SC99205

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, *ex rel*. DEPARTMENT HEALTH AND SENIOR SERVICES,

Appellant-Relator,

v.

RENEE T. SLUSHER, COMMISSIONER, ADMINISTRATIVE HEARING AGENCY,

Respondent.

On Appeal from the Circuit Court of Cole County, Missouri
20th Judicial Circuit
The Honorable Jon Edward Beetem

BRIEF OF AMICUS CURIAE HARVEST OF MISSOURI, LLC

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INTEREST OF AMICUS CURIAE

In 2018, Missouri's citizens approved a constitutional amendment legalizing the cultivation, prescription, sale, possession, and use of medical marijuana. Mo. Const. Art. XIV, § 1.1. Article XIV establishes a detailed licensing regime headed by the Department. It sets out specific factors to be considered in the application process, which require applicants to divulge the most sensitive and prized information of any business, including capitalization plans, detailed business plans, pricing, market analysis, and so on.

Recognizing the sensitive and valuable nature of this information, the law's drafters included an unambiguous confidentiality requirement to protect it. The Department is to "maintain the confidentiality of reports and other information obtained from an applicant or licensee . . .." Mo. Const. Art. XIV, § 1.3(5).

Harvest navigated the application process successfully (as it has in several other jurisdictions) and was awarded cultivation (among others) licenses by the Department. Intervenor Kings Garden's applications for cultivation licenses were not successful. It appealed those denials to the Commission. Kings Garden now seeks, through discovery, the complete, unredacted applications of every single cultivation licensee in Missouri, including Harvest's.[1] The Department objected, citing the confidentiality

[1] This proceeding deals only with Kings Garden's failed applications for cultivation licenses, although the court's ruling would apply to Kings Garden's other applications.

provision in Article XIV. The Commissioner overruled that objection and, after issuing a preliminary writ of prohibition against the Commission, the circuit court ultimately agreed and quashed its initial writ. The Department has now appealed that the circuit court's refusal to prohibit the Commission from forcing the Department to disclose the applications of its licensees.

Harvest's interest in this appeal is self-evident – the circuit court's ruling hands over Harvest's most closely held business information and trade-secrets to its competitors. The resulting damage to its competitive position is irreparable. Kings Garden will be able to see Harvest's business plans, estimates, pricing formulas, security plans, and financial projections. It will learn about Harvest's people and experience. Perhaps most importantly, it will learn how Harvest packages all this information together to present a compelling case for regulatory approval in jurisdictions throughout the country.

And Kings Garden will not be the only competitor that gains this competitive advantage over Harvest. The Commission's discovery ruling will allow every other failed applicant on appeal access to Harvest's information. Like Harvest, many of those applicants (or their affiliates) seek to operate in other jurisdictions. The Commission's ruling will thus put Harvest at a substantial competitive disadvantage to those gaining access to its trade secrets.

ARGUMENT

I. Missouri's constitutional guarantee of confidentiality prohibits the Department from disclosing information and data obtained from applicants for medical marijuana licenses.

A. Rules governing constitutional construction.

With Article XIV, the people of Missouri made marijuana available to serve the medical needs of Missourians. Missouri is now among the growing number of other states that have likewise recognized the value of marijuana to treat numerous medical conditions. The constitution, along with the regulations that have sprung from it, establish detailed rules governing the application and licensing process.

The Department exercised its constitutional authority to limit the number of cultivation licenses it would issue to sixty, but it received far more applications than that. As a result, the Department implemented and followed a blind scoring system to rank the applications and award licenses to the top sixty cultivation applications.

Kings Garden's appeal to the Commission is among the 857 appeals that have been filed under Article XIV. One of its arguments is that Department's scoring was arbitrary. So Kings Garden sought in discovery unredacted copies of applications from applicants who were successful in obtaining cultivation licenses. The Department's objections were largely rejected by the Commission and the circuit court.

