IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CLIMBING KITES, LLC and FIELD DAY BREWING COMPANY, LLC, Plaintiffs, v. THE STATE OF IOWA; KELLY GARCIA, in her official capacity as Director of the Iowa Department of Health and Human Services; and IOWA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	)	Case No. 4:24-cv-202 **POST-HEARING BRIEF IN SUPPORT OF RENEWED MOTION FOR PRELIMINARY INJUNCTION**

ARGUMENT

Iowa corporations are entitled to fair notice of what conduct is prohibited by law, and no business should be expected to run their operations based on a Google search. For the reasons stated in Plaintiff's previous briefs and supplemental declarations attached hereto, the statute's per-serving potency limit, as enacted by the legislature, is impermissibly vague in all applications and therefore unconstitutional.

But *even if* a person of ordinary intelligence can understand what "serving" means in this context, and *even if* the Department can shore up its meaning through rules—which it cannot—it turns out the per-serving limit is so standardless that it has led the Department to enforce its hemp program in an arbitrary or discriminatory manner. *See Hill v. Colorado*, 530 U.S. 703, 732 (2000) ("A statute can be impermissibly vague for either of two independent reasons.").

This became the focus of the July 11 hearing, in which the Department once again claimed it had not "acted" yet, even though as a result of the Department's action, Plaintiffs cannot sell *any* of their products for the foreseeable future. The Court appropriately requested

supplemental evidence on this point. *See* Supp. Declaration of Scott Selix (hereinafter "Selix Supp. Decl."); Supp. Declaration of Dan Caraher (hereinafter "Caraher Supp. Decl."). To summarize the current state-of-play:

- All of Plaintiffs' products approved prior to July 1 and in anticipation of July 1—even those undisputedly legal after July 1—have been shadow-banned, without notice. Selix Supp. Decl. ¶ 38; Caraher Supp. Decl. ¶ 33.
- Manufacturers and retailers *not* a party to this litigation have *not* been treated similarly. Selix Supp. Decl. ¶ 42.
- Retailers—understandably—have refused to sell or order more of Plaintiffs' products, due to the Department's shadow-ban. Selix Supp. Decl. ¶ 44–45; Caraher Supp. Decl. ¶ 37–38.
- Although the Department hinted Plaintiffs' products are still "approved" according to its own internal records, it has refused to definitively tell Plaintiffs they can sell them. Selix Supp. Decl. ¶ 47; Caraher Supp. Decl. ¶ 40.
- Plaintiffs are prohibited from submitting new products for approval to the Department. Selix Supp. Decl. ¶ 46; Caraher Supp. Decl. ¶ 39.
- Once Plaintiffs *can* submit new products (even those undisputedly legal), Plaintiffs must wait at least a month for approval. Selix Supp. Decl. ¶ 54–56; Caraher Supp. Decl. ¶ 47–49.
- Plaintiffs must manufacture, package, label, ship, distribute, and hold products (ones that may or may not be legal, according to the Department) *long* before submitting a product for approval to the Department. Selix Supp. Decl. ¶ 6; Caraher Supp. Decl. ¶ 6.
- The Department is not answering questions from any stakeholders—those in litigation with the Department and not—about how to manufacture or sell products to comply with the law, citing ongoing litigation and a pending rulemaking process. Selix Supp. Decl. ¶ 53; Caraher Supp. Decl. ¶ 46.

Quite literally, ***Plaintiffs need some indication from the Department of how to conduct their business lawfully without the risk of violating the Department's interpretation of the law***.[1]

The Department's conduct to this point highlights its arbitrary enforcement of the statute's per-serving limit. Up until July 1, the Department appears to have determined a

[1] "'And why am I under arrest?' he then asked. 'That's something we're not allowed to tell you. Go into your room and wait there. Proceedings are underway and you'll learn about everything all in good time.'" *In re Silicon Valley Bank (Cayman Islands Branch)*, 658 B.R. 75, 77 n.1 (Bankr. S.D. N.Y. 2024) (quoting Franz Kafka, *The Trial* (1914))).

consumable's "serving" of THC based on a recommended amount of THC as set by the product's manufacturer. This makes sense—the Department was approving 12-ounce beverages with 1, 2, 5, or 10 "servings" per container. But now, even though the legislature may have incorporated that understanding of "serving" into the statute, the Department has apparently pivoted to an interpretation of "serving" based on the underlying food product (i.e., according to FDA RACCs). Why else would Plaintiffs' legal pre-July 1 products suddenly become illegal sometime after July 1?

The Department did not tell market participants to resubmit product lists either before or after July 1. Selix Supp. Decl. ¶ 31; Caraher Supp. Decl. ¶ 26. In fact, Plaintiffs had already provided DHHS the required information to manufacture and sell 12-ounce cans containing more than 4 milligrams of THC after July 1. Selix Supp. Decl. ¶ 30; Caraher Supp. Decl. ¶ 25. Those products were approved. *Id.* But now, all products have vanished, and retailers are no longer selling Plaintiffs' products. The Department has not responded by *reinstating* Plaintiffs' products; it has instead vaguely asserted that Plaintiffs should know the state of the law and resubmit all products, which will be approved in a month or so.

Plaintiffs do not intend to re-brief the legal issues submitted to this Court; instead, Plaintiffs provide this Court the latest factual developments which, due to the Department's actions, have decimated Plaintiffs' businesses and eliminated ***any*** products for sale for the foreseeable future. Selix Supp. Decl. ¶ 41; Caraher Supp. Decl. ¶ 36. Plaintiffs continue to believe the statute's per-serving limitation is unconstitutionally vague, which has now led to arbitrary and discriminatory enforcement by the Department. An injunction must issue.

CONCLUSION

For the reasons previously stated, Plaintiffs respectfully request this Court enter an order enjoining the Department, through Director Kelly Garcia, from any enforcement of the per-

serving potency limit in HF2605 because it is unconstitutionally vague and until such time as the legislature can provide further guidance through a subsequent enactment of law. Plaintiffs further request an order requiring the Department to reinstate Plaintiffs' legally compliant products through the Department's Portal and acknowledge—in writing—the legality of the sale of Plaintiffs' pre-approved products for retail sale.

BELIN McCORMICK, P.C.

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