THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-002006
Case No. 2019-CP-33-0675

John Pendarvis and Lawton Drew, ……. Respondents,

v.

South Carolina Law Enforcement Division and
South Carolina Department of Agriculture, ……. Defendants,

Of which, South Carolina Law Enforcement Division is…… Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
John Pendarvis and Lawton Drew Plaintiffs, -vs- South Carolina Law Enforcement Division and South Carolina Department of Agriculture Defendants.	)	C/A NO. 2019-CP-33-00675

Date of Hearing: October 8, 2019
Court Reporter: Sallie Beth Todd
Appearances: Patrick J. McLaughlin, Attorney for Plaintiffs
Kevin M. Barth, Attorney for SLED
Alden G. Terry, Attorney for SCDA

THIS MATTER is before the court on the Plaintiff's *Petition for an Ex Parte Temporary Restraining Order, Motion for a Preliminary Injunction,* and *Complaint for Declaratory and Injunctive Relief* which was filed on September 26, 2019.

The basis for that motion was that Plaintiff Pendarvis had a Hemp Grower License issued by Defendant South Carolina Department of Agriculture (hereinafter "SCDA"); that Plaintiff Pendarvis had filed an "acreage amendment application" ("location issue") with SCDA to plant two acres of hemp in Marion County ("Marion Co. hemp crop"); that the Marion Co. hemp crop had great value (exceeding $300,000.00); that Defendant South Carolina Law Enforcement Division (hereinafter "SLED") informed the Plaintiffs on September 25, 2019 that the Marion Co. hemp crop would be destroyed in the next few days; that the Plaintiffs were only aware of the location issue as the reason behind Defendant SLED's decision to destroy the Marion Co. hemp crop; that the Plaintiffs had been afforded no administrative or judicial review in the matter; and

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[1] and took the matter under advisement to allow for sufficient review of the submitted materials.

[1] 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.[2]

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,

[2] 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 8th 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").[3]

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

[3] 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.[4]

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

[4] 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.[5]

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

[5] 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 (4th 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 permissory 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 wavier 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

_____
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

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
John Pendarvis and Lawton Drew Plaintiffs, -vs- South Carolina Law Enforcement Division and South Carolina Department of Agriculture Defendants.	)	C/A NO. ***EX PARTE* TEMPORARY RESTRAINING ORDER AND, PRELIMINARY INJUNCTION**

This matter comes before the Court on the Plaintiff's *Petition for an Ex Parte Temporary Restraining Order, Motion for a Preliminary Injunction and Complaint for Declaratory and Injunctive Relief*.

Based on the pleadings and verifications reviewed by this Court, I find that Plaintiffs are likely to suffer immediate and irreparable loss or damage if Defendants proceed with destruction of Plaintiffs' hemp crop located in Marion County without the benefit of due process and judicial review guaranteed to Plaintiffs by the South Carolina Constitution.

I further find that Defendants will not be harmed by the granting of this TRO and Preliminary Injunction pending a hearing on the merits.

IT IS THEREFORE ORDERED that Defendants are hereby temporarily restrained and preliminarily enjoined from entering onto the property under cultivation by Plaintiffs for the purpose of destroying the hemp crop planted thereon.

IT IS FURTHER ORDERED that all parties will be given an opportunity to be heard at a hearing on the merits to be scheduled by this Court at a later date.

AND IT IS SO ORDERED.

Marion, South Carolina
September _____, 2019

_____
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

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
John Pendarvis and Lawton Drew Plaintiffs, -vs- South Carolina Law Enforcement Division and South Carolina Department of Agriculture Defendants.	)	C/A NO. **PETITION FOR AN *EX PARTE* TEMPORARY RESTRAINING ORDER, MOTION FOR A PRELIMINARY INJUNCTION, AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs John Pendarvis and Lawton Drew hereby files this petition for a temporary restraining order, motion for a preliminary injunction, and verified complaint for declaratory and injunctive relief. Plaintiffs would respectfully show unto the Court as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff John Pendarvis is a resident of Dorchester County, South Carolina.
2. Plaintiff Lawton Drew is a resident of Marion County, South Carolina.
3. Defendant South Carolina Law Enforcement Division (hereinafter Defendant "SLED") is the State Law enforcement agency and a governmental entity operating pursuant to the laws of the State of South Carolina and is a public agency subject to suit pursuant to S.C. Code Ann. Section 15-78-10 *et seq*.
4. Defendant South Carolina Department of Agriculture (hereinafter Defendant "SCDA") is the State agency and a governmental entity operating pursuant to the laws of the State of South Carolina and is a public agency subject to suit pursuant to S.C. Code Ann. Section 15-78-10 *et seq*.

5. The Court has jurisdiction over the subject matter of any action filed in this dispute pursuant to Article V, Section 11 of the South Carolina Constitution and the Uniform Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 et seq.

6. Venue is proper in Marion County pursuant to South Carolina Code § 15-7-30(C), because the most substantial part of the acts and omissions giving rise to the allegations here occurred in Marion County, South Carolina.

FACTUAL BACKGROUND

7. On May 1, 2019, Plaintiff John Pendarvis was issued a Hemp Grower License from Defendant SCDA. *See* Exhibit A.

8. On August 10, 2019, Plaintiff John Pendarvis filed a Hemp Farming Program Acreage Amendment Application with Defendant SCDA to add two acres of crop in Marion County.

9. That the Plaintiff Pendarvis did plant two (2) acres of hemp crop in Marion County on property which is owned by Plaintiff Drew.

10. That the crop has been grown and cultivated and is nearing maturing for harvest.

11. That the crop grown on the property of Plaintiff Drew by Plaintiff Pendarvis has great value and that a loss of the crop at this time would cause enormous financial loss to the Plaintiffs.

12. On September 25, 2019, Plaintiffs were informed by Defendant SLED that the two (2) acres of crop located in Marion County would be destroyed in the next few days.

13. Both Plaintiffs have reviewed these pleadings and submit verifications that the contents of the pleadings are true and correct to the best of their knowledge. *See* Exhibit B.

PETITION FOR A TEMPORARY RESTRAINING ORDER AND MOTION FOR A PRELIMINARY INJUCTION
(RULE 65(B), SCRCP)

14. Each of the foregoing paragraphs are incorporated herein.

15. Rule 65 of the civil rules provides that an *ex parte* temporary restraining order (TRO) may not issue "unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon." Rule 65(b), SCRCP.

16. A TRO should issue here to prevent Defendants SCDA and SLED from destroying crops and taking *ultra vires* action.

17. Were such a destruction to occur and were official action taken in contravention of state law and/or due process to Plaintiffs, Plaintiffs would be irreparably harmed and prejudiced. That the value of the crop that is threatened to be destroyed without due process exceeds $300,000.

18. Once the destruction of the crops has occurred, there can be no adequate remedy at law.

19. Accordingly, a TRO should issue prohibiting Defendants SLED and SCDA from destroying crops located in Marion County.

FOR A FIRST CAUSE OF ACTION
(Declaratory Relief)

20. Each of the foregoing paragraphs are incorporated herein.

21. Pursuant to South Carolina Code § 15-53-20, Plaintiff requests that the Court declare that Plaintiff Pendarvis has a valid Hemp Grower License which is attached hereto and made a part hereof.

22. That Defendant SCDA has contemplated that the designation of tracts of property on which hemp can be grown can be changed subsequent to the initial application for license.

23. That Defendant SCDA has provided a form for farmers such as Plaintiff Pendarvis to use in designated alternate tracts of property.

24. That Plaintiff Pendarvis has attempted to follow rules for hemp production in South Carolina.

25. That Plaintiff Pendarvis has not exceeded the forty-acre allotment.

26. That Plaintiff is informed and believes that the only alleged issue arises from the timeliness of the amendment filed with Defendant SCDA re-designating the tract of property on which the hemp would be cultivated.

27. That no administrative review has been afforded to Plaintiff by either Defendant; nor has any judicial review of this matter yet occurred.

28. Plaintiff seeks a declaration of this Court that the license of Plaintiff Pendarvis is valid and that he has the authority to harvest the crop in Marion County without either Defendant engaging in the unlawful taking of the crop.

FOR A SECOND CAUSE OF ACTION
(Injunctive Relief)

29. Each of the foregoing paragraphs are incorporated herein.

30. Pursuant to South Carolina Code §15-53-120, the Court should enter a temporary and, after a plenary merits hearing, permanent injunction enjoining the Defendants from any further violation South Carolina Code § 59-117-40 and any such further relief necessary to conform the Defendants conduct to the law and effectuate the orders and judgement

of this Court.

PRAYER

WHEREFORE, Plaintiffs request that the Court grant their petition for an *ex parte* TRO and, after discovery, enter a final declaratory judgment and injunctive relief as set forth above, along with any further relief the Court deems just and proper.

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Attorneys for Plaintiffs

Florence, South Carolina
September 25, 2019

Exhibit A

SOUTH CAROLINA DEPARTMENT OF AGRICULTURE

2019 Hemp Grower License

This is to certify that the licensee shown below 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.

ISSUED May 1st, 2019

EXPIRES December 31st, 2019

LICENSE # 1992

Trent Pendarvis

139 Gavins Road

Harleyville, S.C 29488

Hugh E. Weathers, Commissioner

Exhibit B

VERIFICATION

I have read the petition for temporary restraining order and complaint for declaratory and injunctive relief and verify that its contents are true and correct to the best of my knowledge.

Plaintiff John Trenton Pendarvis

Sworn to me on September 25, 2019,

Rebekah F. Durr
(print)
Notary Public for South Carolina
My Commission Expires:

Rebekah F. Durr
My Commission Expires
NOTARY PUBLIC
05/14/2025
South Carolina

VERIFICATION

I have read the petition for temporary restraining order and complaint for declaratory and injunctive relief and verify that its contents are true and correct to the best of my knowledge.

L Shane Drew

Plaintiff Lawton Shane Drew

Sworn to me on September 25, 2019,

Rebekah F Drew

Rebekah F Drew

(print)

Notary Public for South Carolina

My Commission Expires:

Rebekah F. Drew
My Commission Expires
NOTARY PUBLIC
05/14/2025
South Carolina

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT Civil Action No.: 2019-CP-33-00675
John Pendarvis and Lawton Drew Plaintiffs, v. South Carolina Law Enforcement Division and South Carolina Department of Agriculture Defendants.,	)	**South Carolina Law Enforcement Division's Response in Opposition *Ex Parte* Temporary Order and Preliminary Injunction and Request to Dissolve Such Order**

NOW COMES the South Carolina Law Enforcement Division (SLED) who hereby responds in opposition to the *Ex Parte* Temporary Order and Preliminary Injunction, which is fatally defective both procedurally and substantively, and requests that this The Honorable Court immediately dissolve such order. Put simply, this entire action is an impermissible attempt to enjoin SLED's enforcement of South Carolina law so that the Plaintiffs can continue violating South Carolina law, which should be rejected. In that regard, SLED would assert the following:

FATAL PROCEDURAL DEFECTS REQUIRING DISSOLUTION

1. Failure to Provide Notice

Rule 65(a) of the South Carolina Rules of Civil Procedure clearly states that "No temporary injunction shall be issued without notice to the adverse party." The order in place in this matter, which is clearly styled as an *Ex Parte* Temporary Restraining Order **And, Preliminary Injunction** is directly and fatally contrary to Rule 65, SCRCP. There is and can be no argument that SLED was not provided notice prior to the issuance of this order. In fact, Attachment 1, which is the email from Plaintiff's Counsel notifying SLED of the existence of this Order after it was issued, conclusively demonstrates such. Accordingly, the applicable Rules of Procedure and South

Carolina jurisprudence mandate that this order must be dissolved. *See* Spartanburg Buddhist Ctr. of S.C. v. Ork, 417 S.C. 601, 609, 790 S.E.2d 430, 434 (Ct. App. 2016) (overturning an injunction that violated the notice requirement of Rule 65).

