DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED: February 3, 2017 5:43 PM FILING ID: 6B51896920EB2 CASE NUMBER: 2017CV30486
Plaintiff(s): DENVER NEIGHBORHOOD-SUPPORTED SOCIAL CONSUMPTION COMMITTEE, an issue committee; EMMETT REISTROFFER and KAYVAN KHALATBARI, individuals; SEXY PIZZA 2 LLC (SOUTH PEARL); and SEXY PIZZA 3 LLC (JEFFERSON PARK),	
v. Defendant(s): COLORADO DEPARTMENT OF REVENUE; and BARBARA J. BROHL, in her official capacity as Executive Director of the Colorado Department of Revenue and State Licensing Authority, Liquor Enforcement Division.	↑ COURT USE ONLY ↑
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COMPLAINT FOR HIDICIAL REVIEW OF FINAL ACENCY ACTION	

### COMPLAINT FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION PURSUANT TO SECTION 24-4-106, C.R.S.

Plaintiffs, through their counsel, file this Complaint, alleging as follows:

### Action of which Plaintiffs are seeking review

The Executive Director for the Colorado Department of Revenue, or State Licensing Authority for the Colorado Department of Revenue, Liquor Enforcement Division (generally referred to as "Defendants") engaged in a permanent rulemaking process in the summer and fall of 2016. During the process, the Liquor Enforcement Division conducted several working groups on several topics, and conducted a public rulemaking hearing.

On November 8, 2016, the electors of Denver voted to pass Initiated Ordinance 300, which allows for social use of marijuana at any business, including a liquor licensed premises, provided they can establish neighborhood support and follow other guidelines. The election results were final and official on November 22, 2016.

On November 18, 2016, the Defendants adopted permanent rules, including Regulation 47-900(E), 1 CCR 203-2 ("Regulation 47-900(E)"), which prohibits a liquor licensed establishment from permitting any marijuana use<sup>1</sup>. The rules, however, were not effective until December 30, 2016.

Defendants lack the authority to adopt Regulation 47-900(E). In addition, Regulation 47-900(E) is void because by the time it became effective, it conflicted with other existing laws, including Initiated Ordinance 300. Further, the rulemaking record did not support Defendants' adoption of Regulation 47-900(E). Therefore, Plaintiffs seek judicial review of Defendants' adoption of Regulation 47-900(E).

<sup>&</sup>lt;sup>1</sup>Regulation 47-900(E) says, "No person or entity licensed under Article 46, 47, or 48 of Title 12, C.R.S., shall permit the consumption of marijuana and/or marijuana products as defined in sections 14 and 16 of Article XVIII of the Constitution of Colorado on any licensed premises.

### Parties, Jurisdiction, and Venue

- 1. Plaintiff Denver Neighborhood-Supported Social Consumption Committee ("Committee") is an issue committee that is registered pursuant to C&R Election Rule 5.3 and Section 8.3.2 of the Charter of the City and County of Denver, Colorado. The Committee is the group that funded and advocated for the passage of Initiated Ordinance 300 in Denver in 2016. The Committee represents the interests of individuals and businesses who are advocates for the responsible social use of marijuana in designated consumption areas, which can include liquor licensed premises. The Committee can be reached at its attorneys' address at 455 Sherman St., Ste. 390, Denver, CO 80203.
- 2. Plaintiff Emmett Riestroffer is an individual who resides in Denver, CO. He can be contacted via his attorneys at 455 Sherman St., Ste. 390, Denver, CO 80203.
- 3. Plaintiff Kayvan Khalatbari is an individual who resides in Denver, CO. He can be contacted via his attorneys at 455 Sherman St., Ste. 390, Denver, CO 80203.
- 4. Plaintiff Sexy Pizza 2 LLC is a Colorado business located at 1579 South Pearl Street, Denver, CO 80210.
- 5. Plaintiff Sexy Pizza 3 LLC is a Colorado business located at 2460 Eliot Street, Denver, CO 80211.
- 6. Defendant the Colorado Department of Revenue is the governmental agency that houses the Liquor Enforcement Division. Its primary address is 1375 Sherman St., Denver, CO 80261.
- 7. Defendant Barbara J. Brohl is the Executive Director of the Colorado Department of Revenue and is the State Licensing Authority for the Liquor Enforcement Division. Her primary address is 1375 Sherman St., Denver, CO 80261.
- 8. This Court has jurisdiction over this matter pursuant to sections 24-4-103 and 24-4-106, C.R.S.
- 9. Venue is appropriate pursuant to C.R.C.P 98.

