IN THE COURT OF APPEALS OF MARYLAND

JANE AND JOHN DOE, *et al.*, Petitioners, v. ALTERNATIVE MEDICINE MARYLAND, LLC, *et al.*, Respondents.	Petition Docket No. 148 Sept. Term 2017

OPPOSITION TO MOTION TO MAINTAIN *STATUS QUO*

Jane and John Doe, Curio Wellness, LLC, Doctor's Orders Maryland, LLC, Green Leaf Medical, LLC, Kind Therapeutics, USA, LLC, SunMed Growers, LLC, Maryland Wholesale Medical Cannabis Trade Association, and, the Coalition for Patient Medicinal Access, LLC ("Petitioners"), by the undersigned counsel, oppose the Motion to Maintain *Status Quo*.

I. HAVING STAYED THE JUNE 2, 2017 PRELIMINARY INJUNCTION HEARING, THIS COURT SHOULD DENY AMM'S FAULTY ATTEMPT TO REINSTATE INJUNCTIVE RELIEF

In its motion, Respondent, Alternative Medicine Maryland, LLC ("AMM"), asks this Court to do today precisely what this Court stayed on Friday – that is, to impose injunctive relief without a prior determination as to Petitioners' right and opportunity to be heard. AMM asks the Court to extend a TRO entered without notice to Petitioners or an opportunity to be heard.

AMM's Motion also misstates the status quo. The status quo today is that the

TRO expired by its express terms on June 4, 2017.[1] Thus, AMM's Motion cannot maintain the status quo.[2] That defect alone is sufficient to deny AMM's Motion.

Moreover, even if AMM's defective Motion had any merit – which it does not – it lacks evidentiary support and the balance of harms strongly favors Petitioners and the public's interest in this critically-important public health program. AMM's Motion totally disregards more than 50 affidavits filed in the circuit court by Stage 1 Grower Awardees, processors, dispensers, and patients who attest to the catastrophic harm that would be caused throughout the industry.

As reflected in those affidavits, businesses that played by the rules established by the State to implement the medical cannabis program and have expended hundreds of millions of dollars to do so will suffer serious and irreparable harm, including to their businesses, employees, and vendors, and, as significantly, patients[3] will be further

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[1] Maryland Rule 15-504(c)(5) ("the order shall... set forth an expiration date, which shall be not later than ten days after issuance. . . ."). Under Rule 1-203, when time expires on a Sunday, it is generally extended to the following day. However, the May 25th TRO set a hearing for June 2nd, and stated: "Ordered that this order shall expire in ten (10) days [sic] time, *on June 4th,* 2017." [Emphasis added]. Here both Rule 15-504(c)(5) and Rule 1-204 expressly and unequivocally provide for expiration on June 4th. AMM seeks to extend a TRO that Petitioners sought to dissolve for being denied their right and opportunity to defend against. Petitioners were denied a mandatory hearing, Rule 15-504(f), on their motion to dissolve. It would violate every principle of due process and fundamental fairness to extend the procedure and Order in controversy, particularly when the Order has expired.

[2] "Ordinarily, the status quo is the last, actual, peaceable, non-contested status which preceded the pending controversy." *Eastside Vend Distributors, Inc. v. Pepsi Bottling Grp., Inc.*, 396 Md. 219, 246 (2006). It cannot colorably be asserted by AMM that the disputed TRO reflects a peaceable, non-contested status.

[3] The Mather affidavit shows that 6,559 patients, 266 physicians, and 222 caregivers have registered for medical cannabis, and 164 pre-approvals have been issued to growers,

delayed in receiving much needed medicine for their critical health needs. All of them will be directly and adversely impacted by AMM's unsupported and meritless Motion.