2. Failure to Properly Serve Required Documents

Rule 65(b) of the South Carolina Rules of Civil Procedure states:

> Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; **shall be served, together with a summons and complaint in the event no summons and complaint have previously been served in the action, upon the adverse party in accordance with the provisions of Rule 4**; **shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes**, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

Attachment 2 is an Affidavit of SLED Chief Mark Keel indicating that SLED was not served with the summons and complaint at the time of service of the temporary restraining order and further indicating that SLED has yet to be served with any of the pleadings in this matter. Specifically, SLED has not been served with the *Petition for an Ex Parte Temporary Restraining Order*, the *Motion for a Preliminary Injunction*, nor the *Complaint for Declaratory and Injunctive Relief* that are referenced in this Order. This failure by the Plaintiff's to meet the baseline notice requirements set forth in Rule 65 is directly contrary to the Rules of Civil Procedure and cannot be cured. As such, the Order must be dissolved.

In addition, the Order is fatally defective in completely and totally failing to define any actual "injury" alleged to be suffered by the Plaintiffs, and failing to define why the order was granted without notice to SLED. There is simply no argument that this Order meets the specificity required by Rule 65(b) and, thus, this Order must be dissolved.

3. Failure to Provide Required Security.

Rule 65(c) of the South Carolina Rules of Civil Procedure clearly states,

> Except in divorce, child custody and non-support actions where the giving of security is discretionary, **no restraining order or temporary injunction shall issue except upon the giving of security by the applicant**, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State or of an officer or agency thereof.

The Order in this matter is completely and totally silent on the security requirement mandated by Rule 65. As such, this order is fatally defective and must be dissolved. *See* Spartanburg Buddhist Ctr. of S.C. v. Ork, 417 S.C. 601, 609, 790 S.E.2d 430, 434 (Ct. App. 2016) (holding an injunction without security required by Rule 65(c) is fatally defective); AJG Holdings, LLC v. Dunn, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009) (remanding a case when the circuit court failed to order a party to post a bond before issuing a temporary injunction); Atwood Agency v. Black, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (stating even a "nominal security bond does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper"); 12 S.C. Jur. *Equity* § 19 (1992) ("Rule 65(c) ... requires that security be posted before the court may issue either a restraining order or temporary injunction.").

4. Lack of Required Specificity

Rule 65(d) of the South Carolina Rules of Civil Procedure mandates that

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

The Order issued in this matter fails the specificity requirement in that it is not specific in reasons for its issuance and simply impermissibly references the other documents in this case, which have not been properly served on SLED in accordance with the established Rules of Civil Procedure. *See* Attachment 2. As such, this Order fails to comply with Rule 65(d), SCRCP and must be dissolved.

FATAL SUBSTANTIVE DEFECTS REQUIRING DISSOLUTION

1. This Crop Was Planted and Cultivated Unlawfully.

In addition, although SLED has not been properly served with any of pleadings in this matter, SLED is nevertheless informed and believes that this action cannot set forth an actionable case as the only loss to the Plaintiffs will be the loss of their ability to continue unlawful conduct in direct violation of South Carolina law. 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. *See* S.C. Code Ann. § 46-55-20(A)(1). Therefore, this entire action, which is a request for this Court to authorize the Plaintiffs to continue illegal conduct, must fail.

In fact, SLED is informed and believes that the Plaintiffs illegally planted this field and began illegally cultivating this crop prior to even seeking licensure from the Department of Agriculture for this field. This conduct is expressly prohibited by S.C. Code Ann. § 46-55-20(A)(1) and cannot form the basis of a restraining order in this matter. Further, Defendant Department of Agriculture (Ag), the statutorily empowered regulator for hemp in South Carolina, denied the Plaintiffs attempt to amend any existing licensure to include this illegally grown field

expressly because Ag found that the Plaintiffs had acted willfully in planting and cultivating this crop in violation of South Carolina law. Attached and incorporated herewith as Attachment 3 is the letter sent to Plaintiff Pendarvis by Assistant Commissioner Derek Underwood explicitly denying Pendarvis' late application to amend his hemp license to include this field. In this letter, Ag indicates that Pendarvis is "unlawfully growing Hemp on acreage **that is not on record with SCDA**. This is a willful violation of the Hemp Farming Program which requires a licensed grower to provide the SCDA with a legal description and global positioning coordinates of land on which the licensee **seeks to cultivate hemp**." (emphasis in original). This letter goes on to note that "SCDA does not believe this violation to be negligent or an oversight on your part, but instead views this conduct as willful."

The South Carolina Hemp Farming Act – S.C. Code Ann. § 46-55-10 *et seq*., which was signed into law by Governor McMaster on March 28, 2019, empowers Ag to be the sole regulatory entity for hemp farming in South Carolina. This bill gives Ag the sole discretion in determining whether violations of the Hemp Farming Act are negligent or are willful. *See* S.C. Code Ann. § 46-55-40. In this matter, in accordance with S.C. Code Ann. § 46-55-40(B), Ag determined conclusively and unequivocally that the Plaintiffs' acted willfully and "violated state law with a culpable mental state greater than negligence" and reported the "hemp producer to the Attorney General and the Chief of the South Carolina Law Enforcement Division" in accordance with this same law. It is noteworthy that SLED's sole involvement in this matter is predicated on SLED's receipt of notice of a willful violation of the Hemp Farming Act from Ag in this matter and SLED's involvement is the enforcement of the criminal laws. Accordingly, this entire action is a fatally defective attempt to get this Court to immunize the Plaintiffs' unlawful and illegal conduct. Therefore, this action must fail and the Order must be dissolved.

2. This Crop Tested Above the Allowable THC Level for Hemp Under Both State and Federal Law, thus Rendering it Marijuana.

Hemp is defined in South Carolina as "the plant Cannabis sativa L. and any part of that plant, including the nonsterilized seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with the federally defined THC level for hemp" which is "a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis" using post-decarboxylation or similarly reliable methods. *See* S.C. Code Ann. § 46-55-10(6), (8). Attachment 4, which is incorporated herewith, is the SLED Drug Analysis report from the field in question that 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. Accordingly, this field tested as marijuana and cannot be lawfully cultivated, manufactured, or possessed. Pursuant to S.C. Code Ann. § 44-53-370, it is unlawful to manufacture, distribute or possess with the intent to distribute marijuana. Marijuana is defined as "all species or variety of the marijuana plant and all parts thereof whether growing or not; the seeds of the marijuana plant; the resin extracted from any part of the marijuana plant; or every compound, manufacture, salt, derivative, mixture, or preparation of the marijuana plant, marijuana seeds, or marijuana resin." S.C. Code Ann. § 44-53-110(27). As the crop in question is above the legal limit for hemp set forth in both state and federal law, this crop cannot be cultivated without violating both state and federal drug laws. Accordingly, this entire action is an attempt to have this Court authorize the cultivation and sale of marijuana in direct violation of both state and federal law. Violations of state and federal law cannot form the basis of immediate and irreparable loss or damage to the Plaintiffs. Therefore, this Order must be immediately dissolved.

3. This Crop Was Planted and Grown In Direct Violation of the Participation Agreement

In order for any individual to "cultivate, handle, or process" hemp in South Carolina, the individual must be licensed by Ag. As the sole regulatory body over hemp farming, Ag has determined that all lawful participants in the hemp program must sign a Participation Agreement. Plaintiff Pendarvis' signed agreement is attached hereto and incorporated by reference herein as Attachment 5 in this matter. In signing this agreement Pendarvis "promises to comply with the requirements set forth in the South Carolina Hemp Farming Act, which is incorporated by reference into this Agreement." Pendarvis willfully did not comply. *See* Attachment 3. In addition, Pendarvis agreed that he "will abide by all applicable laws and regulations incident to the growth, cultivation, or marketing of hemp." Pendarvis willfully did not comply. *See* Attachment 3. In the section titled "Licensed Growing Locations", Pendarvis agreed "to apply for registration of all growing, handling, and storage location, including GPS coordinates, and receive SCDA approval for those location **PRIOR** to having living (non-cut) Hemp on those premises." Neither Pendarvis nor Drew sought or received Ag approval prior to willfully and unlawfully planting and cultivating this crop in direct violation of Pendarvis' agreement to do such. It is noteworthy that Plaintiff Drew is not now and has never been individually licensed by Ag to plant or cultivate hemp in South Carolina and is acting in concert with Plaintiff Pendarvis pursuant to Pendarvis' signed Participation Agreement, as such, Plaintiff Drew is bound by the terms of such. As such, the Plaintiffs' actions clearly violate multiple requirements of the Participation Agreement required to lawfully grow or cultivate hemp in South Carolina. The continuation of this Order would result in a continuing breach of the Plaintiffs' agreement with Ag. Accordingly, this order must be dissolved.

4. Plaintiff's Consented to Forfeiture and Destruction of This Illegal Crop

The Plaintiffs have also waived their right to due process and judicial review guaranteed to Plaintiffs by the South Carolina Constitution, and, as such, this ground cannot constitute "immediate and irreparable loss or damage" to the Plaintiffs. Specifically, in the Participation Agreement, which SLED did not possess until on or about September 17, 2019, Plaintiffs clearly and unequivocally voluntarily waived the right to due process regarding illegal hemp. Specifically, the Agreement states that the "Permitted Grower **acknowledges and consents to the forfeiture and destruction, without compensation, of hemp material: i. Found to have a measured delta-9 THC content more than .3 percent on a dry weight basis;…and iii. Growing in an area that is not licensed by SCDA**." This crop fails on both counts. This crop was found to have a measured delta-9 THC content of **.48**, which is certainly more than .3 percent on a dry weight basis. *See* Attachment 4. In addition, this crop was grown in an area not licensed by SCDA. *See* Attachment 3. As such, due to the Plaintiffs voluntary consent, no judicial authorization is required in this matter, and the lack of such cannot form the basis for this action. *See* Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2nd 576 (1967)(holding that the constitutional immunity from unreasonable searches and seizures may be waived by valid consent); United State v. Durades, 929 F.2d 1160 (7th Cir. 1991)(holding that warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent.). Accordingly, the Plaintiffs are not entitled to any additional judicial review in this matter and the lack of such cannot form the basis of this action, or of any "immediate and irreparable loss or damage" required for a temporary restraining order in South Carolina. *See* Rule 65, SCRCP. Therefore, this Order must be dissolved.

5. This Action is an Impermissible Attempt to Enjoin the Enforcement of the Law

As far back as the early 1900s, the South Carolina Supreme Court held that, "[o]rdinarily a court of equity has no jurisdiction to restrain criminal proceedings…." Cain v. Daly, 74 S.C. 480, 55 S.E. 110, 112 (1906) (citing In re Sawyer, 8 Sup. Ct. 482, 31 L. Ed. 402; Crighton v. Dahmer, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, and note, 35 Am. St. Rep. 666, and note at page 677; 5 Am. & Eng. Dec. in Equity, and citations at page 51.) In 1929, the South Carolina Supreme Court cited this very rule in denying a request to enjoin actions regarding prosecutions for possession of slot machines. Harvie v. Heise, 150 S.C. 277, 148 S.E. 66 (1929).

The South Carolina Supreme Court has carved out only one limited two-prong exception to the prohibition on enjoining criminal prosecutions, stating "when the ordinance or statute under which the prosecutions are had is **clearly void** and **irreparable injury to property rights** may result for its enforcement, equity may interfere." Cain v. Daly, 74 S.C. 480, 55 S.E. 110, 112 (1906) (emphasis added). As such, only when a criminal statute is clearly void **and** irreparable injury to property rights may result in the enforcement of a statute should a court consider enjoining the enforcement of the laws of this state. However, neither exist in this case.