#### Allegations

1. Defendants govern the regulation and control of the manufacture, distribution, and sale of alcoholic beverages.

- 2. The Colorado Department of Revenue, State Licensing Authority, Marijuana Enforcement Division, governs the licensing of the cultivation, manufacture, distribution, and sale of medical and retail marijuana.
- 3. Defendants' duties and authority under the Department of Revenue, State Licensing Authority, Liquor Enforcement Division do not overlap with the duties or authority of the Department of Revenue, State Licensing Authority, Marijuana Enforcement Division.
- 4. All matters relating to the regulation of medical and retail marijuana are assigned to the Colorado Department of Revenue, State Licensing Authority, Marijuana Enforcement Division.
- 5. Defendants do not have statutory authority to adopt a rule regulating marijuana consumption.
- 6. In Colorado, an individual with a debilitating medical condition may consume medical marijuana under state law.
- 7. In Colorado, an individual 21 and older may consume marijuana under state law.
- 8. Regulation 47-900 is entitled "Conduct of Establishment."
- 9. In October, 2016, Defendants published notice of the permanent rulemaking that included Regulation 47-900(E).
- 10. The permanent rulemaking was based upon recommendations from working groups comprised of liquor industry stakeholders and the Liquor Enforcement Division.
- 11. The permanent rulemaking was not based upon recommendations from working groups that included marijuana industry stakeholders.
- 12. The permanent rulemaking was not based upon recommendations from working groups that included designated medical marijuana patients.
- 13. The permanent rulemaking was not based upon recommendations from working groups that included designated retail marijuana consumers.
- 14. The permanent rulemaking was not based upon recommendations from working groups that included designated alcohol consumers.
- 15. The permanent rulemaking was not based upon concerns of increased criminal activity if dual use (marijuana and liquor) was allowed on liquor licensed premises.

- 16. The issues considered for the permanent rulemaking were categorized within four subject groups:
  - a. Changes due to SB 16-197, which allows liquor-licensed drugstores in multiple locations if certain criteria are met;
  - b. Changes to Trade Practices;
  - c. Mandated review processes; and
  - d. Changes due to HB 16-1031, which dealt with powdered alcohol.
- 17. On November 8, 2016, Denver voters passed Initiated Ordinance 300, which allows for marijuana consumption in designated areas after certain criteria are met.
- 18. Initiated Ordinance 300 allows for the possibility of marijuana consumption on a liquor licensed premises, including those premises licensed by Defendants pursuant to Articles 46, 47, and 48 of Title 12 of the Colorado Revised Statutes.
- 19. On November 18, 2016, the Defendants adopted numerous rules, including Regulation 47-900(E).
- 20. The rules became effective December 30, 2016.
- 21. Initiated Ordinance 300 became effective before the Defendants' rules were effective.
- 22. The electorate of Denver voted to allow for the possibility of dual use consumption (marijuana and liquor) on a liquor licensed premises.
- 23. Defendants' actions have rendered Plaintiff Committee's investment into Initiated Ordinance 300 less meaningful.
- 24. Defendants' actions have rendered Plaintiffs Committee's purpose for Initiated Ordinance 300 less meaningful.
- 25. Because Initiated Ordinance 300 was effective prior to the effective date of Regulation 47-900(E), Plaintiff Committee has a legally protected interest making it so: (1) a liquor licensed business should be able to seek neighborhood support for their participation in a program that allows marijuana consumption on their liquor licensed premises without risking enforcement of Regulation 47-900; and (2) Plaintiff Committee's members should be able to attend fully legal (pursuant to state law) social use events or activities pursuant to Initiated Ordinance 300 on a liquor licensed premises.
- 26. Defendants' actions have caused, or threaten to cause, Plaintiff Committee injury.