And, AMM's motions for injunctive relief – including here – are untimely and barred by laches. AMM's initial motion for a TRO was filed *608 days* (approximately a year and eight months) after promulgation of the specific criteria in the law it now challenges. AMM has put forward no evidence that it objected to – or even sought clarification of – that criteria during the pre-award review process. Now, approximately four years after enactment of the Maryland Medical Cannabis Act and – at the 11th hour and 59th minute – after awards were issued, hundreds of millions of dollars expended, and patients have signed up with doctors for medicinal treatments, does AMM make its extraordinary, procedurally-defective, and unsupported request to "maintain" the alleged status quo. Without allowing the affected parties to be heard, AMM asks this Court to enter a *de facto* preliminary injunction, of indefinite duration, on the sparsest allegation, and on only a $100.00 bond.[4]

In addition to being barred by laches and other doctrines, AMM's request violates due process, substantive, statutory[5] and procedural rights,[6] and jeopardizes Petitioners'

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processors, and dispensaries. Ms. Mather is a State employee. Her affidavit was filed by the Commission in the circuit court.

[4] An affidavit AMM filed in the circuit court showed that AMM is capitalized at $10 million. Petitioners' affidavits show that they will sustain hundreds of thousands of dollars for every day of delay.

[5] AMM sued under the Declaratory Judgment Act, which provides: "If declaratory relief is sought, a person who has or claims any interest which would be affected by the declaration, shall be made a party." Md. Code Ann., Cts. & Jud. Proc. Art. §3-405(a)(1). Petitioners have and claim such an interest.

health, their businesses, and their employees. If an injunction is granted, the medicinal cannabis program will grind to a screeching halt, operating businesses will be directly and adversely affected, hundreds of employees will be laid off and others will not be hired, operating and capital funds will dry up, and patients will needlessly suffer. That action would compound the errors in the circuit court and, as the undisputed affidavits demonstrate, it would destroy the *status quo*, not preserve it.

AMM's request should be denied, a limited bypass writ of certiorari on the intervention dispute should issue; simultaneous informal briefing should be ordered; after oral argument, the order denying intervention should be reversed; intervention should be ordered with full rights to discovery and participation as of the December 30, 2016, intervention motion; and, the matter should be remanded for further proceedings with all parties at the table. That would have the salutary effect of both mooting AMM's ill-founded motion to maintain the alleged *status quo*, and expediting resolution of this time-sensitive litigation.[7]

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[6] Rule 2-211(a)(2) requires joinder of any person if "disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action" and subsection (b) requires pleading reasons for non-joinder. AMM failed to comply. Rule 2-214 mandates intervention of right. AMM opposed Petitioners' motion to intervene with statements that were inaccurate and directly contradict AMM's statements in this Court. Rule 15-505(a) provides: "A court may not issue a preliminary injunction without notice to all parties and an opportunity for a full adversary hearing on the propriety of its issuance." AMM has not complied with that Rule either.

[7] AMM asks this Court to continue a TRO that was improperly entered in direct violation of the Maryland Rules and due process. That invitation should be rejected. To the extent, if any, to which the Court entertains AMM's request, Rule 8-425 (d) (affidavit) and (g) (factors) apply. For reasons set forth in other filings by Petitioners in this Court and the circuit court, AMM has not, and cannot demonstrate entitlement to injunctive

AMM should not be heard to complain of denial of its Motion. If AMM suffered any injury, and it did not, it is a self-inflicted injury because AMM wrongfully sat on its laches and steadfastly refused to bring indispensable parties before the Court.[8]

II. EQUITY COMPELS DENIAL OF AMM'S MOTION TO "MAINTAIN" *STATUS QUO*

The General Assembly enunciated the overarching public policy for the Act, expressing that one of its primary purposes is "to make medical cannabis available to qualifying patients in a safe and effective manner." Md. Code Ann., Health Gen'l. Art. §13-3302(c).[9] That beneficial relief should be implemented with all deliberate speed. For patients and their critical health needs, it is a civil right. For growers and their considerable investments, it is an economic necessity and, for the State, it is the fulfillment of a statutory contract with the Grower Awardees. *All* relief requested by Petitioners furthers the legislative goal of *timely* availability of medicinal cannabis to ameliorate pain and suffering.

AMM's dilatory requests for injunctive relief, including here, only further delay the implementation of this important public health program. At worst, it derails the entire

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relief. AMM's request to indefinitely continue an improper, ex parte, dissolved TRO, simply compounds the due process, substantive, statutory, and procedural deprivations of Petitioners' right to notice and an opportunity to be heard.