The Hemp Farming Act in South Carolina is not clearly void. In addition, as set forth more fully above, there is and can be no irreparable harm from the constitutional enforcement of valid, enforceable and constitutional laws of the State of South Carolina. Moreover, the Plaintiffs have violated both state and federal law and the Participation Agreement. Therefore, the Plaintiffs cannot satisfy either prong of the Cain v. Daly test, and the temporary restraining order in question must be dissolved.

Moreover, this order, as currently constructed, prohibits SLED from complying with its inspection authority set forth in S.C. Code Ann. § 46-55-20(B)(2). This law states that a

> person applying for a license to cultivate, handle, or process hemp shall provide the department with prior written consent:
>
> (a) allowing representatives of the department, the State Law Enforcement Division, and local law enforcement agencies to enter onto all premises where hemp is cultivated, handled, processed, or stored for the purpose of conducting physical inspections, obtaining samples of hemp or hemp products, or otherwise ensuring compliance with the requirements of state law and any administrative regulations promulgated by the department; and
>
> (b) to the testing procedure set forth in the state plan, using post-decarboxylation or other similarly reliable methods, delta–9 THC concentration levels of hemp produced in the State.

This Court's order negates the Plaintiffs' consent and prohibits SLED from "obtaining samples of hemp or hemp products, or otherwise ensuring compliance with the requirements of state law." Accordingly, this Court's order is an impermissible attempt to circumvent the enforcement of South Carolina law and should be dissolved.

CONCLUSION

Therefore, based upon the foregoing, all applicable South Carolina law and jurisprudence, any subsequent memoranda that may be filed in this matter, and any arguments that may be advanced at the hearing of this matter; the South Carolina Law Enforcement Division requests that the temporary restraining order in this matter be dissolved.

[SIGNATURE PAGE ATTACHED]

Respectfully Submitted,

s/Kevin M. Barth
Kevin M. Barth, SC Bar #559
Post Office Box 107
Florence, South Carolina 29503
843-662-6301
kbarth@bbllawsc.com

ATTORNEY FOR SLED

Florence, South Carolina

October 7, 2019

From: Patrick McLaughlin <Patrick@wukelalaw.com>
Sent: Thursday, September 26, 2019 1:53 PM
To: Whitsett, Adam <awhitsett@sled.sc.gov>; aterry@scda.sc.gov
Cc: cbhutto@williamsattys.com; 'Seals, William Law Clerk (Catherine Holland)' <wsealslc@sccourts.org>; 'Seals, William Secretary (Anna Meetze)' <wsealssc@sccourts.org>; 'Joann Nettles' <jnettles@wukelalaw.com>; 'Rebekah Durr' <rfdurr@williamsattys.com>
Subject: [EXTERNAL] Pendarvis and Dew v. SLED and SCDA CA No. 2019 CP 33 00675

EXTERNAL EMAIL: Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Adam and Alden:

I just called and left both of you voicemails about this case as General Counsels for SLED and SCDA respectively.

Brad and I represent the Plaintiffs, who today filed for an order granting a TRO and preliminary injunction in this matter. I have copied and pasted below the email exchange with Judge Seals' law clerk, Hunter, re: scheduling a hearing on this matter. (I have also cc'd Hunter on this email, along with Judge Seals' administrative assistant, Anna Meetze).

We would greatly appreciate it if you could notify us immediately of whether or not you can each accept service on behalf of Chief Keel and Commissioner Weathers respectively or if we will have to have them personally served. (*edit*. I just spoke with Alden on the phone who confirmed she could accept for Commissioner Weathers and that she would advise us and the Court of availability for a hearing).

Also, if you please advise us and the Judge Seals office of your availabilities for scheduling a hearing as requested in the emails below.

I am about to be on the road for an out-of-town conference tomorrow, but if either of you have any questions, please feel free to contact myself or Brad. Our mobile numbers are 843-409-3892 (Patrick) and 803-516-1814 (Brad).

Thank you and we look forward to hearing from and working with you.

Patrick J. McLaughlin
Wukela Law Firm
403 Second Loop Rd.
PO Box 13057
Florence, SC 29504-3057
(O) 843-669-5634
(F) 843-669-5150
(M) 843-409-3892

Patrick@wukelalaw.com

STATE OF SOUTH CAROLINA)) COUNTY OF MARION)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT Civil Action No.: 2019-CP-33-00675
John Pendarvis and Lawton Drew)) Plaintiffs,)) v.)) South Carolina Law Enforcement Division) and South Carolina Department of) Agriculture)) Defendants.,)	**AFFIDAVIT**

PERSONALLY APPEARED before me, **Adam L. Whitsett**, who being duly sworn, attests to the following:

1. I am the General Counsel for the South Carolina Law Enforcement Division.

2. On Thursday, September 26, 2019, I accepted service of the attached *Ex Parte* Temporary Restraining Order And, Preliminary Injunction on behalf of Chief Keel. However, the attached email and order are all that I received at that time.

3. To date, SLED has not been served with any other pleadings in this matter, including, but not limited to: the *Petition for an Ex Parte Temporary Restraining Order*, the *Motion for a Preliminary Injunction*, nor the *Complaint for Declaratory and Injunctive Relief*.

FURTHER AFFIANT SAYETH NOT.

Adam L. Whitsett

SWORN TO before me this 7th day of October, 2019

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: My Commission Expires June 23,2025

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT C/A NO.
John Pendarvis and Lawton Drew Plaintiffs, -vs- South Carolina Law Enforcement Division and South Carolina Department of Agriculture Defendants.	)	***EX PARTE* TEMPORARY RESTRAINING ORDER AND, PRELIMINARY INJUNCTION**

This matter comes before the Court on the Plaintiff's *Petition for an Ex Parte Temporary Restraining Order, Motion for a Preliminary Injunction and Complaint for Declaratory and Injunctive Relief.*

Based on the pleadings and verifications reviewed by this Court, I find that Plaintiffs are likely to suffer immediate and irreparable loss or damage if Defendants proceed with destruction of Plaintiffs' hemp crop located in Marion County without the benefit of due process and judicial review guaranteed to Plaintiffs by the South Carolina Constitution.

I further find that Defendants will not be harmed by the granting of this TRO and Preliminary Injunction pending a hearing on the merits.

IT IS THEREFORE ORDERED that Defendants are hereby temporarily restrained and preliminarily enjoined from entering onto the property under cultivation by Plaintiffs for the purpose of destroying the hemp crop planted thereon.

IT IS FURTHER ORDERED that all parties will be given an opportunity to be heard at a hearing on the merits to be scheduled by this Court at a later date.

AND IT IS SO ORDERED.

Marion, South Carolina
September _____, 2019

_____
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

Electronically signed on 2019-09-26 12:52:40 page 2 of 2

Whitsett, Adam

From:	Patrick McLaughlin <Patrick@wukelalaw.com>
Sent:	Thursday, September 26, 2019 1:53 PM
To:	Whitsett, Adam; aterry@scda.sc.gov
Cc:	cbhutto@williamsattys.com; 'Seals, William Law Clerk (Catherine Holland)'; 'Seals, William Secretary (Anna Meetze)'; 'Joann Nettles'; 'Rebekah Durr'
Subject:	[EXTERNAL] Pendarvis and Dew v. SLED and SCDA CA No. 2019 CP 33 00675
Attachments:	Order granting TRO and Prelim Injunction 9-26-2019.pdf

EXTERNAL EMAIL: Do not click any links or open any attachments unless you trust the sender and know the content is safe.

Adam and Alden:

I just called and left both of you voicemails about this case as General Counsels for SLED and SCDA respectively.

Brad and I represent the Plaintiffs, who today filed for an order granting a TRO and preliminary injunction in this matter. I have copied and pasted below the email exchange with Judge Seals' law clerk, Hunter, re: scheduling a hearing on this matter. (I have also cc'd Hunter on this email, along with Judge Seals' administrative assistant, Anna Meetze).

We would greatly appreciate it if you could notify us immediately of whether or not you can each accept service on behalf of Chief Keel and Commissioner Weathers respectively or if we will have to have them personally served. (*edit*. I just spoke with Alden on the phone who confirmed she could accept for Commissioner Weathers and that she would advise us and the Court of availability for a hearing).

Also, if you please advise us and the Judge Seals office of your availabilities for scheduling a hearing as requested in the emails below.

I am about to be on the road for an out-of-town conference tomorrow, but if either of you have any questions, please feel free to contact myself or Brad. Our mobile numbers are 843-409-3892 (Patrick) and 803-516-1814 (Brad).

Thank you and we look forward to hearing from and working with you.

Patrick J. McLaughlin
Wukela Law Firm
403 Second Loop Rd.
PO Box 13057
Florence, SC 29504-3057
(O) 843-669-5634
(F) 843-669-5150
(M) 843-409-3892
Patrick@wukelalaw.com

****

From: Patrick McLaughlin [mailto:Patrick@wukelalaw.com]
Sent: Thursday, September 26, 2019 1:22 PM
To: 'Seals, William Law Clerk (Catherine Holland)'; 'cbhutto@williamsattys.com'
Cc: 'Seals, William Secretary (Anna Meetze)'; 'Joann Nettles (jnettles@wukelalaw.com)'
Subject: RE: John Pendarvis and Lawton Drew VS South Carolina Law Enforcement Division and South Carolina Department of Agriculture

Hunter:

We will get SLED and SCDA served immediately and will loop their counsels in so we coordinate dates with their calendars. Brad is out of town next week, but I can cover a hearing on Wednesday. I am not sure of Brad's availability the week of Oct. 7th, but I could attend a hearing Monday, Tuesday or Friday in Horry that week if needed.

Patrick

From: Seals, William Law Clerk (Catherine Holland) [mailto:wsealslc@sccourts.org]
Sent: Thursday, September 26, 2019 1:11 PM
To: patrick@wukelalaw.com; cbhutto@williamsattys.com
Cc: Seals, William Secretary (Anna Meetze)
Subject: John Pendarvis and Lawton Drew VS South Carolina Law Enforcement Division and South Carolina Department of Agriculture

Good Afternoon,

Judge Seals has reviewed your filed Petition and signed your Proposed *Ex Parte* Temporary Restraining Order, and Preliminary Injunction. His Honor request that we get a hearing scheduled at the earliest possible time. Would you be available to set the hearing in Marion on Wednesday (10/2) or Thursday (10/3) of this upcoming week? If neither of these dates work for you, I can provide additional availability the following week when we will be holding court in Horry.

Best,

C. Hunter Holland
Law Clerk to the Honorable William H. Seals, Jr.
Circuit Court Judge, At-Large, Seat 6
103 North Main Street
Marion, South Carolina
Ph: (843) 423-0446
Cell: (843) 643-0663
Fax: (843) 423-0535

South Carolina
DEPARTMENT OF AGRICULTURE
CONSUMER PROTECTION DIVISION
123 Ballard Court, West Columbia, SC 29172

Hugh E. Weathers, Commissioner

August 28, 2019

Mr. Trent Pendarvis
967 West Main Street
Harleysville, SC 29448

RE: Trent Pendarvis (permit # 1992) violation of Hemp Farming Program

Mr. Pendarvis,

It has come to our attention that you are unlawfully growing Hemp on acreage **that is not on record with the SCDA.** This is a willful violation of the Hemp Farming Program which requires a licensed grower to provide the SCDA with a legal description and global positioning coordinates of the land on which the licensee **seeks to cultivate hemp.**

Amendments submitted on 8-01-2019 and 8-28-2019 for adding acreage where hemp has already been planted, cultivated and matured **will not be processed by the SCDA.** Therefore, this crop is considered in violation of S.C. Code Ann. Section 46-55-40(B).

