



that irreparable injury by way of enormous financial loss would take place if the Marion Co. hemp crop was destroyed.

As a result of that filing, the Court issued an *Ex Parte* Temporary Restraining Order and Preliminary Injunction on September 26, 2019. That order temporarily restrained and preliminarily enjoined the Defendants “from entering onto the property under cultivation by Plaintiffs for the purpose of destroying the hemp crop planted thereon” and further provided that all parties would have an opportunity to be heard at a hearing on the merits to be scheduled by the Court at a later date.

On September 26, 2016, Plaintiffs’ counsel, via email, communicated to general counsel for both Defendants about the matter, serving the signed order and asking if they would accept service on behalf of their respective agency heads. Both general counsels acknowledged they would. That email also included a previously sent email from this Court’s law clerk regarding potential dates to schedule a hearing in this matter and asked the general counsels to reply directly regarding the scheduling issue. Ultimately, the Court set this matter for October 8 at 10:00 a.m.

Defendant SLED retained Kevin M. Barth who made an appearance electronically on Friday, October 4, 2019 and subsequently filed a *Response in Opposition* on October 7, 2019. Plaintiffs filed a *Reply* to that response on October 8, 2019.

The parties appeared as referenced above and the Court heard argument from both the Plaintiffs and Defendant SLED<sup>1</sup> and took the matter under advisement to allow for sufficient review of the submitted materials.

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<sup>1</sup> Given the issue at this time was the TRO/injunction of “enforcement” efforts, Defendant SLED was the agency arguing the position of the State.

## **BRIEF STATEMENT OF THE DISPUTE**

The issue before the Court at this time is whether or not to leave the temporary restraining order (TRO) and preliminary injunction issued by the Court on September 26, 2019 in place. The dispute at the heart of this issue is one of due process. Plaintiffs allege that the State has threatened to seize a valuable crop and destroy it without affording them the right to challenge the agency decisions giving rise to that seizure and destruction. The Defendants allege that the Plaintiffs are in violation of the law and a contractual agreement through which they have waived their due process rights.<sup>2</sup>

## **LEGAL STANDARD**

Actions for injunctive relief are equitable in nature. Wiedemann v. Town of Hilton Head, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).

## **DISCUSSION**

### **The Hemp Farming Act:**

This case involves the interpretation of relatively new law in South Carolina for which there is no interpretive appellate case law: “The Hemp Farming Act,” which is found in Title 46, Chapter 55 of the South Carolina Code of Laws. *See* S.C. Code §§46-55-10 through 44-55-60,

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<sup>2</sup> In their *Response*, SLED raised several procedural defects in the Plaintiffs’ service of the initial pleadings and a failure to provide required security. As to the service issues, while Plaintiffs admitted to potentially failing to serve all the pleadings initially, that defect was cured prior to the hearing and the Court finds that all the parties had notice of the issues raised by the Plaintiffs and were present and ready to argue the issues of the October 8<sup>th</sup> hearing. As such, the Court does not believe there was any prejudice to the Defendants in regard to procedural defects that were raised, but have since been cured. The issue of required security is addressed later in this order.

(hereinafter “Act”).<sup>3</sup>

The Act defines a “licensee” as “an individual or business entity possessing a license issued by the department under the authority of this chapter to cultivate, handle, or process.” S.C. Code §46-55-10(10). The Act defines “department” to be the South Carolina Department of Agriculture and “Commissioner” to be the “Commissioner of the South Carolina Department of Agriculture.” S.C. Code §46-55-10(5) & (3).

“Hemp” or “industrial hemp” is defined as “the plant *Cannabis sativa* L, and any part of the plant, including nonsterilized seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with the federally defined THC levels for hemp. Hemp shall be considered an agricultural commodity.”

The Act contains code sections for “hemp farming licensure” (S.C. Code §46-55-20), “Corrective action plan required for negligent violations” (S.C. Code §46-55-40), and “Unlawful conduct relating to marijuana in proximity to industrial hemp; penalties” (S.C. Code §46-55-60).

In short, what legally determines if a plant is an agricultural commodity or a controlled substance are the THC levels. Specifically, the level of delta-9 tetrahydrocannabinol (“delta-9”), which is the primary psychoactive ingredient in cannabis. As of the Federal Agriculture Improvement Act of 2018, that legal limit is set at 0.30% on a dry weight basis. *See* S.C. Code §46-55-10(8), directing to the “federally defined THC level for hemp” which can be found at 7 U.S.C. 1369(o).