[8] In the circuit court, the State filed a motion asserting that the grower awardees were necessary parties. The State is correct. Several grower awardees moved to intervene as of right and permissively. Both motions were denied. Only the latter is appealable, and it has been appealed.

[9] Stated in full, HG §13-3302(c) provides: "The purpose of the Commission is to develop policies, procedures, guidelines, and regulations to implement programs to make medical cannabis available to qualifying patients in a safe and effective manner."

program without offering any solution. AMM's motion to "Maintain" the alleged *status quo* tells suffering patients to wait for relief, even though AMM knowingly sat on its alleged rights.

Prior to enactment of the medical cannabis statute, the Attorney General's bill review letter alerted the General Assembly of the Constitutional requirements for consideration of race and ethnicity in this program.[10] The General Assembly did not conduct the recommended disparity study. The Attorney General's second letter (opining that consideration of race and ethnicity would be unconstitutional under Supreme Court precedent) was issued in March 2015.[11] AMM is charged with knowledge of it. The subsequent September 2015 COMAR provision omitted race and ethnicity as a factor. AMM is charged with knowledge of it. The grower license application did not call for disclosure of race or ethnicity, as AMM admits in its filings. AMM knew that in October 2015. AMM submitted its November 2015 license application without *any* objection. After a $2 million evaluation process, awards were made on August 15, 2016, and AMM did not receive an award. AMM did not file suit until October 31, 2016. It then did not move for a TRO and preliminary injunction until May 15, 2017.

Meanwhile, Petitioners received their awards, obtained zoning approvals, purchased or leased real property, built buildings, obtained use and occupancy permits, purchased equipment, hired employees, and expended tens or hundreds of millions of

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[10] The Bill Review letter is attached as Exhibit 1. It would have been introduced, had Petitioners received a hearing. It is judicially noticeable, Rule 5-201, and undisputed.

[11] No one has disagreed with the Attorney General's analysis of the applicable Supreme Court precedent.

dollars, as required by COMAR 10.62.08.06.E. That COMAR provision required that growers be operational within one year of the August 15, 2016, award, or risk forfeiture.

AMM's inaction is compounded, and its unsupportable position laid bare, by the fact that AMM is the beneficiary of a dispensary award it obtained under precisely the same criteria it now challenges for grower awards. Indisputably, AMM has unclean hands.

Petitioners were denied an opportunity to be heard before entry of the TRO that AMM now seeks to extend. For the reasons set forth herein, it should not be extended. Instead of granting the interlocutory relief requested by AMM, this Court should issue, as set forth below, a *limited* bypass certiorari writ and order that all parties file simultaneous informal briefs with respect to the question of intervention, with all supporting documents, and permit oral argument as soon as practicable.

III. THE COURT SHOULD ISSUE A LIMITED BYPASS WRIT OF CERTIORARI AND ORDER BRIEFING, NOT A DE FACTO PRELIMINARY INJUNCTION

This supplemental section addresses only facts, relevant to the bypass petition, that were presented *subsequent* to the filing of the bypass petition. AMM's June 2nd filing admits facts showing that bypass certiorari is appropriate. In it, AMM admits that Petitioners have protectable interests. Similarly, in its June 2nd filing, the State has stated that it does not protect the grower awardees' interests. And, everyone agrees that there is a need for speedy resolution. Certiorari should issue to address this important case, and informal briefing of the intervention issue should be ordered on an expedited basis, as set forth above.

A. Bypass Certiorari is Justified to Effectuate the Act and Protect Petitioners' Important, Vested Rights

With the expiration of the TRO on June 4th, the bypass petition centers on wrongful denial of intervention. This *case* is of undeniable importance and certworthy. Every person with gray hair has seen a relative, loved one, or friend suffer from the awful diseases and treatments that can be ameliorated by medical cannabis.[12] Delay caused by this dilatory litigant to further AMM's economic interests would be unconscionable. Further, it would be contrary to legislative intent, as noted at the outset of this memorandum.