SCDA does not believe this violation to be negligent or an oversight on your part, but instead views this conduct as willful.

This letter serves as **the official response** to your actions and 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).

If you have any questions or would like additional information, please do not hesitate to contact me at dunder@scda.sc.gov or 803-737-9702.

Respectfully,

Derek Underwood
Assistant Commissioner
South Carolina Department of Agriculture

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

HENRY D. MCMASTER
Governor

MARK A. KEEL
Chief

September 24, 2019

Glenn Wood
South Carolina Law Enforcement Division
4400 Broad River Road
Columbia, SC 29210

DRUG ANALYSIS
SLED LAB: L19-17138
Your Case No: 78190163
Incident Date: 9/16/2019
[S] Lawton Drew
Agent of Pendarvis

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Mark A. Keel, Chief
South Carolina Law Enforcement Division

ITEMS OF EVIDENCE:

Item: 1 Paper bag.

Item: 1.1 Plant material.
RESULTS:
Total Delta-9-Tetrahydrocannabinol (THC) percent dry weight: 0.48 +/- 0.07%; 2 tested.

This report contains the conclusions, opinions and interpretations of the analyst whose signature appears below.

Technical records supporting the conclusions in this report are available upon request. Afford sufficient time for production.

Douglas Robinson
Forensic Scientist

CALEA

P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

SOUTH CAROLINA DEPARTMENT OF AGRICULTURE
SOUTH CAROLINA HEMP FARMING PROGRAM

PARTICIPATION AGREEMENT

This Participation Agreement ("Agreement") is made and entered into this day of _____, 2019 (the "Effective Date") between the **South Carolina Department of Agriculture** ("SCDA") and the **undersigned party** ("Permitted Grower"), collectively the "Parties."

WHEREAS, the Agricultural Improvement Act of 2014 (the "2014 Farm Bill") (Section 7606, codified at 7 U.S.C § 5940) authorizes state departments of agriculture and institutions of higher education, if authorized by their respective state's law, to grow or cultivate industrial hemp for research purposes;

WHEREAS, The Agricultural Improvement Act of 2018 (the "2018 Farm Bill") (H.R. 2 (115)) achieves the following: removes hemp from the Controlled Substances Act (Section 12619); mandates that states cannot prohibit the transportation of hemp or hemp products through their state (Section 10114); makes farmers eligible for crop insurance, and provides that marketability requirements for the crop insurance program can be waived (Section 11101); includes hemp in the United States Department of Agriculture (USDA) supplemental and alternative crops programs (Section 7129); and includes hemp in USDA's critical agricultural materials program (Section 7501);

WHEREAS, The South Carolina Hemp Farming Act, makes it legal for hemp to be grown under certain conditions in South Carolina,

WHEREAS, pursuant to the 2014 Farm Bill and the 2018 Farm Bill, it is lawful for a permitted individual to cultivate, produce, or otherwise grow hemp in South Carolina to be used for any lawful purpose, including, but not limited to, the manufacture of hemp products, and scientific, agricultural, or other research related to other lawful applications for hemp;

WHEREAS, under the South Carolina Hemp Farming Act, the South Carolina Department of Agriculture (SCDA) is the administrator of South Carolina's Hemp Farming Program (hereinafter, the "Program") application and permitting process;

WHEREAS, Permitted Grower wishes to participate in the Program for the cultivation of hemp; now,

THEREFORE, this Agreement, and the documents expressly incorporated by reference herein, together constitute the terms and conditions for Permitted Grower's participation in Program and SCDA and Permitted Grower hereby agree as follows.

I. Permitted Grower Conduct.

a. Permitted Grower promises to comply with the requirements set forth in South Carolina Hemp Farming Act, which is incorporated by reference into this Agreement;

b. Permitted Grower will conduct himself and his agricultural operations in a lawful manner. Permitted Grower recognizes that if anytime during his participation in the Program, if he is charged with a drug related felony SCDA may immediately revoke the Permitted Grower's license.

c. Permitted Grower acknowledges and agrees that hemp cultivation or processing not in accordance with SCDA policy and applicable state and federal law falls outside Permitted Grower's Grower Hemp License and may be prosecuted.

d. Permitted Grower will abide by applicable laws and regulations incident to the growth, cultivation, or marketing of hemp. Permitted Grower will intend in good faith to grow, cultivate, and/or produce hemp.

e. Permitted Grower acknowledges that any action—intended or incidental—that is contrary to applicable laws and regulations—known or unknown—falls outside the scope of Permitted Grower's participation in the Program. Permitted Grower acknowledges that this provision applies to all actions incident to his licensed cultivation or processing of hemp, including but not limited to any sale or disposition of the resulting plants, plant materials, or seeds.

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 Amendment(s);

ii. Agrees to apply for registration of all growing, handling, and storage location, including GPS coordinates, and receive 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.

III. Seed, Plant, or Propagules Acquisition.

Dan's Dew #
843 229 7994
Dew #4

a. Documentation. Permitted Grower agrees that all seed, plants, or other propagules to be used by Permitted Grower must have documentation showing that mature plants grown from that seed variety or strain have a floral material delta-9-THC content of not more than 0.30 percent on a dry weight basis;

b. Domestic Seed, Plant, or Propagates Acquisition.

i. Seed, plant, or propagates acquisitions will be conducted by the Permitted Grower without the assistance or involvement of SCDA. It is Permitted Grower's sole responsibility to ensure that the domestic or foreign seed, plant, or propagates he seeks to obtain is from a qualifying hemp program which lawfully acquired or cultivated that seed, plant, or propagates or from a legal foreign source. Further, Permitted Grower is responsible for the entire seed, plant, or propagates procurement process, which includes without limitation, supplier sourcing, ordering, payment, transportation, and weighing of the product.

IV. Permitted Access.

a. Permitted Grower agrees to allow representatives of SCDA, the State Law Enforcement Division, and local law enforcement agencies to enter onto all premises where hemp is cultivated, handled, processed, or stored for the purpose of conducting physical inspections, obtaining samples of hemp or hemp products, or otherwise ensuring compliance with the requirements of state law and any administrative regulations promulgated by the SCDA.

V. License Fees.

a. Permitted Grower agrees to remit to SCDA all license fees and other expenses of the Program, including but not limited to all fees, if any, related to 1) sampling and analysis of hemp plants and plant materials and 2) destruction of resulting hemp crops found by SCDA to be non-compliant with applicable laws and regulations.

VI. SCDA's Role.

a. Permitted Grower acknowledges that with respect to Permitted Grower's production of hemp, SCDA's role is to fulfill regulatory oversight of the Program's licensing. Permitted Grower understands and agrees that he shall not receive compensation or wages from SCDA and SCDA will not offer financial resources, tangible products, or commercial labor in support of Permitted Grower's hemp crop.

VII. Sample Submission.

a. Permitted Grower acknowledges and agrees that Permitted Grower must submit a minimum of four random samples per grow to an independent testing laboratory to be tested for delta-9 tetrahydrocannabinol concentrations not more than thirty days prior to harvest.

VIII. Plant Destruction.

a. Permitted Grower acknowledges and consents to the forfeiture or destruction, without compensation, of hemp material:

i. Found to have a measured delta-9 THC content of more than 0.3 percent on a dry weight basis;

ii. Bearing off-label pesticide residues (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 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.

IX. Best Management Practices.

a. Permitted Grower acknowledges and agrees to use reasonable security measures to prevent unauthorized access to areas where hemp plants, plant materials, or seeds are located, and take reasonable precaution to prevent unauthorized growth or distribution of hemp.

X. Food Drug and Cosmetic Safety.

a. Permitted Grower agrees to comply with the federal Food Drug and Cosmetic Act and all other applicable local, state, and federal laws and regulations relating to product development, produce laws and regulations relating to product development, product manufacturing, consumer safety, and public health.

XI. Miscellaneous Provisions.

a. Entire Agreement. The Parties agree that the terms of this Agreement supersedes any previous agreement concerning the Permitted Grower's participation in the Program.

b. Term. Permitted Grower's License to participate in the Program shall expire December 31, 2019. Future participation in the Program will require Permitted Grower to reapply and be approved by SCDA.

c. Advice of Counsel. Permitted Grower acknowledges that SCDA cannot provide Pilot Grower with legal advice regarding operation of a business to produce hemp or hemp products and SCDA recommends that Permitted Grower seek the advice of an attorney for alllegal questions regarding production of hemp and participation in the Program.

d. Indemnification and Release. Permitted Grower agrees to indemnify, hold harmless, and release forever the State of South Carolina, its departments, agencies, officers, employees, and agents of any kind from all liability claims arising out of Pilot Grower's negligent or illegal actions or actions otherwise in violation of the terms of the Program

involving the domestic or international acquisition, cultivation, or processing of hemp and Permitted Grower's participation in the Program.

e. Law Governing. This Contract shall be governed by and construed in accordance with the laws of the State of South Carolina.

f. Modifications Must be in Writing. This Agreement may not be changed orally. All modifications of this Agreement must be in writing and must have been signed by each party.

g. The Parties agree that this Agreement supersedes all existing agreements, if any, between them, including any supplements or amendments thereto, with respect to the Program.

h. Savings Clause. If any provision of this Agreement, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Agreement, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

i. Survival. The Parties further agree that this Agreement shall be effective only during the period of Permitted Grower's Program licensure to cultivate or process hemp that immediately follows the Agreement's effective date. Notwithstanding the foregoing, any of the terms and covenants contained in this Agreement which require the performance of either party after the expiration of Permitted Grower's licensure shall survive the expiration of such.

(Signature Page(s) to Follow)

IN WITNESS WHEREOF, the parties have executed this Agreement by and through their duly authorized agents as of the day and year first above written.

PERMITTED GROWER:

Name: John Trenton Pendarvis
Date: 5/13/19

John Trenton Pendarvis

SOUTH CAROLINA DEPARTMENT OF AGRICULTURE:

Hugh E. Weathers
South Caroiina Commissioner of Agriculture

STATE OF SOUTH CAROLINA COUNTY OF MARION	)	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
John Pendarvis and Lawton Drew Plaintiffs, -vs- South Carolina Law Enforcement Division and South Carolina Department of Agriculture Defendants.	)	C/A NO. 2019CP3300675 **SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR AN *EX PARTE* TEMPORARY RESTRAINING ORDER, MOTION FOR A PRELIMINARY INJUNCTION, AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs John Pendarvis and Lawton Drew hereby provide this supplemental memorandum in support of their *Petition for an Ex Parte Temporary Restraining Order, Motion for a Preliminary Injunction, and Complaint for Declaratory and Injunctive Relief*.

Since the filing and granting of the *ex parte* temporary restraining order in this matter, Plaintiffs have been notified that the Defendants are not just asserting failure to comply with the location identification provisions of the "Participation Agreement" entered in to by Plaintiff Pendarvis. Plaintiffs have just recently received notice that the Defendants are also asserting that the hemp crop on the subject land has been designated as "too hot," i.e., testing with too high a level of total delta-9-tetrahyrdocannabinol ("delta-9"). Specifically, Plaintiffs have been provided a SLED lab report dated September 24, 2019 showing a delta-9 percent dry weight of 0.48 +/- 0.07% for two (2) plants tested. *See* Attachment 4 to Defendant SLED's *Response in Opposition* filed October 7, 2019. This reason is different than the original "location identification" issue that SCDA had originally noticed. *See* Attachment 3 to

Defendant SLED's *Response*.