The question at this stage is whether the Department can be compelled to produce this information in light of the confidentiality requirement in Article XIV. In relevant part, this provision states:

> The department shall maintain the confidentiality of reports or other information obtained from an applicant or licensee containing any individualized data, information, or records related to the licensee or its operation, including sales information, financial records, tax returns, credit reports, cultivation information, testing results, and security information and plans, or revealing any patient information, or any other records that are exempt from public inspection pursuant to state or federal law. Such reports or other information may be used only for a purpose authorized by this section. ….

Mo. Const. Article XIV, §1.3(5). The Court is tasked here with determining the breadth of this confidentiality command.

The goal of constitutional construction "is to give effect to the intent of the voters who adopted the provision by considering the plain and ordinary meaning of the words used." *Pearson v. Koster*, 367 S.W.3d 36, 48 (Mo. 2012) (cleaned up). "[E]very word . . . is presumed to have effect and meaning." *Wenzlaff v. Lawton*, 653 S.W.2d 215, 216 (Mo. 1983). Those words are in turn given their plain, ordinary meaning. *Ibid*. And, "of course, this Court must give due regard to the primary objectives of the provision under scrutiny as viewed in harmony with all related provisions, considered as a whole." *Ibid*. The legislature "must be presumed to have known the problems presented which indicated the desirability of [a constitutional amendment], and to have drawn

the amendment in a way to prevent or remedy the difficulty." *Sch. Dist. of Kan. City v. State*, 317 S.W.3d 599, 608 (Mo. 2010).

The goal of Article XIV is to create a vibrant, safe, and legal medical marijuana market in the State of Missouri. To achieve this, the law's architects established a searching licensing and regulatory process. Mo. Const. Art. XIV § 1.3. They sought to attract high-quality operators like Harvest to build and participate in this emerging market (*e.g.*, apply for licenses to operate). Knowing the application process requires applicants to provide their most sensitive business and trade secrets, the drafters included a confidentiality provision—which the voters adopted—to keep the applicant's information secret. This encouraged interested parties to both apply and be candid in their applications. Mo. Const. Art. XIV § 1.3(5).

Neither of the lower tribunals gave this provision its intended effect. The Commission declared that it was only intended to prevent disclosure of applicant information through the Sunshine Law. Doc. 4, p.3. The circuit court eschewed that reasoning (correctly), but adopted Kings Garden's position that due process required it to be allowed access to its competitor's applications because that information is supposedly necessary to its appeal. Doc. 21, p. 5.

But Section 1.3(5) does not contemplate (much less authorize) compelling the Department to hand over an applicant's information to their competitors. In fact, the interpretation adopted by the circuit court undercuts the entire purpose of the

confidentiality provision in Section 1.3(5) and breaks the promise the clause makes to prospective applicants.

The Department's analysis of the flaws in these decisions is compelling and needn't be repeated here. Substitute Appellant's Br. at 19-26. Suffice to say, neither decision vindicates the people's intent expressed in Section 1.3(5) to protect applicant information from disclosure by the Department. As this Court held in *Tucker*, when a provision of law obligates the government to keep documents provided to it by private citizens confidential, those documents cannot be disclosed through discovery in civil litigation. *State ex rel. Dep't of Soc. Servs. v. Tucker*, 413 S.W.3d 646, 648 (Mo. 2013).

Two other points bear mention. First, the fallout from the circuit court's order will extend beyond Harvest and Kings Garden. If it stands, each and every failed applicant will have a right to obtain the most closely guarded business information from their more successful competitors. This Court should reject that position in favor of the common-sense reading of Section 1.3(5): that the records listed there are not subject to disclosure by the Department under any circumstances.

Second, and relatedly, if affirmed, the circuit court's decision will subject Harvest's trade secrets to discovery in cases of all sorts. Worse, it paves the way for discovery of all information Section 1.3(5) was meant to protect, including application data provided by patients and providers a like. The only requirement, if the circuit court's view is adopted, is that the request be tied somehow to a subject covered in Section 1.3's fifty-nine separate

provisions. This cannot be what the people intended when they enacted Section 1.3(5).