B. The June 2, 2017 Filings Show That Petitioners Have Interests That Need Protection and That the Interests Are Not Adequately Protected by the Commission

Based on AMM's June 2nd filing in this Court, certiorari is appropriate to resolve the question of Petitioners' intervention. AMM admits that: "It is Respondent's [AMM's] position that the entire licensing process, including but not limited to the granting of pre-approvals and the issuance of a final license to ForwardGro, LLC, was conducted in derogation of the law and in an unconstitutional, arbitrary and capricious manner, such that *all* medical cannabis *pre-approvals,* and any *licenses* stemming therefrom, *are categorically invalid,* and for which no entity can maintain a legitimate

[12] Section 13-3304(d)(1) of the Health General article provides: "The Commission is encouraged to approve provider applications for the following medical conditions: (i) A chronic or debilitating disease or medical condition that results in a patient being admitted into hospice or receiving palliative care; or (ii) A chronic or debilitating disease or medical condition or the treatment of a chronic or debilitating disease or medical condition that produces: 1. Cachexia, anorexia, or wasting syndrome; 2. Severe or chronic pain; 3. Severe nausea; 4. Seizures; or 5. Severe or persistent muscle spasms."

property right." AMM's June 2, 2017, Opposition to Bypass Petition, 4 (Emphasis added).

Petitioners have a certworthy, interest in the proceeding below. They have spent millions of dollars in reliance on the awards and license that AMM seeks to invalidate. Under the old axiom that you cannot hook a fish until it opens its mouth, AMM has opened wide and effectively admitted that bypass certiorari is necessary and appropriate. Without a writ, Petitioners' rights to be heard will be lost. Further, as the State wrote in its June 2nd, filing in this Court, "[a]s the State Defendants have argued below, the petitioners who are recipients of pre-approvals are indispensable parties to the proceedings below. . . ."

The June 2nd filings reinforce the fact that those interests are *not* adequately protected by the Commission. Petitioners have stated in open Court and in pleadings that the adequate representation argument is not critical of the Office of the Attorney General's performance. Instead, Petitioners correctly note that their interests *differ* from that of the State. The grower Petitioners have an economic interest and the State has a policy interest. As the State wrote in its June 2nd, filing in this Court, "the State Defendants do not represent the interests of the petitioners."

IV. ALL PROPOSED INTERVENORS IN THE CIRCUIT COURT ACTION JOIN AND SHOULD BE DEEMED PARTIES TO THIS PETITION AND OPPOSITION TO THE MOTION TO "MAINTAIN" *STATUS QUO*

In order to avoid imposition on the Court and due to time constraints, Grower Awardees, Temescal Wellness of Maryland, LLC, and Holistic Industries, LLC and licensee, ForwardGro, LLC,[13] have not filed separate motions herein, but fully join in Petitioners' Opposition to the Motion to "Maintain" Status Quo and all prior grower awardee filings in the instant proceedings.

All of the Grower Awardees moved to intervene and dissolve or modify the TRO in the circuit court. No hearing was held on denial of the dissolution motions.[14] In addition to the present appeals, several have previously appealed prior denials of intervention. *Doe v. Alternative Medicine Maryland, LLC,* No. 40, Sept. Term 2017 (Ct.Spec.Apls.).

Each Grower Awardee has the same, similar, or additional due process, substantive, statutory, and procedural rights to be heard as expressed herein. It is requested that they be permitted to brief intervention and an order permitting intervention name those additional parties as intervenors as of right in the circuit court.[15]

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[13] A license has been issued to ForwardGro, LLC.

[14] Rule 15-504(f) provides that: "The court *shall* proceed to *hear* and determine the application [to dissolve or modify a TRO] at the earliest possible time." [Emphasis added].

[15] A copy of the circuit court's order regarding ForwardGro, LLC, denying (for a second time) ForwardGro party status as an intervenor is attached as Exhibit 2.

V. CONCLUSION

Everyone supports the laudable goal of racial and ethnic diversity in State programs. The affidavits show that many of the growers have made substantial, voluntary efforts to achieve it.