Despite this recent development, Plaintiffs are still entitled to due process and have a right to challenge SCDA's findings. Contrary to Defendant SLED's argument, nowhere in the "participation agreement" (*see* Attachment 5 Defendant SLED's *Response*) does any participant in the Hemp program agree to waive their due process rights. An agreement provision recognizing that a participant "acknowledges and consents to the forfeiture and destruction, without compensation, of hemp material: i. Found to have a measured delta-9 THC content more than .3 percent on a dry weight basis;…and iii. Growing in an area that is not licensed by SCDA" (Defendant SLED's *Response,* p.8) **does not** waive a participants right to challenge such findings.

Unlike purely contractual rights, constitutional rights cannot be extinguished or waived absent express agreement. A contractual wavier of due process rights "must, at the very least, be clear." Bowens v. N.C. Dept. of Human Resources, 710 F.2d 1015, 1018 (4th Cir. 1983). "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 at 1019, internal citations omitted. "An impartial decision maker is an essential element of due process." Bowens at 1020, internal citations omitted.

The necessity for due process and impartial decision makers reviewing decisions such as those made against the Plaintiffs in this matter are evidenced within the "participation agreement" itself. That agreement calls for the sampling of **four** (4) plants per grow to be tested by "an independent testing laboratory" for delta-9 concentrations "not more than thirty (30) days prior to harvest."

The Plaintiffs took a sample from the current incident site in question which was tested on September 27, 2019 that registered a Total THC% of 0.26%. *See* Exhibit C (labeled consecutively with exhibits of Plaintiffs' original filing). Plaintiffs took an additional sample recently which, the results of which are expected back within days.

Further, the participation agreement acknowledges the fluctuation issues related to measuring delta-9 in a growing biological plant 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**."

The agreement recognizes the unique obstacles of an industry reliant on mother nature by virtue of providing a "Permit Amendment Application" for licensees to change their license sites. In other words, participants enter this agreement with the understanding that that SCDA understands these issues and that there is relief available.

There are no provisions within the participation agreement wherein participants expressly waive their due process rights. There is no provision within the "Hemp Farming Act" that a decision made by the SCDA commissioner pursuant to S.C. Code §46-55-40 is not subject to challenge or review. The participation agreement specifically acknowledges that it "shall be governed by and construed in accordance with the laws of the State of South Carolina."

The Plaintiffs have rights, under South Carolina law. Specifically, the Administrative Procedures Act, to contest these decisions by Defendant SCDA and then to have a judicial review of those administrative decisions. In this particular case, it appears as though Defendant SCDA informed Defendant SLED that Plaintiff Pendarvis had committed a willful

violation in need of enforcement on August 5, 2019. *See* Exhibit D. That is more than three (3) weeks before the August 28, 2019 correspondence denying his amendments. Defendant SLED, in turn on August 8, 2019, appears to have sought an opinion from the South Carolina Attorney General regarding the appropriate procedure by which to enforce a "willful violation of the South Carolina Hemp Farming Act." *See* Exhibit E. That opinion concluded:

> 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 sough 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**.
> *Exhibit E*, p.5, emphasis added.

Defendant SLED did none of the above, instead merely calling the Plaintiffs and telling them that the crop in question was going to be destroyed in the coming days. Faced with the information that SLED intended to destroy the crop in question within days, after already having destroyed Plaintiff Pendarvis' crop in Dorchester County in violation of his due process rights, the Plaintiffs had no remedy other than seeking emergency relief from the circuit court.

As things stand, there are conflicting test results. There are amendments that were denied, showing attempts by Plaintiff Pendarvis to comply with the agreement and there is proof Plaintiff Pendarvis has a valid hemp license (*see* Exhibit A of initial filing). There could be no harm to the State of South Carolina from allowing the TRO and injunction to remain in place, discovery to be had and the merits of this dispute litigated. Plaintiffs would consent to depositing any and all proceeds of the upcoming harvest into trust. If unsuccessful in this

dispute, the worst that could happen to the State of South Carolina, is they obtain the proceeds from the harvest. If Defendant SLED is allowed to proceed with the destruction of this crop, the Plaintiffs would be irreparably prejudiced and denied the fruits of their labor.

PRAYER

WHEREFORE, Plaintiffs request that the Court leave the TRO and injunction in place on a temporary basis, pending an adjudication on the merits of the dispute, that Defendants SLED and SCDA be required to provide written notice of the exact nature of the alleged willful conduct and provide the Plaintiffs with notice of the administrative appeals process and allow discovery.

Respectfully submitted,

WUKELA LAW FIRM

s/Patrick J. McLaughlin
Patrick J. McLaughlin
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PO Box 13057
Florence, SC 29504-3057
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s/C. Bradley Hutto
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Facsimile: 803-536-6298
Email: cbhutto@williamsattys.com
Attorneys for Plaintiffs

Florence, South Carolina
October 8, 2019

Exhibit C

eurofins | Quality Trait Analysis

Eurofins Scientific Inc.
Quality Trait Analysis
8900 Beckett Rd.
West Chester, OH 45069
Tel: (866) 968-7782
Fax: (513) 693-4030

Company: QTA

Reporting Date: 09/27/2019

Analysis Report

Material: Hemp Floral

Sample ID: 192486_018

QTA Analysis ID: C0E96051

Analysis Date: 9/27/2019 12:43:00 PM

Characteristics	Result
CBD, %	0.38
CBDA, %	6.02
Total CBD, %	5.66
THC, %	0.10
THCA, %	0.18
Total THC, %	0.26

Sample Identifiers

Sample ID: 192486_018

Moisture: 69.80

Comments: Shane1CherryBaox, 9/25

Exhibit D

South Carolina
DEPARTMENT OF AGRICULTURE
CONSUMER PROTECTION DIVISION
123 Ballard Court, West Columbia, SC 29172

Hugh E. Weathers, Commissioner

MEMORANDUM

To: Lt. Jason D. Wells, Narcotics
South Carolina Law Enforcement Div.

From: Derek M. Underwood, Assistant Commissioner
Consumer Protection Division, SCDA

Date: August 5, 2019

RE: Trent Pendarvis (permit # 1992) violation of Hemp Farming Program

It has come to our attention that Mr. Trent Pendarvis is unlawfully growing Hemp on acreage that is not on record with the SCDA. This is a willful violation of the Hemp Farming Program which requires a licensed grower to provide the SCDA with a legal description and global positioning coordinates of the land on which the licensee seeks to cultivate hemp.

Mr. Pendarvis, during an SCDA farm visit, acknowledged to an SCDA employee that the land at issue was not on record with SCDA, yet the SCDA employee observed the land to be planted with mature hemp plants. SCDA does not believe this violation to be negligent or an oversight on the part of Mr. Pendarvis and instead views this conduct as willful. This memo is to request SLED enact enforcement of this willful violation by Mr. Pendarvis.

Exhibit E

ALAN WILSON
ATTORNEY GENERAL

August 8, 2019

Adam L. Whitsett, Esq.
General Counsel
South Carolina Law Enforcement Division
PO Box 21398
Columbia, SC 29221-1398

Dear Mr. Whitsett:

We received your request seeking an opinion on the appropriate procedure to pursue enforcement of the Hemp Farming Act with respect to hemp grown in violation of the Act. This opinion sets out our Office's understanding of your question and our response.

Issue:

Your letter indicates that the South Carolina Department of Agriculture notified SLED of a willful violation of the South Carolina Hemp Farming Act and requested enforcement of the law. Your letter also points out:

> S.C. Code Ann. § 46-55-20(A)(1) provides that "it is unlawful for a person to cultivate, handle, or process hemp in this State without a hemp license issued by the department." However, there is no specific direction as to the process or procedure to have the illegally grown hemp, which is contraband *per se*, seized or destroyed. Accordingly, SLED would greatly appreciate any specific guidance you can provide on the proper procedure in this matter.

Law/Analysis:

It is the opinion of this Office that in the 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 caution. *See id.*

As discussed in a recent opinion of this Office issued July 10, the South Carolina Hemp Farming Act makes it "unlawful for a person to cultivate, handle or process hemp in this State

without a hemp license . . . ." *Op. S.C. Att'y Gen.*, 2019 WL 3243864 (July 10, 2019). Our July 10 opinion discusses the Act at length and concluded:

> We readily acknowledge that the Hemp Farming Act of 2019 was not drafted with the greatest of clarity and needs legislative or judicial clarification. Having said that, the Act makes it "unlawful" for a person, without a license, to cultivate, handle, possess or process hemp, as defined in the Act.
>
> . . .
>
> A court is likely to conclude that possession and handling of unprocessed or raw hemp material without a license is contraband per se and subject to seizure. We have referenced herein numerous decisions to such effect. *See e.g. Mims Amusement Co. v. SLED, supra* (defining contraband per se). We defer to law enforcement, in a given situation, based upon the relevant facts, as to whether material is raw or unprocessed hemp and whether § 46-55-20 has been violated.

Id. (emphasis added). Our opinion here has been expedited, and it should be read in the context of that opinion dated July 10, 2019. In the factual scenario you present to us, law enforcement is prepared to proceed on information that hemp is being grown in violation of the law and is therefore contraband *per se*. Consistent with our July 10 opinion and the longstanding policy of this Office, we defer to law enforcement's determination of that factual question. Our opinion here is focused solely on the procedure SLED should follow in pursuing an enforcement action.

Constitutional Considerations and General Forfeiture Law

As our Office has previously discussed, a state or a political subdivision which seeks to seize property must do so only in a way that comports with constitutional mandates. *See, e.g., Medlock v. 1985 FORD F–150 PICK UP VIN 1FTDF15YGFNA22049*, 308 S.C. 68, 471 S.E.2d 85 (1992) (holding, on state constitutional grounds, that the owners of property subject to South Carolina's drug-related forfeiture statute are entitled to a jury trial where the property "normally is used for lawful purposes"). As you no doubt are aware, the Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Additionally, the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." US Const. amend. V. The Fourteenth Amendment similarly provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV, § 1. The Fourteenth Amendment also incorporated certain federal constitutional protections and made them binding upon the states. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (Fourth Amendment incorporation); *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (partial Fifth Amendment incorporation). Similarly, the South Carolina Constitution mandates that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated." S.C. Const. art. I § 10. Additionally, the South Carolina Constitution forbids that "any person be deprived of life, liberty, or property without due process of law." S.C. Const. art. I § 3.

Within this constitutional framework, the state or a political subdivision has the power to seize certain contraband, and to confirm the forfeiture in judicial proceedings. *See, e.g., State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). Forfeiture proceedings are civil, in rem cases which target such property, and may be brought independently of criminal prosecutions. *See id; see also Farmer v. Florence Cnty Sheriff's Office*, 401 S.C. 606, 738 S.E.2d 473 (2013).

In *Myers v. Real Property at 1518 Holmes Street*, the South Carolina Supreme Court held that seizure and forfeiture of contraband is within the legitimate police power of the state, and is not a "taking" for constitutional purposes. *Myers v. Real Property at 1518 Holmes Street*, 306 S.C. 232, 411 S.E.2d 206 (1991). The Court in *Myers* also relied on U.S. Supreme Court precedent to hold that due process permitted a post-seizure hearing to confirm forfeiture and did not require notice in advance of a seizure in light of the extraordinary nature of the forfeiture situations. *Id.* at 236, 411 S.E.2d at 212 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. at 680, 94 S.Ct. at 2090, 40 L.Ed. at 466 (1974)). Our state Supreme Court reiterated this due process holding in *State v. 192 Coin-Operated Video Game Machines*, opining that "[t]he most due process requires is a post-seizure opportunity for an innocent owner 'to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law.'" *State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 197, 525 S.E.2d 872, 883 (2000) (quoting *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981)).