As the Plaintiffs noted at oral argument before the Court, a review of the South Carolina Code of State Regulations for SCDA shows just one (1) mention of the word “hemp.” S.C. Code

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<sup>3</sup> A review of the annotated code shows no case citations listed for any of the Act’s statutory sections and a legislative history going back, at most, just five (5) years.

of Regulations 5-477. That regulation was last amended in 2010, well before the passage of the Act, and deals with the sampling size needed to test seeds. SCDA's website shows that as of this year, there are 114 hemp growing permit holders in 35 of South Carolina's 46 counties.<sup>4</sup>

**The Participation Agreement:**

The Defendants rely heavily in this dispute on the "Participation Agreement" Plaintiff Pendarvis executed on May 13, 2019 with SCDA. Specifically, sections II-Licensed Growing Locations and VIII-Plant Destruction. Those sections are as follows:

- II. Licensed Growing Locations
  - a. The Permitted Grower
    - i. Affirms that living (non-cut) Hemp shall not be grown, handled, or stored at any location other than the locations listed on the Permitted Grower's Application or Application Amendments(s);
    - ii. Agrees to apply for registration of all growing, handling, and storage location, including GPS coordinates, and receives SCDA approval for those locations prior to having living (non-cut) Hemp on those premises; and
    - iii. Acknowledges that Permit Holder shall Submit a Permit Amendment Application and obtain written approval from a representative of SCDA before implementing any change to the license sites stated on the Permitted Grower's Application.

and

- VIII. Plant Destruction
  - a. Permitted Grower acknowledges and consents to the forfeiture or destruction, without compensation, of hemp material:
    - i. Found to have measured a delta-9 THC content of more than 0.3 percent on a dry weight basis;
    - ii. Bearing off-label pesticide residue (or believed by SCDA to have had pesticides applied off-label), regardless of the source or cause of contamination; and
    - iii. Growing in an area that is not licensed by SCDA.
  - b. Notwithstanding the foregoing, Permitted Grower or processors may retain any hemp that tests between three-tenths of one percent to one percent delta-9 tetrahydrocannabinol on a dry weight basis and

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<sup>4</sup> <https://agriculture.sc.gov/divisions/consumer-protection/hemp/>

recondition the hemp product by grinding it with the stem and stalk. Hemp products must not exceed three-tenths of one percent delta-9 tetrahydrocannabinol.<sup>5</sup>

**Allegations and Responses by the Parties:**

**-Crop Was Planted and Cultivated Unlawfully**

Defendant SLED alleges that the crop was planted and cultivated unlawfully.

Specifically, pursuant to S.C. Code Ann. §46-55-20(A)(1) it is “unlawful for a person to cultivate, handle, or process hemp in this State without a hemp license” issued by the South Carolina Department of Agriculture. The Plaintiffs do not now and have never had a license to cultivate, handle, or process this crop located in Marion County. As such, Plaintiffs’ conduct was illegal at the time of the filing of this action and remains illegal.

*Response*, p.4.

Plaintiffs pled, and it is uncontested, that Plaintiff Pendarvis “was issued a Hemp Grower License from Defendant SCDA.” *Petition*, ¶7. The license states Plaintiff Pendarvis “has complied with Section 46-55-20 of the code of laws of South Carolina and is issued this license to engage in the growing of hemp on such approved growing locations on records with the Department during the calendar year shown above.” *Petition*, Exhibit A.

The Court notes that the Act requires the licensee to “provide the department with a legal description and global positioning coordinates sufficient to locate the fields or greenhouses used to cultivate hemp.” S.C. Code §46-55-20(B)(1). The Defendants want to take the participation agreement and elevate it to law. *Response*, p.4. However, as the Plaintiffs argue, through that same participation agreement, Defendant SCDA acknowledges the reality of mother nature intruding on a farmer’s best laid plans by providing for a hemp licensee to submit a “Permit Amendment Application and obtain written approval from a representative of SCDA before implementing any

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<sup>5</sup> Defendants do not rely on Section VIII(b) in their arguments, but Plaintiffs do. An issue which will be addressed below.

change to the license sites stated on the Permitted Grower's Application." *Response*, Attachment 5, p.2, Sec. II(a)(iii).

**-Crop Tested above the Allowable THC Level for Hemp.**

Defendant SLED alleges that the crop was "too hot," i.e., tested with a level of delta-9 THC that was above the legal limit. Defendant SLED produced a copy of a "SLED Drug Analysis report" which they allege "specifically and unequivocally indicates that the plant material on this field contained a Total Delta-9 Tetrahydrocannabinol (THC) percent dry weight of .48 with a +/- of .07% as of September 16, 2019." *Response*, p.6 and Attachment 4.

However, Plaintiffs produced their own lab report from September 27, 2019 showing a Total THC% of 0.26%. *Supplemental Memo*, Exhibit C. While raising issue with how Defendant SLED sampled for their tests (the participation agreement calls for four (4) plants per grow to be tested, while Defendant SLED's lab report documents just two (2) being sampled), Plaintiffs also argued that Defendant SCDA acknowledges the fluctuating nature of delta-9 levels in living hemp plants by providing that "permitted growers or processors may retain any hemp that tests between three-tenths of one percent (.30%) to one percent (1.00%) delta-9...and recondition the hemp product by grinding it with the stem and stalk." *Response*, Attachment 5, Sec. VIII(b).