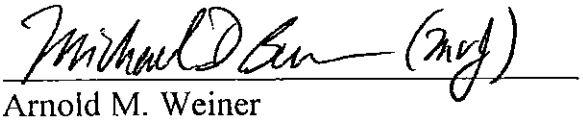
Here, however, the bypass certiorari petition presents a different request – it presents a request to be heard in protection of one's vested interests. Many rights may be waived by inaction. *E.g.*, Rule 2-325 (wavier of right to jury trial); Rule 2-322 - 323(e) (waiver by failure to plead); Rule 5-103(a)(1) (waiver by failure to object); Ross *v. State Board of Elections,* 387 Md. 649 (2005) (laches). Petitioners should be permitted to present those and other defenses and, without a writ, will not be able to do so.

The circuit court closed the Courtroom door to Petitioners. As a matter of fundamental fairness, they now seek the right to present those and other defenses to the circuit court *nunc pro tunc* December 30, 2016, free and clear of any order to "Maintain" the alleged *status quo.*

Wherefore, Petitioners request that this Court deny the Motion to Maintain the Alleged *Status Quo,* and for such other relief as the Court deems appropriate.[16]

[16] It is indisputable that AMM's action, not just its motions for injunctive relief, is barred by laches. Under similar circumstances, this Court has exercised the power of summary disposition *sua sponte. Canavan v. Maryland State Board of Elections,* 430 Md. 533 (2013) (summary affirmance *sua sponte* on laches and untimeliness); *Phaison v. Maryland,* 360 Md. 482 (2000); *Okon v. Maryland,* 346 Md. 249 (1997) (summary reversal); *Ross v. Maryland*, 348 Md. 484 (1998) (same); *see Peck v. DiMarto,* 362 Md. 660 (2001) (summarily vacating decision).

RESPECTFULLY SUBMITTED,



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Attorneys for Proposed Intervening Defendants

Font: Times New Roman, 13 point

CERTIFICATE OF SERVICE

I HEREBY certify that on this 5th day of June, 2017, a copy of the foregoing was served, by first-class mail, postage prepaid, and via email, on:

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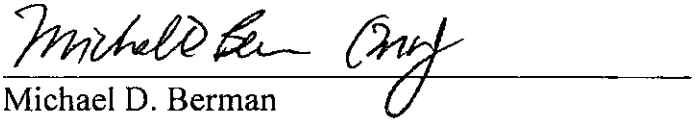

Michael D. Berman

IN THE COURT OF APPEALS OF MARYLAND

JANE AND JOHN DOE, *et al.*, Petitioners, v. ALTERNATIVE MEDICINE MARYLAND, LLC, *et al.*, Respondents.	Petition Docket No. 148 Sept. Term 2017

ORDER DENYING MOTION TO MAINTAIN *STATUS QUO*

It is this ____ day of May, 2017, by the Court of Appeals of Maryland, ORDERED that the Motion to Maintain *Status Quo* be, and hereby is, DENIED, and any litigant wishing to do so, including Petitioners, Respondents, Temescal Wellness of Maryland, LLC, Holistic Industries, LLC and ForwardGro, LLC, shall file an informal brief (printing and formal covers not required), no longer than ___ pages, with 13 point Times New Roman font, with only necessary supporting evidence, on the ___ day of _____, 2017, and copies of this Order to be sent to all counsel of record.

_____
Judge, Court of Appeals of Maryland

EXHIBIT 1

J. May
HB 881

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THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 11, 2014

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 113[1]	SB 225[1]
HB 313[2]	SB 266[2]
HB 341[3]	SB 479[3]
HB 641[4]	SB 503[6]
HB 695	SB 803[4]
HB 881[5]	SB 923[5]
HB 912	
HB 957	
HB 1366[6]	
HB 1399	

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401-1991
410-946-5600 · 301-970-5600 · FAX 410-946-5601 · TTY 410-946-5401 · 301-970-5401

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/eb

cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

[1] HB 113 is identical to SB 225.

[2] HB 313 is identical to SB 266.

[3] HB 341 is identical to SB 479.

[4] HB 641 is identical to SB 803.