Our Supreme Court also has held that there is no right to a jury trial in a forfeiture proceeding against contraband *per se*, such as illegal gaming devices, because the very possession of such items is illegal. *Mims Amusement Co. v. SLED*, 366 S.C. 141, 154, 621 S.E.2d 344, 351 (2005) (citing, *inter alia*, *People ex rel. O'Malley v. 6323 North LaCrosse Ave.*, 158 Ill.2d 453, 199 Ill.Dec. 690, 634 N.E.2d 743, 746 (1994) ("There is a vast difference between the forfeiture of contraband *per se* and the forfeiture, by an innocent third party, of legal property . . . .")). Although the owner of the property is entitled to a post-seizure hearing to determine

whether the seized items are in fact contraband *per se*, the Court held in *Mims Amusement Co. v. SLED* that due process is satisfied where that hearing is a bench trial before a single magistrate. *Id.; see also State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 196, 525 S.E.2d 872, 883 (2000).

Seizures Under the South Carolina Hemp Farming Act

The question presented in your letter does raise a novel issue, however. Numerous prior opinions of this Office have addressed statutory schemes wherein the General Assembly expressly set out procedures for the seizures of contraband. *See, e.g., Op. S.C. Att'y Gen.*, 2017 WL 5053042 (October 24, 2017). However, no such guidance or instructions appear in the Hemp Farming Act. Our Office has concluded that hemp grown in violation of the Hemp Farming Act is contraband *per se* under the Act, *Op. S.C. Att'y Gen.*, 2019 WL 3243864 (July 10, 2019), but the Act is silent on the procedures the State must use to enforce that law. *See* S.C. Code Ann. § 46-55-10 et seq. (Supp. 2019).

As an example of one statutory procedure to seize contraband, we consider the decision of the South Carolina Supreme Court *State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). In *192 Video Games*, SLED determined certain video game devices to be illegal gambling devices and seized them pursuant to Section 12-21-2712, which reads:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

S.C. Code Ann. § 12-21-2712; *see also State v. 192 Coin–Operated Video Game Machines,* 338 S.C. at 196, 525 S.E.2d at 883. The Supreme Court construed this statute to require a post-seizure hearing to comport with due process:

> The statute does not direct a pre-seizure hearing, nor is one required in a civil forfeiture case. The most due process requires is a post-seizure opportunity for an innocent owner "to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law." *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981).

Id., 338 S.C. at 197, 525 S.E.2d at 883. We highlight this case as one example where the General Assembly declared certain items to be unlawful and further set out the procedure for seizing and disposing of them. *See id.*

However, the Hemp Farming Act contains no comparable statutory directions for the seizure of contraband product. *See* S.C. Code Ann. § 46-55-10 et seq. (Supp. 2019). Of course, due process would still require an "opportunity for an innocent owner to come forward and show, if he can, why the res should not be forfeited and disposed of as provided for by law." *State v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 197, 525 S.E.2d 872, 883 (2000) (citing *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981)). Given the absence of any legislative direction in the Hemp Farming Act, we advise that the prudent course of action would be to provide that opportunity in a hearing. We hope that this also will lead to judicial clarification of some of the many questions created as a result of the Hemp Farming Act.

Conclusion:

In conclusion, it is the opinion of this Office that in the 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 caution. *See id.* Our opinion here has been expedited, and it should be read in the context of that opinion dated July 10, 2019. In the factual scenario you present to us, law enforcement is prepared to proceed on information that hemp is being grown in violation of the law and is therefore contraband *per se*. Consistent with our July 10 opinion and the longstanding policy of this Office, we defer to law enforcement's determination of that factual question. Our opinion here is focused solely on the procedure SLED should follow in pursuing an enforcement action.

Our Office acknowledged recently that "the Hemp Farming Act of 2019 was not drafted with the greatest of clarity and needs legislative or judicial clarification." *Op. S.C. Att'y Gen.*, 2019 WL 3243864 (July 10, 2019). In this instance you have identified what appears to be a gap, in that the Act requires that a willful violation of state law in connection with cultivated hemp must be reported to SLED, but the Act does not specify what procedures SLED must follow to enforce the law in the situation you describe in your letter. S.C. Code Ann. § 46-55-40(B) (Supp. 2019). This is yet another example of the need for legislative or judicial direction regarding the implementation of South Carolina's industrial hemp program. 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.

Moreover, we emphasize again the importance of the General Assembly revisiting the Act to address the numerous issues recognized in this, as well as our July 10 opinion. In addition, as the agency designated by the General Assembly to regulate hemp, the Department of Agriculture, working closely with SLED, may wish to promulgate regulations to address the omissions identified in these opinions.

Sincerely,

Robert D. Cook
Solicitor General

David S. Jones
Assistant Attorney General

TATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF MARION	)	**2019-CP-33-00675**
JOHN PENDARVIS & LAWTON DREW,	)	
Plaintiffs,	)	
Vs	)	**Transcript of Record**
SOUTH CAROLINA LAW ENFORCEMENT DIVISION & SOUTH CAROLINA DEPARTMENT OF AGRICULTURE,	)	October 8, 2019
Defendants.	)	

B E F O R E:

The Honorable William H. Seals, Jr.
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Patrick McLaughlin, Esquire
Attorney for Plaintiffs

Kevin Barth, Esquire
Attorney for SLED

Alden G. Terry, Esquire
Attorney for SCDA

Sallie Beth Todd
Official Court Reporter

I N D E X

(There were no witnesses called during the hearing.)

E X H I B I T S

(There were no exhibits marked during the hearing.)

THE COURT: Alright. I'm ready whenever you are.

MR. MCLAUGHLIN: Thank you, Your Honor. May it please the Court? Patrick McLaughlin here today on behalf of the plaintiffs John Pendarvis and Lawton Drew in a case versus South Carolina Law Enforcement Division and South Carolina Department of Agriculture. Your Honor, this is a case out of Marion County that Your Honor agreed to expedite here for us today here in Horry County. I believe we provided the clerk with the caption and the case number from Marion County, but this is case 2019-CP-22-00675. Judge, I apologize for late submissions. It's kind of the nature of this thing coming up at the last second. I know Mr. Barth had to submit something late which is understandable given that he just got involved in it. We worked on a Reply to get out. We finished that e-mail to everybody this morning. My staff e-filed it wile we were here. I do have a hard copy for Your Honor. I've given a hard copy to both Kevin and Alden as well and I can approach and hand it up to Your Honor.

THE COURT: Thank you.

MR. MCLAUGHLIN: Thanks, Judge.

THE COURT: Thank you.

MR. MCLAUGHLIN: To start out with and be quite frank, Your Honor, all of this is somewhat unusual and new to me. I think in my entire career I've had to move for an emergency relief in the way of a restraining order and injunction maybe

once before and that was many years ago. And certainly, everything to do with this new Hemp Act here in South Carolina is new to all of us. We're all -- and excuse the pun, we're all plowing new fields here so to speak when it comes to the growing of hemp in South Carolina. I am -- I got involved in this case when I was contacted by Senator Hutto who is representing Mr. Pendarvis for the incident where SLED came in and seized and destroyed some of his hemp crop over in Dorchester County, which I believe lead to criminal charges against Mr. Pendarvis. Senator Hutto was hired to do that. At some point in time, the week that we originally made these filings, which I think would have been about two weeks ago Senator Hutto received notice by way of a phone call from SLED saying there's this other field that your fellow has over in Marion County and we're going to go in and seize that and destroy it too. And so that kind of incited Brad to reach out to a lawyer local to Marion and he reached out to me. And that's when we made our initial fillings and asked the Court for the unusual and extraordinary relief of a TRO prelim injunction type of situation to stop SLED from going in and destroying this crop which is worth a significant amount of money, several hundred thousand dollars, before we could basically have a merits hearing on whether or not they have the right to do that. Now, subsequent to getting that filed I did contact Ms. Terry who is here today with the Department of

Agriculture and Mr. Whitson with the -- the attorney for SLED. They both agreed to accept service. And, Your Honor, I just sent them the order. Mr. Barth has plead a lot of procedural issues in his Response and I will candidly admit to the Court, we may not have dotted every I and crossed every T as far as that. It was kind of a last second thing trying to stop them from destroying it and then calendar wise we've been swamped since then and I didn't think to send them the original pleadings. I will say that once I saw Mr. Barth's Response yesterday in that regard, we went ahead and got it sent out. I think Mr. Barth will concede that point that we did get the original pleadings and stuff served on everybody via e-mail last night. As far as addressing those aspects of it, Judge, my argument today would be oops we're sorry, but no harm no foul at this point in time. We've gotten it served. Everybody knows what we alleged and why we came into court for this relief. As to the substantive issues raised by SLED in their response I would -- I did file this -- we did file this supplemental memorandum like I said, this morning. And I would just basically kind of run through these things very briefly, Your Honor, because I know we just submitted it to you. You haven't had a chance to really review it.

Number one, this idea that a participant and a -- in the hemp growing program in South Carolina by virtue of this participants agreement, which Mr. Barth made an exhibit to his

response. The idea that they've waived their due process rights in that agreement is simply not true. That is not. In fact – and case law is quite clear that a contractual -- and I cite this on page two of our Reply, 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. And that comes from a 4th Circuit case, *Bowens v North Carolina Department of Human Resources*. The cite on that is 710 F.2d 1015 at 1018. That case goes on to say, when a crop or an 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. And that is *Bowens* at 1019 leaving out the internal citations. *Bowens* goes on to say, an impartial decision maker is an essential element of due process. Reading the Response, it appears that SLED's position is that because in this participation agreement there is language where -- and I will cite, this is from page 8 of SLED's Response, Judge. They say specifically -- they begin this section, the section is section 4. It's entitled Plaintiff's Consent to Forfeiture and Destruction of This Illegal Crop. They begin this section by arguing plaintiff's have also waived their right to due process and judicial review guaranteed to the plaintiffs by the South

Carolina Constitution. And it goes on that the agreement -- specific language form the agreement where it says permitted grower acknowledges and consents to the forfeiture and destruction without compensation of the hemp material and then it lists several instances by which that could possibly happen. I: Found to have a measured delta-9 THC content of more that 0.3 percent on a dry weight basis. Then there's a II that's not cited by then. Then there's a III that is cited: Growing in an area that is not licensed by the South Carolina Department of Agriculture. They argue the plaintiffs in this case fail on both of those accounts. Well, that language is not sufficient to say that any participant in the hemp program has waived their right to challenge a finding that their plants are -- have too high a level, they call that -- I've learned a lot in the last two days about this, Judge. They call it being too hot. They refer to the level of delta-9 as, you know, if it's over the 0.3 required under the law that the plants are too hot. So, there's nothing that says that they've waived their right to challenge a finding by the agency that their plants are too hot. There is nothing in the agreement that they waive their rights to challenge a finding that they are not growing the crops on land that they designated; or that there's language -- there's a distinction within the statute itself and this is 46-55-40. There is distinctions between negligent and willful behavior. So,

plaintiffs can't in good faith be attempting to comply with the Hemp Act and possibly run afoul of it. Our argument, Judge, is if you look at that agreement, what it's taking into account is the reality of the nature of farming. You've got to designate that -- first off, the license itself has no designation for land on it. We supplied the license that Mr. Pendarvis has as Exhibit A to our initial filing. There is no land designation on there. You designate this land at another point in time, I think it's sometime in April that you have to designate. I'm not sure about that. I believe I was told that somewhere and maybe I'm wrong. But, we all know that sometimes land that you may plan to plant your crops on, you may think you can plant it and then something happen. It could get drought stricken. It could become flooded, any number of reasons why after you originally designate it you may realize I can't, that the crops not going to grow well here. I've got to grow it somewhere else. The Department of Agriculture recognizes that reality of farming and they recognize it by the fact that they have an application for participants to amend their location designation. Now, the location designation is really just so that law enforcement in this State knows where people are growing the hemp so that they can (a) go in and test it and make sure that the people are not growing, you know, marijuana instead of hemp. And (b) if they were doing detection and eradication efforts, you