- 27. Plaintiff Riestroffer supports Initiated Ordinance 300.
- 28. Plaintiff Reistroffer wishes to attend social events or activities pursuant to Initiated Ordinance 300 on a liquor licensed premises.
- 29. Plaintiff Riestroffer has a legally protected interest as Initiated Ordinance 300 was effective prior to the effective date of Regulation 47-900(E).
- 30. Defendants' actions have caused, or threaten to cause, Plaintiff Reistroffer injury.
- 31. Plaintiff Khalatbari supports Initiated Ordinance 300.
- 32. Plaintiff Khalatbari wishes to attend social events or activities pursuant to Initiated Ordinance 300 on a liquor licensed premises.
- 33. Plaintiff Khalatbari has a legally protected interest as Initiated Ordinance 300 was effective prior to the effective date of Regulation 47-900(E).
- 34. Defendants' actions have caused, or threaten to cause, Plaintiff Khalatbari injury.
- 35. Plaintiffs Sexy Pizza 2 LLC and Sexy Pizza 3 LLC ("Pizza Plaintiffs") have valid beer and wine licenses issued by Defendants.
- 36. The Pizza Plaintiffs wish to participate in or host social events or activities pursuant to Initiative 300 on their liquor licensed premises.
- 37. The Pizza Plaintiffs do not want to risk enforcement for a violation of Regulation 47-900(E).
- 38. Because Initiated Ordinance 300 was effective prior to when Regulation 47-900(E) became effective, Pizza Plaintiffs have a legally protected interest in seeking neighborhood support for their participation in a program that allows marijuana consumption on their liquor licensed premises.
- 39. Defendants' actions have caused, or threaten to cause, Pizza Plaintiffs injury.

#### FIRST CLAIM FOR RELIEF

# (Judicial Review of Final Agency Action pursuant to section 24-4-106, C.R.S. – Hold Defendants' Regulation 47-900(E) as outside the power delegated to them by the General Assembly)

- 40. Plaintiffs incorporate all prior allegations and factual statements herein.
- 41. The purpose of the State Licensing Authority, Liquor Enforcement Division, is "[f]or the purpose of regulating and controlling the licensing of the

- manufacture, distribution, and sale of alcoholic beverages in [Colorado]..." § 12-47-201(1), C.R.S.
- 42. The Defendants lack jurisdiction to regulate the consumption of marijuana in Colorado.
- 43. Regulation 47-900(E) should not have been issued as it is not within the power delegated to Defendants. § 24-4-103(8)(a), C.R.S.
- 44. Any agency action that is arbitrary or capricious, contrary to a constitutional right, in excess of statutory authority, an abuse of discretion, unsupported by the record, or otherwise contrary to law shall be held unlawful and set aside. § 24-4-106(7), C.R.S.
- 45. Defendants acted outside the power delegated to them by the General Assembly when they adopted Regulation 47-900(E), and Regulation 47-900(E) must be set aside.

#### SECOND CLAIM FOR RELIEF

### (Judicial Review of Final Agency Action pursuant to section 24-4-106(7), C.R.S. – Hold Defendants' Regulation 47-900(E) as unauthorized by law)

- 46. Plaintiffs incorporate all prior allegations and factual statements herein.
- 47. The purpose of the State Licensing Authority, Liquor Enforcement Division, is "[f]or the purpose of regulating and controlling the licensing of the manufacture, distribution, and sale of alcoholic beverages in [Colorado]..." § 12-47-201(1), C.R.S.
- 48. The Defendants lack jurisdiction to regulate the consumption of marijuana in Colorado.
- 49. Regulation 47-900(E) should not have been issued as it is not authorized by law. § 24-4-103(8)(a), C.R.S.
- 50. Any agency action that is arbitrary or capricious, contrary to a constitutional right, in excess of statutory authority, an abuse of discretion, unsupported by the record, or otherwise contrary to law shall be held unlawful and set aside. § 24-4-106(7), C.R.S.
- 51. Defendants' adoption of Regulation 47-900(E) was unauthorized by law, and Regulation 47-900(E) must be set aside.