[5] House Bill 881 and Senate Bill 923 are each entitled "Medical Marijuana – Natalie M. LaPrade Medical Marijuana Commission." There are two differences between the two bills. First, the title of House Bill 881 provides, at page 3, lines 13-17, that the bill is "prohibiting a medical marijuana grower agent from being employed by, and receiving any compensation or gifts from or having any financial interest in a certifying physician or a medical marijuana treatment center." The equivalent language has been removed from the title of Senate Bill 923. Page 3, lines 1-4. The language was deleted from the Senate Bill, and does not appear in the House Bill. Thus, the title difference is mere overbreadth and not a cause for concern. In addition, the list of persons who are not subject to arrest for activities related to medical marijuana includes at item (7), "a hospital or hospice program where a qualifying patient is receiving treatment," while House Bill 881 covers "a hospital or hospice program where a qualifying patient is receiving treatment or is a member of the medical staff." It is our view that it will be extremely rare and irrelevant that a qualifying patient will also be a member of the medical staff. Thus, we think that this is likely an error in the drafting and, as a result, we think the Senate Bill is to be preferred. Finally, both bills require the Commission to "actively seek to achieve racial, ethnic, and geographic diversity when licensing" medical marijuana growers and dispensaries. We advise that these provisions be implemented consistent with the provisions of the United States Constitution as described in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (2013).

[6] HB 1366 is identical to SB 503.

EXHIBIT 2

JUDGE BARRY G. WILLIAMS
CIRCUIT COURT FOR BALTIMORE CITY
111 N. CALVERT STREET
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FACSIMILE TRANSMITTAL SHEET

TO: Mr. Ira Kasden Mr. Allan Weiner Mr. Joseph D. Wilson Mr. Bezalel Stern (pro hac vice pending)	FROM: Alyson Parker Kierzewski
COMPANY:	DATE: 6.1.17
FAX NUMBER: 202-342-8451	TOTAL NO. OF PAGES INCLUDING COVER: 5
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: Order_ForwardGro, LLC	YOUR REFERENCE NUMBER:

☐ URGENT X FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Best,

Alyson Parker Kierzewski
Law Clerk for Judge Williams

ALTERNATIVE MEDICINE MARYLAND, LLC,	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
NATALIE M. LAPRADE MARYLAND MEDICAL CANNABIS COMMISSION, *et al.*,	*	BALTIMORE CITY
	*	Case No.: 24-C-16-005801
Defendants	*	

* * * * * * * * * * * * *

ORDER

On May 30, 2017, ForwardGro, LLC filed a Notice of Appearance of New Counsel, which stated that "ForwardGro believes that this Court's May 25 Email serves as a reconsideration of the Court's prior February 21, 2017 denial of ForwardGro's Motion to Intervene" and that "ForwardGro will govern itself as a party going forward in this matter, unless the Court orders otherwise." The Court notes that this belief is not correct. The Court's May 25, 2017 email did not serve as reconsideration of this Court's February 21, 2017 denial of ForwardGro's Motion to Intervene nor is ForwardGro LLC is permitted to "govern itself as a party," in this matter absent express approval by this Court. As noted in the email, counsel for ForwardGro, LLC is invited to argue solely on the issue of whether or not the license issued to ForwardGro, LLC should be suspended, if and only if, the Court grants a Preliminary Injunction at the June 2, 2017 hearing. Therefore, it is this 31st day of May, 2017, by the Circuit Court for Baltimore City:

Notice to Clerk: Please mail copies to all parties.

ORDERED, that ForwardGro, LLC's request to "govern itself as party" going forward in this matter is **DENIED;** and it is further

ORDERED that ForwardGro, LLC will receive twenty-five (25) minutes of time to address the Court solely on the issue of whether or not the license issued to ForwardGro, LLC should be suspended, if a preliminary injunction is granted.

Judge Barry G. Williams
Circuit Court for Baltimore City
Signature appears on the original document

Judge Barry G. Williams
Circuit Court for Baltimore City

TRUE COPY
TEST

CIRCUIT COURT FOR BALTIMORE CITY

Notice to Clerk: Please mail copies to all parties.

Notice to the Clerk:
Please Mail Copies to All Parties

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