know, they're out there flying over Marion one day and they see a field full of marijuana plants, they'd be able to know that's not marijuana, that's hemp growing there because it's on our map. So, there's certainly no express provisions in that agreement that these people have waived their rights to challenge a determination that they violated those things. Now, there is provision in that agreement that says if it is found that these people have violated those, then the State can come in and take that crop and you're not going to get compensated for it. That's what the agreement has put these people on notice. But, it doesn't rise to the level required by law of expressly laying out that you are waiving your due process rights. And, Judge, there's a reason why that's not in the agreement and the reason is, is because it ain't in the Hemp Act. And there's a reason why it ain't in the Hemp Act. It's not in the Hemp Act because the legislature does not have the power to grant the executive the power to be arbitrary and capricious over things. Under South Carolina law we've got rights, we've got due process rights, we have stronger due process rights than under the United States Constitution; but we also have the Administrative Procedures Act which lays out the fact that every South Carolinian has the right to challenge a finding by an agency. They have a right to go in and challenge that agency administratively. Once those administrative challenges are exhausted, they then have the

right to have a judicial review of that agency's determination. Now, because there's a right to judicial review that imposes certain obligations on the agencies. The agencies have to provide adequate notice of what it is that the person is alleged to have violated. The agencies have to inform that person what their administrative appellate rights are. That did not happen here. The original memorandum which we included as Exhibit D to our Reply today is dated August 5, 2019 and that was from Assistant Commissioner of the Department of Agriculture Derrick Underwood to Lieutenant Jason Wells with SLED. If you look at that document, Judge, this is all about there being a violation based on the location issue. There's nothing in here about the plants being too hot. Now, we just -- once Mr. Barth and I finally had a chance to communicate yesterday, listen Patrick is ain't just the location issue, they're saying your guys plants are too hot. That's the first we'd heard about this, so I said -- Kevin said, I've got the report I'll send it to you. He has included that report from SLED in his filing, his Response. That filing, I believe, puts it at 0.48 percent which even within their plus or minus, the plus or minus of the SLED report is 0.07, I believe. So, even if you gave credit for the minus on that you'd be looking at a plant that was registering 0.41 which is still higher than what the 0.3 is. Well, here's the problem with that finding, (a) we've got a

test that we included as Exhibit C to our Reply that was filed today which shows the analysis date was September 27, 2019 and it shows a total THC which would read higher. That's ain't just the delta-9, it's got total THC of 0.26 which is well below the legal limit of 0.3. Now, at a minimum what we're presented her with now -- and by the way, the Department of Agriculture recognizes the fact that these hemp growers can test the material themselves, it's laid out in the agreement, and it lays out for them what they're supposed to do. They're supposed to take four plants and send to an independent lab. The lab's got to be ISO certified. Interestingly enough, it appears from the lab report that SLED's given us that they took two plants and submitted it. So, SLED's note even following the -- and here's where a big problem is, Judge, there is no regulations. The Department of Agriculture is supposed to regulate this. We looked, the only -- we found one example within all of the Department of Ag's regulations and I mean I guess it's possible we missed it but we could only find one example of them even referencing hemp in their regulations and it was like talking about how to do weights and measurements. It had nothing to do with this hemp program. So, they're really kind of making it up as they go along. But, we've got two tests now that show different readings. They acknowledge, you know, we talked earlier about the realities of trying to grow crops on certain lands and how

they acknowledge the fact that sometimes you would have to change it. They also acknowledge this problem with the fickle nature of the delta-9 measurement in hemp, industrial hemp. And they acknowledge it through the fact that they allow that licensed growers, even if they have hemp that measures about the 0.3, that they can still collect and process hemp all the way up to 1.0 percent. They just have to recondition it, which my very naive and brand new understanding of what that means is they mix in, I guess, the flower and the bud with the stalks and the stems and they grind it all up and it kind of spreads it out some more. So, they don't really have regulations, what we do have in writing through the agreement and through their own website, acknowledges the fact that what is alleged that these plaintiffs have done wrong, there's a writing within the agency an acknowledgement that people in good faith can run afoul of these same issues. Okay. And so, we fell like that is enough to create a material question of fact where the Court needs to step in and stop them from being able to go in and destroy this crop like they have already destroyed the crop in Dorchester. We are certainly willing to -- when Kevin and I talked the other day we talked about whether or not this was something we could consent to. You know, could we just consent to just leaving -- nobody do anything right now and let's do some discovery and then let's argue this thing on the merits and unfortunately the problem

is the harvest. That's the ticking clock here. My client tells me that he believes this field's going to be ready to harvest in about a week. Kevin has explained to be that his client has to take a bright line that they cannot allow this gentleman to harvest this at all. Our position is what's the harm to the State of South Carolina? The two things he's accused of doing, growing it on land he didn't tell them about. He filed -- he tried to amend it, they declined it. They know where it's at now, they have notice of where it's at now. There's some argument in their brief about the order that's in place now prohibits them from complying with their inspection authority. I don't believe that's true, Your Honor. The order simply temporarily restrains and preliminarily enjoins them from entering onto the property under cultivation by the plaintiffs for the purpose of destroying hemp crop planted therein. We certainly did not take that to mean that they couldn't come on and inspect the crop. We certainly did not take that to mean that they can't come on and take samples to further test this crop. Where's the harm going to be to the State of South Carolina? I would submit to Your Honor, the State of South Carolina, other than an ideological stance, stands more cause to be prejudiced. In fact, they stand -- the only thing going to happen to them is they might make money out of this because if we harvest it we agree any money from the proceeds from the harvest would have

to be kept in trust and not disbursed to anyone pending adjudication of this issue on the merits. If the plaintiffs wind up being unsuccessful the State's going to get that money. They're going to come out ahead. As they stand now, they're going to have to pay somebody to go out there. They're going to have to pay for the fuel to take a tractor out there and bush hog these crops. I would -- I would add at the end here, my clients have told me that they are waiting on two more pending labs, Your Honor, from this same field. One that was taken about a week ago and then another that was taken just yesterday that they expect to get in very shortly. But, there's some real problems about how testing is done, how you submit the plant. Are you submitting the whole plant, are you submitting just the flower? Are you submitting certain sections from each part of the plant? And, you know, I think that's what the administrative appeals process is there to flesh out. I know, I agree it's interesting -- one last thing that we submitted, and I don't believe I've touched on. Right after they received the August 5th notice, they being SLED, received the August 5th notice from the Department of Agriculture they asked for the Attorney General's opinion. That was expedited. And that opinion has been attached as Exhibit E to our Reply this morning. And telling enough on the last page of that, excuse me page five of a six page opinion the conclusion, in conclusion it is the opinion of

this office that in the absence of legislative direction SLED should seek judicial authorization for the seizure of illegally grown hemp in order to insure that the grower receives due process consistent with the Constitutions of the United States and the State of South Carolina. Then it cites one of our video poker cases from 2000. We advise that this authorization be sought with notice to the grower and an opportunity for them to be heard in hearing in an abundance of caution. They got this opinion on August 8th, Your Honor, and then for some reason proceeded to ignore it, go in and seize his crop in Dorchester, went ahead and destroyed it which he's irreparably prejudiced. He can't get that back now. I guarantee you that SLED's going to take the position that he can't be compensated for it pursuant to that agreement and so if there's any prejudice more irreparable than that I don't know what it would be. But, we would merely submit and I'm in an unusual position arguing an Attorney General's opinion. I don't do that often; but you know what, my good friend Kevin Barth usually ain't on the other side of defending the State of South Carolina. So, this case presents a whole bunch of unusual things, Your Honor. And with that I'll sit down. Thank you.

THE COURT: Alright. Thank you.

You're recognized.

MR. BARTH: May it please the Court, Your Honor? I am

Kevin Barth here as Patrick said, unusually for the South Carolina Law Enforcement Division. I believe this might be the first time in 37 years I have argued on behalf of a governmental agency instead of being on the other side, Your Honor. But, to be honest with you I got involved with this late last week. So, as Patrick has done, I have studied and learned a lot about this new Hemp Act prior to coming over here this morning. We provided the Court with a brief, a memo. I'm not sure if Your Honor's had time to look at that and digest it. But, I will note just for the record that procedurally, Your Honor, that the order was served without the Summons and Complaint.

THE COURT: Do you have a hard copy of your memo by chance that I can look at while you ---

MR. BARTH: Yes, sir. I have a copy with the attachments.

THE COURT: Thank you.

MR. BARTH: Thank you, Your Honor. Your Honor, it was served without being served with a Summons and Complaint and actually failed to define what the actual injury would be, although it doesn't take a rocket scientist to figure out that what he's talking about is destroying his hemp field. The one thing, Your Honor, procedurally that I do what to call to the Court's attention though, is that the statute under which they are moving, Your Honor, requires that the movement provide a

security bond. We've cited cases in there that says there has to be a security bond sufficient enough to provide the other side with money to pursue the claim and collect damages in the event the plaintiffs don't prevail. Your Honor, they've posted no security. Your Honor's order did not require them to post a security so our position at this point would be if Your Honor does in fact extend the injunction preventing us from forfeiting and destroying or seizing and destroying this field, we would ask that the bond certainly be sufficient. By their own admission, Your Honor, they in one of their pleadings allege that this field is worth about $300,000. It's the only figure we have and it comes from the plaintiff's pleadings so we would ask in the event Your Honor requires a bond it certainly needs to be something that would be in that range or above. Patrick is right on the Summons and Complaint we looked it up online, I know what it says. He formally served me with it yesterday and really like he said, no harm, no foul on that one. But, our position is that generally that it wasn't done properly which is, Your Honor, not the crux of the matter to be honest with you. The crux of the matter really is the substantive issue of whether or not we can enforce, seize and destroy this hemp because of a failure to comply with the Hemp Act. And, Your Honor, in our brief we noted a few things, the first one -- and bear in mind now, the plaintiffs have to show a likelihood of prevailing on the

merits. What there is no dispute about though, Your Honor, is that Mr. Pendarvis has no license to grow in Marion County. The Act is absolutely crystal clear that you have to give the GPS coordinates of exactly where you're planting it like Patrick said, so they know the difference between a marijuana field and a hemp field. Mr. Pendarvis knows that. He submitted an application with the GPS coordinates for his Dorchester County fields. As I understand it, all of this came about when he had overplanted on land in Dorchester that wasn't permitted and at that time mentioned, oh yeah well I've got a field in Marion County as well which is how the case ended up in Marion County. Your Honor, there's absolutely no dispute what the Hemp Act requires prior to planting a field with hemp. And Pendarvis can't dispute that he doesn't have a license, he doesn't. He can't dispute that Drew, Mr. Lawton Shane Drew, doesn't have a license because he doesn't. he doesn't have a license to grow at all. He's growing under Pendarvis' license and like I said, it mentions nothing about a Marion County field. So, I have no idea how, Your Honor, they're going to prevail on the merits of saving a field of hemp in a county that is not licensed to sell hemp, or not licensed to harvest it for a land owner who is not licensed to harvest or cultivate it and there really isn't any dispute about that. Nobody disputes that Mr. Drew planted this field and began cultivating it on the word of Mr. Pendarvis. Your

