission's ranking system therefore threatens to irreparably harm Alabama Always and its rights and privileges. Alabama Always has expended substantial sums of

money in its efforts to comply with the Compassion Act and will not be able to recover those sums because the Commission enjoys sovereign immunity.

Injunctive and declaratory relief are appropriate here. Without the requested injunctive relief, Alabama Always will suffer immediate and irreparable injury. Furthermore, the harm that Alabama Always faces is not susceptible of being compensated with money damages. 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. Alabama Always is likely to succeed on the merits of its claim, for the reasons explained in its 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.

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 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 complaint, Alabama Always prays that the Court enter an order in the form attached as **Exhibit A**.

Respectfully submitted,

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

OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that this has been served electronically via email on the Commission's counsel on December 8, 2023:

/s/ William G. Somerville
Of Counsel

Exhibit A**Proposed Order****TEMPORARY RESTRAINING ORDER**

Based upon Plaintiff Alabama Always, LLC's motion for temporary restraining order, 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 the AMCC conducting its business by not adhering to the principle of majority rule, 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's rules, specifically Alabama Administrative Code r. 538-X-3-.20 & -20ER violate the majority rule provision contained in Alabama Code § 41-22-15(a).

Without issuance of a temporary restraining order, Plaintiff will suffer immediate and irreparable harm for which there is no adequate remedy at law. 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. Neither the Commission nor any applicant is entitled to a system in which a minority of Commission members is allowed to exercise what amounts to a veto over the majority's judgment. The Court further finds

that the Commission's proceedings scheduled for December 12 can proceed in light of this Order.

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

The Commission shall not utilize the ranking and nominating process contemplated by Alabama Administrative Code r. 538-X-3-.20 & -.20ER and described specifically as follows:

In order to determine the order in which Applicants should be considered, each Commissioner will be given an opportunity to submit, in an open meeting, *a written form providing an overall preliminary rank, in descending order, of each of the Applicants in the license category*, giving due consideration to all statutory and regulatory criteria. Such forms shall be tabulated and averaged by the Commission staff and used solely to determine the order in which individual Applicants are subsequently considered. In those instances where two or more applicants receive identical average rankings, the order shall be determined by a drawing. The Chair will call for a motion to approve or deny each application in the order established above. Following such motion, duly seconded, the Chair will provide an opportunity for further deliberations and a vote.

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 December, 2023.

CIRCUIT COURT JUDGE