**Due Process:**

South Carolinians enjoy constitutional protections from being deprived of property "without due process of law" through both the United States Constitution (Fifth and Fourteenth Amendments) and the Constitution of the State of South Carolina (Art. I, §3).

As evidenced by the allegations and responses presented by both parties to the Court, this is a matter that begs for due process to help weigh competing positions while protecting important property rights. The Court is aware that Defendant SLED has already confiscated and destroyed

some of Plaintiff Pendarvis' crop located in another county. Certainly, both Defendants will take the position that the participation agreement prohibits the Plaintiffs from being entitled to compensation for crops lawfully confiscated and destroyed. *See* Section VIII(a) of the agreement. Thus, if the crop is confiscated and destroyed, the Plaintiffs will face significant legal hurdles in seeking remedy.

The Act specifically contemplates these types of allegations occurring and not subjecting participants to confiscation and forfeiture of their crops. The South Carolina General Assembly specifically provides for licensees to be able to conduct "corrective action plans" for:

- a) Failing to provide a legal description and global positioning coordinates of the land on which the licensee cultivates hemp;
- b) Failing to obtain a proper license or other required authorization from the commissioner; or
- c) Producing *Cannabis sativa L.* with more than the federally defined THC level for hemp.

S.C. Code §46-55-40(A)(1)(a)(b)and(c).

That code section goes on to lay out that "the corrective action plan provided in item (2) is the sole remedy for negligent violations of this chapter, regulations promulgated pursuant to this chapter, or the state plan and that a licensee who negligently commits such violations "shall not be subject to any criminal or civil enforcement."

It certainly appears to the Court that the General Assembly did not want to harshly punish South Carolinians who ran afoul of this new law by mistake, and they recognized that the specific allegations being made against the Plaintiffs could be mistakes for which participants should be allowed opportunities to correct.

Plaintiffs satisfy the requirements under the law for an injunction. If the Plaintiffs' crops are seized and destroyed, Defendants will surely argue the provision in the participation agreement that the Plaintiffs' can receive no compensation. If Defendants' interpretation is correct, Plaintiffs

have no other remedy at law to halt destruction of the crops and protect their property interests at this stage.

As to a likelihood of success on the merits, the Court finds it is likely that the Plaintiffs would be successful in challenging their right to due process.

“When a property interest has been created, the due process clause, not state regulations, defines what process is constitutionally mandated. At a minimum, due process usually requires adequate notice of the charges and a fair opportunity to meet them.” Bowens v. N.C. Dept. of Human Resources, 710 F.2d 1015, 1019 (4<sup>th</sup> Cir. 1983), internal citations omitted. “An impartial decision maker is an essential element of due process.” Bowens at 1020, internal citations omitted.

While case law recognizes the level of process due may be “flexible” dependent upon the demands of the situation, South Carolina appellate courts have refused to interpret this to mean the flexibility is so pliable as to allow a governmental agency to refuse to announce the rules of procedure it intends to use to confiscate property. John M. McIntyre & Silver Oak Land Mgt. v. Sec. Comm’r of S.C., 425 S.C. 439, 449, 823 S.E.2d 193, 198 (Ct. App. 2018), citing Kurschner v. City of Camden Planning Comm’n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008).

Furthermore, the South Carolina Constitution specifically declares that:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review. (1970 (56) 2684; 1971 (57) 315.)

South Carolina Constitution, Art. I, §22.

The very next section of our state constitution provides that provisions such as Art. I, §22 “shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory and permissive by its own terms.” South Carolina

Constitution, Art. I, §23.

The necessity for notice, an opportunity to be heard and the right to appeal an administrative agency's decision is embodied by this dispute. While the Defendants contend that Plaintiff Pendarvis' conduct was willful and intentional as opposed to negligent, Defendants admit that Plaintiff Pendarvis did attempt to "amend" his locations. Via August 28, 2019 correspondence, Defendant SCDA notified Plaintiff Pendarvis that his amendments "will not be processed" and that "this crop is considered in violation of S.C. Code Ann. Section 46-55-40(B)." That correspondence further informed Plaintiff Pendarvis that Defendant SCDA "does not believe [his violation of growing hemp on acreage not on record with SCDA] to be negligent or an oversight on your part, but instead views this conduct as willful." *Response*, Attachment 3.