### THIRD CLAIM FOR RELIEF

# (Judicial Review of Final Agency Action pursuant to section 24-4-106(7), C.R.S. - Hold Defendants' Regulation 47-900(E) void because it conflicts with Initiated Ordinance 300)

- 52. Plaintiffs incorporate all prior allegations and factual statements herein.
- 53. Initiated Ordinance 300 was in effect prior to the effective date of Regulation 47-900(E).
- 54. Regulation 47-900(E) was not appropriately adopted as it conflicted with another law, *i.e.*, Initiated Ordinance 300. § 24-4-103(4)(b)(IV), C.R.S.
- 55. Any rule that conflicts with another statute shall be void. § 24-4-103(8)(a), C.R.S.
- 56. Any agency action that is arbitrary or capricious, contrary to a constitutional right, in excess of statutory authority, an abuse of discretion, unsupported by the record, or otherwise contrary to law shall be held unlawful and set aside. § 24-4-106(7), C.R.S.
- 57. Defendants' adoption of Regulation 47-900(E) conflicts with Initiated Ordinance 300, and because Initiated Ordinance 300 was effective first, Regulation 47-900(E) must be set aside.

### FOURTH CLAIM FOR RELIEF

(Judicial Review of Final Agency Action pursuant to section 24-4-106(7), C.R.S. - Declaratory Judgment - Hold Defendants' Regulation 47-900(E) inapplicable to Denver)

- 58. Plaintiffs incorporate all prior allegations and factual statements herein.
- 59. Initiated Ordinance 300 was in effect prior to the effective date of Regulation 47-900(E).
- 60. Because Defendants' adoption of Regulation 47-900(E) occurred after Initiated Ordinance 300 was in effect, Regulation 47-900(E) should not apply in Denver.
- 61. Similarly, Regulation 47-900(E) should not apply to any other jurisdiction that had a similar law in effect prior to the effective date of Regulation 47-900(E) that allowed dual use (marijuana and liquor) on a liquor licensed premises.

### FIFTH CLAIM FOR RELIEF

# (Judicial Review of Final Agency Action pursuant to section 24-4-106(7), C.R.S. – Hold Defendants' adoption of Regulation 47-900(E) was unsupported by the record)

- 62. Plaintiffs incorporate all prior allegations and factual statements herein.
- 63. Defendants' adoption of Regulation 47-900(E) was not supported by the record.
- 64. Any agency action that is arbitrary or capricious, contrary to a constitutional right, in excess of statutory authority, an abuse of discretion, unsupported by the record, or otherwise contrary to law shall be held unlawful and set aside. § 24-4-106(7), C.R.S.
- 65. Defendants' adoption of Regulation 47-900(E) was unsupported by the record, and Regulation 47-900(E) must be set aside.

### **Prayer for Relief**

Plaintiffs pray for the following relief:

- 1. This Court enter judgment in Plaintiffs favor;
- 2. This Court hold that Defendants' adoption of Regulation 47-900(E) was not within the power delegated to Defendants by the General Assembly;
- 3. This Court hold that Defendants' adoption of Regulation 47-900(E) was in excess of their statutory authority;
- 4. This Court hold that Defendants' adoption of Regulation 47-900(E) was not authorized by law;
- 5. This Court hold that Defendants' Regulation 47-900(E) is void;
- 6. This Court declare that Regulation 47-900(E) does not apply in Denver or any other jurisdiction that has a law that was in effect prior to Regulation 47-900(E) and allows dual use (marijuana and liquor) on a liquor licensed premises;
- 7. This Court hold that Defendants' adoption of Regulation 47-900(E) was not supported by the record;
- 8. This Court hold that Defendants' adoption of Regulation 47-900(E) exceeded Defendants' jurisdiction;

- 9. This Court hold that Defendants' adoption of Regulation 47-900(E) was contrary to law;
- 10. This Court hold that Defendants' adoption of Regulation 47-900(E) was arbitrary and capricious;
- 11. This Court grant Plaintiffs any other relief this Court deems proper; and
- 12. This Court enter an order for Plaintiffs to recover their costs and attorneys' fees for this lawsuit.

Submitted this 3rd day of February, 2017.

VICENTE SEDERBERG, LLC

/s/ Kelly A. Rosenberg

Kelly A. Rosenberg Joshua Kappel