B. An applicant's right to appeal does not render the confidentiality clause impotent.

The circuit court found that disclosure to Kings Garden of information from successful applications was necessary to give meaning to its right to appeal. But that position is grounded on the flawed notion that Kings Garden would be deprived of a "full and meaningful appeal" without this access. Doc. 21, p.5. Again, the Department's Substitute Brief drives home the problems with this argument.

In short, the Court can vindicate the right to confidentiality the Constitution provides applicants like Harvest while also addressing the needs of appellants like Kings Garden. To begin with, Kings Garden does not need Harvest's application data to make a case that its application was arbitrarily scored. Substitute Appellant's Brief at 28. It can use its own applications, which it contends received a wide-range of scores for effectively the same answer, as proof. And it can gather information from other applicants willing to share it to make this comparison, as others have done in these appeals. *Id*. at 29.

If access to applicant information is to be had at all, Kings Garden should be made to seek it from the source by subpoena duces tecum. Consider how this process would have played out here. Harvest would have been allowed to appear and argue to quash or limit the requests made of it. At a minimum, Harvest could have (and would have) implored the Commission and

circuit court to adopt the strict protective order suggested in Section II below.

Notably, the Commission recognized the import of protecting the confidential information of third parties like Harvest. But as it was, the parties offered no meaningful means of redacting the information Kings Garden was seeking nor did they offer any other provisions to protect that information. Doc. 5, pp. 3-4. The outcome may have been different if Kings Garden's requests had been made directly to Harvest, which would have been allowed plead its case and guide the Commission.

II. Alternatively, the Court should direct that the application information sought must be subject to attorneys-eyes-only protection.

A. The information in Harvest's applications warrants trade-secret treatment.

Much of the information Kings Garden is being given access to qualifies as quintessential trade secrets under Missouri law. Under Missouri law, "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Nat'l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 18 (Mo. banc 1966); *see also Brown v. Rollet Bros. Trucking Co.*, 291 S.W.3d 766, 778 (Mo. App. 2009) (affirming that *Nat'l Rejectors* remains good law).

The Commission granted Kings Garden access to the responses of all licensees to application questions 22-25, 32-36, 39-40, 45, 48, 51-52, 55-59, 60-62, 66-68 and questions 1C-11C. Doc. 5, p.2. For successful applicants like Harvest, the answers to

these questions contain trade secrets about their operational and business plans. A brief description of the information sought is useful context:

- Questions 21-25, and 39 detail Harvest's plans for maintaining a steady supply of marijuana (22), its plans to protect the safety and security of patients and the community (23), its plans for preventing marijuana from being diverted to the illegal market (24), its plans for making the products available to low-income patients, and its plans for storing marijuana at its locations (39);
- Questions 32-36 include details about the company's accounting and financial plans (40), how the company will train its employees (32-26), how it will set its prices and how it will analyze supply and demand in the market (48), how it will source its non-marijuana products (45), how it will control odor (51), and how it will prevent minors from obtaining its product (52);
- Questions 55-62 deal with the company's security plans. Among them, how it will secure its buildings, parking lots, and storage and containment areas; how it plans to screen and monitor employees; and how it plans to trace and track its product.
- Questions 65-68 ask applicants how their operations would positively affect their communities. This includes projections for job creation, economic development, and wages.

- Questions 1C-4C seek information about the company's employees, officers, and owners.
- Questions 5C-11C include additional trade secrets about Harvest's facility designs, growing technology, agricultural practices, quality control, and waste management.

Harvest's responses have all the hallmarks of trade secrets. No business would voluntarily share information about how it prices its products with competitors. No business would volunteer details about the efficiencies of process and finances it enjoys. No business would share its training, security processes, regulatory compliance policies, or compensation and wages practices. The reason is self-evident, Harvest's operational know-how, security, finances, pricing, and wages provide it a competitive advantage and actual economic value. Harvest's competitors simply cannot emulate any of this without investing the time, effort, and financial resources Harvest has expended over the years.