Despite stating that it serves as "the official response" to Pendarvis' "actions," there is no notice within the August 28, 2019 correspondence to Pendarvis that his crops will be seized and destroyed. The correspondence merely states Defendant SCDA has "notified SLED and fulfilled the requirement of reporting to the Attorney General these culpable violations, greater than negligence, of the Hemp Farm Program as such requirement is set forth in S.C. Code Ann. Section 46-55-40(B)." Likewise, there is no notification anywhere in the correspondence as to what administrative appellate procedure Pendarvis is entitled to or any deadline he has to challenge any of these "findings" by Defendant SCDA. Finally, there is no notice whatsoever in that correspondence that the Plaintiffs' plants tested "too hot."

Contrary to the argument put forth by the Defendants, the Plaintiffs did not waive "their right to due process and judicial review." *Response*, p.8. Unlike purely contractual rights, constitutional rights cannot be extinguished or waived absent express agreement. A contractual waiver of due process rights "must, at the very least, be clear." Bowens at 1018. Nowhere in the

participation agreement does it expressly state that licensees waive their rights to due process and judicial reviews.

The Court notes that the Plaintiffs right to due process was recognized by the South Carolina Attorney General's Office in an opinion which it appears Defendant SLED sought in response to being informed of Plaintiff Pendarvis' alleged violations. Via memorandum dated August 5, 2019, Defendant SCDA requested Defendant SLED "enact enforcement of this willful violation by Mr. Pendarvis." *Supplemental Memo*, Ex. D. Within three (3) days, Defendant SLED had requested an opinion from the South Carolina Attorney General, apparently an "expedited" request, seeking guidance as to the appropriate procedure by which to enforce a "willful violation of the South Carolina Hemp Farming Act." *Supplemental Memo*, Exhibit E. That opinion from the South Carolina Attorney General stated:

In conclusion, it is the opinion of this Office that in absence of legislative direction, SLED should seek judicial authorization for the seizure of illegally-grown hemp in order to ensure that the grower receives due process consistent with the Constitutions of the United States and the State of South Carolina. *See, e.g., State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). We advise that this authorization be sought with notice to the grower and an opportunity for them to be heard in a hearing in an abundance of cautions. *See id.*... Therefore our Office advises that SLED proceed with the utmost care to fully ensure that the grower and all interested parties receive due process in any enforcement action.

*Supplemental Memo*, Exhibit E., p.5.

While Attorney General opinions are not binding, our appellate courts have instructed that "they should not be disregarded without cogent reason." *Marchant v. Hamilton*, 279 S.C. 497, 502, 309 S.E.2d 781, 784 (Ct. App. 1983), *citing Etiwan Fertilizer Co. v. South Carolina Tax Commission*, 217 S. Ct. 354, 60 S.E. (2d) 682 (1950). Under the facts as presented, the Court can find no cogent reason to disregard the reasoning set forth by the South Carolina Attorney General opinion issued at Defendant SLED's request in this matter.

Whether the Plaintiffs provided Defendant SCDA with enough information to satisfy S.C. Code §46-55-20(B)(1) is a question for which the Plaintiffs have a right to due process. Whether the Plaintiffs' plants are "too hot" is a question for which the Plaintiffs have a right to due process. Whether the Plaintiffs' acted willfully or negligently is a question for which the Plaintiffs have a right to due process.

Accordingly, the Court finds that an injunction is the only way to protect the Plaintiffs' rights at this stage, while they exercise their due process rights.

**Security:**

The Court is aware of the security requirement issue raised by SLED in their *Response*. The Court is also aware that the hemp crop has almost reached maturation and will imminently be ready for harvest. As such, the Court orders the Plaintiffs to continue to exercise reasonable and necessary farming practices to harvest the hemp crop. Upon harvest, the Plaintiffs are directed to deposit in to trust all sale proceeds from the harvest and hold those funds until such time as this litigation is resolved. The issue of reimbursement of costs for the production and the harvesting of the crop to the plaintiffs shall be litigated and addressed at the final hearing. As there is no pending prejudice to the State by an injunction which merely limits them from seizing and destroying the crop, the Court believes the security afforded from the sale proceeds is sufficient to protect the State's interests.

IT IS THEREFORE ORDERED that the preliminarily injunction issued by the Court prohibiting the Defendants from entering onto the property under cultivation by Plaintiffs for the purpose of destroying the hemp crop planted thereon be left in place pending resolution of the pending litigation.

IT IS FURTHER ORDERED that the Plaintiffs deposit any sale proceeds of the harvest of

the hemp crop in to trust and hold those funds until such time as this litigation is resolved.

AND IT IS SO ORDERED.

Marion, South Carolina  
November \_\_\_\_\_, 2019

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William H. Seals, Jr.  
Circuit Court Judge



Marion Common Pleas

**Case Caption:** John Pendarvis , plaintiff, et al VS South Carolina Law Enforcement  
Division , defendant, et al

**Case Number:** 2019CP3300675

**Type:** Order/Other

IT IS SO ORDERED

s/. The Honorable William H. Seals Jr. #2157