Honor, Patrick has mentioned two or three times that there's a difference between negligence and willfulness and realistically when Mr. Drew planted this, he did that on the basis of Pendarvis' word that it was okay. And it turned out Pendarvis was wrong and told him later oops I made a mistake. So, Pendarvis, the found, Your Honor, the Department of Agriculture has under the statute to come in and determine if a violation is negligent or willful. There determination is shown in one of the exhibits that Patrick attached, Your Honor, that planting it in a field without GPS coordinates being approved, this is a willful violation and not a negligent violation. Understand they want to challenge that but in order to prevail on the merits, Your Honor, they're going to have to prove that this particular field was licensed, and that Mr. Pendarvis was licensed to grow hemp in that field. I don't know how they're going to do that because there is no license for that field. Your Honor, I would note a couple of other things, that if the field is illegal and if the hemp is illegal the way I understand it, Your Honor, and Patrick will correct me if I'm wrong, but the way I understand it is if you're cultivating and growing hemp that does not comply with the statute that is illegal possession of controlled substance. That's a field of marijuana. It's not a field of hemp that's licensed to be grown. So, what they're asking Your Honor to do is to issue an order that restrains us

from enforcing the law and apparently they want to go ahead and harvest it which is also a criminal violation if it's done outside of the permitting process which this will be. I mention that to, your Honor, because I respectfully don't believe that the Court can issue an order that allows someone to continue criminal behavior, potentially criminal behavior which this would be under the statute. I will note two other things, Your Honor. I'm not going to get into the weight issue because Patrick's right. I learned yesterday via talking to the investigator that yeah, I might test these four plants and they may be out of compliance bit these two plants might be in compliance. Our readings do show that the samples that were tested were too hot. They had too much THC in it to be legal. Patrick had another one tested and it came in within the bounds and I understand all of that. That's one of the ways they could probably challenge all of this is on the samples and whether the THC is too high or too low. But, Your Honor, the participation agreement is very clear that you are to make this application, provide the required information prior to planting any hemp in the field. The agreement, Your Honor, if I can find it, Your Honor, licensed growing location, it says the permitted grower agrees to apply for registration of all growing, handling, and storage location including GPS coordinates and receive Department of Agriculture approval for this location prior to having living

noncut hemp on the premises. That's page two, Your Honor, of participation agreement, paragraph 2 (a) 2. What they did, Your Honor, is after Mr. Pendarvis got caught, he then sought to amend his application to add this field in. I'm not sure if it asked to add in the other one in Dorchester, for our purposes it doesn't really matter. What matters is that he did that after the hemp was planted and was being cultivated by Mr. Drew. Understandably so, the Department of Agriculture denied that application because the statute and the agreement are clear, you get all of these permissions before you plant it because after you plant it you run into situations like this. Is it a marijuana field or is it a hemp field? And the only distinction to me seems to be the level of THC and whether you had a license. That's basically where we are, Your Honor. They have a field that has been planted, cultivated and now ready to be harvested without a license, without approval, without a permit, and with the actual grower not having a license at all. I don't know the intricacies of how I can plant hemp on your field under your license, but I do know that if I do that and my plan is to do that, you would move before the Department of Agriculture to have my -- have that field approved before you, me, or anyone else can come in there and plant. And what he did, and they're complaining about the fact that the Department of Agriculture didn't approve the amendment which would have added in this field,

but Your Honor, he knew very well you do that before you plant it. And like I said, none of this came up until he was already caught and then tried to go back and get it approved after the fact. And rightfully so they didn't do that, they didn't approve it, Your Honor. And what we are asking Your Honor to do today is dissolve the restraining order and injunction as much as we can at this stage, move to dismiss the action because our position, SLED's position, Your Honor, is that if it isn't licensed, it isn't permitted, and it isn't in an approved location, it is illegal. It's illegal to possess it, it's illegal to harvest it, it's illegal to cultivate it and there entire lawsuit all of the irreparable damage and all they're asking for is to be allowed and have the Court allow the plaintiffs to continue illegal behavior. You wouldn't approve a drug dealer getting to go ahead and harvest his acre of marijuana because he's going to lose a bunch of his drug money. That's what this is when you're outside of the rules and they are outside of the rules. And we would ask Your Honor to dissolve the restraining order. If Your Honor is inclined to restrain and enjoin us from going on the fields and forfeiting them and destroying them, we would certainly ask that Your Honor's order not allow him to harvest it. I mean, that would absolutely be an order condoning illegal behavior to allow him to go in there and harvest it. I mean, technically speaking if he harvest it, these guys can

be arrested for it. Nobody wants -- I don't want to see that happen or anything like that. I truly don't think the Court can condone and allow illegal behavior to go forward. Lastly, Your Honor, I would mention to you Patrick was reading it and it says that the agreement that's signed by Mr. Pendarvis, permitted grower, acknowledges and consents to the forfeiture or destruction without compensation of the hemp material growing in an area that's not licensed by the Department of Agriculture. Your Honor, Patrick cited cases that said if you're going to waive a right it has to be clear. That's about as clear as it gets. You plant it without a license we have the right without compensation to come in and destroy it, prevent it from being harvested, cultivated, or sold. Mr. Pendarvis knew exactly what it is he signed and now he's asking the Court to allow him to back up on that agreement and claim he -- apparently he claims he didn't know what he was signing and it wasn't clear. I find that amazingly hard to believe for a sophisticated businessman a farmer like Mr. Pendarvis is. We're simply asking Your Honor to enforce the agreement he signed, allow us to go in there and forfeit it and destroy it, or certainly at the very least, Your Honor, make the plaintiffs post a significant bond and prevent them from illegally harvesting their field.

THE COURT: Alright. Yes, sir.

MR. BARTH: Thank you, your Honor.

THE COURT: Thank you.

MR. MCLAUGHLIN: Thank you, Your Honor. Very, very -- I'll try to be very brief. First off, we believe that the department has in the past allowed people to amend the location after they've already put the plants in the ground. That belief is based primarily on knowledge that my co-counsel Senator Hutto, who has I believe another client who has post-facto gotten approval for moving a location. It's my understanding that there is a FOIA request pending now with the Department of Agriculture, but we have not gotten a response yet on that regard about has this happened before, how have you handled it before. That's something that discovery would help us get an answer to. I think the key phrase that Mr. Barth just uttered was potential criminal behavior. That's right. That's what this is, potential. Nowhere when it says they waive their right to compensation does it say that they're waiving their rights to contest a finding that they have engaged in criminal behavior. And the shear fact that what little written rules, if we want to call this agreement that, because all the Department of Agriculture has for people to be able to look at. But the shear fact that those written rules acknowledge the fact that people do have to change locations and that their plants may be too hot but still be okay to be processed as hemp, shows that people can fun afoul of the exact two issues that they're citing that our

clients did and still be okay under the Act. They acknowledge that there can be a difference between negligence and willfulness. There's a lot of questions, Your Honor, to be quite frank with you sitting her today I don't even know the information to adequately talk to you about how these original amendments to the applications were originally communicated. I don't know, I don't know if Mr. Pendarvis tried to do that via e-mail or something like that. I don't know how easy they make these applications to get. I don't know if he had been asking for it for a month and a half before they got it and then was faced with a time crunch of I've got these seedlings if I don't get them in the ground they're going to die and I've got to plant them. I don't know the answer to that. All of those are things that can come out through further discovery. And just on the bond issue, Judge, the purpose of the bond is to protect the person we're stopping from from losing out on something. We're saving them money by stopping them from coming in and destroying it. They're not going to make any money off of that. They're going to expend; they're going to suffer expenses to go in and do it. We're saving them money. But to the extent the Court says you know what I agree there's got to be some type of bond put in place here, Your Honor, we would argue that's not the value of the crop when it's actually harvested. We would argue that would be whatever financial injury that the State would suffer as a

result of this and we think that would be relatively minor. And I would just point out, keep in mind Your Honor, this particular plaintiff, at least one of them Mr. Pendarvis, has already suffered dire financial consequences from the destruction of the crop in Dorchester, which is my understanding was significantly larger than this crop here in Marion. I believe that it was into the seven figures of crop in Dorchester that was destroyed so he's already taken a hit. But we just ask the Court to pause everything, allow him to exercise his due process rights to challenge these findings by the agency. Thank you, Judge.

THE COURT: Thank you.

MR. BARTH: May I just say one thing, Your Honor? I would respectfully ask Mr. McLaughlin to do one thing. How do you challenge the fact that this says we can forfeit and destroy it without compensation if it is grown in an area that is not licensed by the Department of Agriculture and they do not dispute that this location is not licensed by the Department of Agriculture. Criminal behavior is not -- the fact of the matter is it's not licenses, you didn't do it right and this is the penalty you pay. You lose it. And it's very clear to all of the farmers that sign participation agreements is you have to be very, very specific with your GPS locations and if you decide to grow it outside of that, you're going to forfeit it and it's going to be destroyed. And to be

honest with you, nothing Mr. McLaughlin says today discovery will cure. Discovery will not cure the fact that it's grown on a piece of land that has not permit for an owner that is not permitted to grow there. That is what it is.

THE COURT: Did he have a license to grow the hemp?

MR. BARTH: Yes, sir, in Dorchester.

THE COURT: It was just in the wrong place. Was it grown in Dorchester and Marion County or just in Marion County and it was supposed to have been grown in Dorchester County?

MR. MCLAUGHLIN: If you look at Exhibit A I believe to the original filing, Judge, that is the license. The license itself has no designation for location. The license merely says when it was issued, when it expires, it has a license number, and then says the licensee and his personal residence. There's -- it's not that they issue a license for you to grow hemp on this particular property, they issue you a license. They acknowledge the fact that you may grow your allotment on several different -- and I will address what Mr. Barth just said, this is what discovery will show us. Here's the problem, there's no written regulations. The Department of Agriculture supposed to promulgate these, and they haven't. They want to say this agreement is like a regulation but it's not. Regulations have to go through and be submitted and be approved and all those things. Here's what discovery can show is, discovery can show us if my clients have been treated

differently that other people who have gone in at some point and put the plants in the ground and then tried to amend their location application and the Department of Agriculture has told them yeah that's okay then that shows that they're treating people differently. And if they're treating people differently that's arbitrary and capriciousness and that can be challenged administratively, that's what the whole nature of Administrative Procedures Act, that's why it's there.

MR. BARTH: Your Honor, if you would look at the license Patrick was just talking about, the license itself to Mr. Pendarvis says this is to certify that the licensee shown below this complied with Section 46-55-20 and is issued this license to engage in the growing of hemp on such approved locations -- approved growing locations on record with the Department.

THE COURT: So, the whole key is the location?

MR. BARTH: The location. That's why the statute makes it crystal clear. In some of the documents we've provided, Your Honor, you have to provide GPS coordinates, so you know exactly where it is supposed to be. And that is very different than saying I can grow 100 acres wherever I want to put them because there's no way to tell if I'm growing marijuana or growing hemp if I can pick any random 100 acres in South Carolina I want. I have to grow it only where I have given and had approved these GPS coordinates and there are

none for this field. Thank you, Your Honor.

THE COURT: Let me think about it and I'll let you know something maybe today or tomorrow.

MR. BARTH: Thank you, Your Honor.

MR. MCLAUGHLIN: And thank you, Your Honor, for setting this up. We appreciate it.

MR. BARTH: Thanks for fitting us in, Judge.

(COURT ADJOURNED)

C E R T I F I C A T E

I, the undersigned, Sallie Beth Todd, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the Transcript of Record of the hearing held in the interest of John Pendarvis & Lawton Drew versus South Carolina Law Enforcement Division and South Carolina Department of Agriculture held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on October 8, 2019.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

SBTodd

Sallie Beth Todd, CVR

Official Reporter

February 28, 2020.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all materials proposed to be included by all parties and not any other materials.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Record on Appeal complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

In accordance with Section (g)(3) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), the undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant, does hereby certify that service of the **Record on Appeal** in the above-captioned matter was made upon all counsel of record by email only this the 26th day of August 2020:

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