The identities of Harvest's employees and owners are a trade secret as well. The names and expertise of these best-in-class individuals, as well as their work and reputations, are closely guarded by Harvest. That secrecy is a competitive advantage because the relative anonymity of Harvest's people makes it difficult for competitors to poach them.

In addition, the work performed by Harvest's employees and management team secures other unique and valuable advantages. The work of Harvest's team (e.g., its operational plans) is the product of years of experience and expertise. It

cannot easily be replicated by competitors, regardless of their financial resources or time and effort expended.

What's more, the compilation of all this information in Harvest's applications separately warrants protection. That is, Harvest's application know-how creates a competitive advantage in the application process itself. The circumstances of this case prove the point. Harvest's application and responses built a compelling case for the licenses the Department ultimately awarded. Kings Garden's weaker applications did not.

B. Attorneys-eyes-only protection is appropriate in this case.

When a party seeks discovery from a competitor that would divulge "trade secrets, patents, or other intellectual property," courts commonly restrict access to those materials to the attorneys only. *Gillespie v. Charter Communs.*, 133 F. Supp. 3d 1195, 1202 (E.D. Mo. 2015) (quoting *Ragland v. Blue Cross Blue Shield of N.D.*, No. 1:12-cv-080, 2013 U.S. Dist. LEXIS 99369, at *3 (D.N.D. June 25, 2013)); *In re city of New York*, 607 F.3d 923, 935-36 (2d Cir. 2010) ("attorneys' eyes only" disclosure is a "routine feature of civil litigation involving trade secrets").

An "attorneys' eyes only" designation prevents the party itself from learning about—and gaining advantage from—the business secrets of its competition in the market. While the standard is high, sensitive, secret, and valuable business information typically fits the bill.

This protection is necessary to avoid Harvest's information falling into the hands of competing companies as well as the teams of consultants they use to seek regulatory approval in

other jurisdictions. As the Department notes, the same consultants that are presently assisting failed applicants in their appeals before the Commission are likely counseling clients seeking regulatory approval in other jurisdiction in competition with Harvest.

In sum, this case involves precisely the sort of information that is typically subject to "attorneys' eyes only" designation. The applications and responses sought are rife with trade secrets of Kings Garden's competitors, including Harvest. Even if the information is not technically a trade secret, it still falls squarely within the sort that typically enjoys attorneys' eyes-only protection. *See Consultus, LLC v. CPC Commodities*, No. 19-00821-CV-W-FJG, 2020 U.S. Dist. LEXIS 250180, at *9 (W.D. Mo. Dec. 3, 2020). In *Consultus*, the court restricted access to the materials sought to the lawyers only, without determining whether it "was in fact [a] trade secret" because the requests sought the disclosure of "potential trade secrets and customer lists." *Ibid*.

The confidentiality clause enshrined in Article XIV, § 1.3(5) only bolsters this conclusion. By its plain terms, this provision was designed to induce applicants to come forward to build a market for medical marijuana in Missouri in part with the promise that their information would be kept secret. The Court should uphold and enforce that bargain. *See Pearson*, 367 S.W.3d at 48.

CONCLUSION

The circuit court's decision should be reversed. This Court should hold that the confidentiality clause in Article XIV, § 1.3(5) of the Missouri Constitution prohibits the disclosure of Harvest's application responses to Kings Garden. But at a minimum, the Court should hold that the constitution's promise of confidentiality requires an order restricting access to these materials to counsel only, thereby preventing Kings Garden (and others) from gaining any advantage from Harvest's business and trade secrets.

CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(B)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function of Word by which it was prepared, contains 3,093 words, exclusive of the appendix.

The undersigned further certifies that the electronic copy of this brief filed with the Court is in PDF format and complies with Missouri Supreme Court Rules and is virus free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was filed electronically November 9, 2021 and that all counsel of record are registered users of and have been served by the court's electronic filing system.

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