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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

<p>M & D RETAIL BOZEMAN, LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>KRISTEN BARBOUR, in her official capacity; and THE CITY OF GREAT FALLS,</p> <p>Defendants.</p>	<p>Cause No.: DDV-2024-357</p> <p>ORDER DENYING TEMPORARY RESTRAINING ORDER AND SETTING SHOW CAUSE HEARING</p>
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Plaintiff M & D Retail Bozeman, LLC (M&D), represented by Dillon Post, moves the Court for a temporary restraining order and preliminary injunction prohibiting Defendants Kristen Barbour, the division administrator of the Montana Department of Revenue, Cannabis Control Division (CCD), and the City of Great Falls “from enforcing their Cease and Desist Actions against M and D, and to prevent the Cannabis Control Division from enforcing ARM 42.39.102(27).” For the reasons that follow, the application for a temporary

1 restraining order will be denied, and a hearing will be set on the motion for a
2 preliminary injunction.

3 **BACKGROUND**

4 M&D’s preliminary showing is that they operate a retail store in
5 Great Falls, Wild West Wellness (Wild West), that sells products containing
6 some amount of Δ-9 tetrahydrocannabinol (THC), the primary psychoactive
7 component in marijuana. On May 3, 2024, the CCD issued a cease-and-desist
8 letter contending that Wild West, which is not a licensed dispensary, sells
9 products containing THC in excess of the concentrations and per-serving and per-
10 package weights established in statute. (Pl.’s Mem. in Supp. of Pet. for Prelim.
11 Inj. & Temp. Restraining Or. [Pl.’s Br.] Ex. E, Dkt. 3 at 81¹.) CCD’s Cease and
12 Desist Order details that Department employees purchased various products from
13 Wild West between November 2023 and March 2024. (Pl.’s Br. Ex. E, Dkt. 3 at
14 83–85.) CCD alleged that testing of many of these products exceeded either 0.3%
15 “Total THC” or the total weight of the THC in the product exceeded the per-
16 serving limit of 0.5 mg THC and the per-package limit of 2 mg THC.

17 Likewise, on April 26, 2024, the City of Great Falls issued its own
18 cease-and-desist letter. Its letter cites revocation of Wild West’s safety inspection
19 certificate in March, a zoning determination that Wild West was effectively
20 operating as a dispensary and was not in compliance with the City’s marijuana
21 zoning rules, and the City’s determination based on its own investigation—
22 apparently relying on products purchased from Wild West and M&D’s Billings
23 retail store—that M&D was selling marijuana without a license.

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25 ¹ Pagination is based on the relevant docket entry in Fullcourt Enterprise.

1 M&D must satisfy each element of the preliminary injunction
2 standard to obtain a TRO on any of these grounds. M&D has not met this burden
3 for any of these claims.

4 **a. Administrative definition of Marijuana**

5 By statute, the term “marijuana” excludes “hemp,” which is
6 statutorily defined as “the plant species *Cannabis sativa* L. and any part of that
7 plant, including the seeds and all derivatives, extracts, cannabinoids, isomers,
8 acids, salts, and salts of isomers, whether growing or not, with a **total delta-9**
9 **tetrahydrocannabinol concentration** of not more than 0.3% on a dry weight
10 basis.” Mont. Code Ann. §§ 16-12-102(20)(b), 80-18-101(1)(a) (emphasis
11 added). The Department of Revenue has rulemaking authority to “limit, if
12 necessary, the appropriate THC potency percentages for marijuana and marijuana
13 products,” and to adopt certain “labeling and packaging standards that protect
14 public health.” *Id.* § 16-12-112(1)(h),(i).

15 The Department’s administrative rules use a definition of
16 marijuana that differs somewhat in its text from the statutory definition:
17 ““Marijuana” means the same as the definition in 16-12-102, MCA, and includes
18 the biomass of the marijuana plant which contains greater than 0.3% **total THC**
19 **concentration** and appreciable concentrations of other cannabinoids of interest
20 including flower, bud, shake, trim, and manicure.” Admin. R. Mont.
21 49.32.102(27). The term “THC” means Δ -9 THC for the purposes of the rule, but
22 the rule also defines the term “total THC” to mean “the highest theoretical
23 concentration of psychoactive THC available in a marijuana item achievable only
24 through the complete conversion of THCa to THC with the application of heat
25 during administration/consumption. Total potential psychoactive THC is the sum

1 of THC and THCa calculated using the following equation: Total potential
2 psychoactive THC = (THCa x 0.877) + THC.” *Id.* 49.32.102(57). THCa refers to
3 “tetrahydrocannabinolic acid.” *Id.* 49.32.102(55).

4 M&D casts its challenge to the administrative definition of
5 marijuana in various ways, but they all amount to the same objection: that the
6 Department has considered THCa in its calculation of the total amount of THC
7 for purposes of calculating Δ-9 THC concentration to distinguish between
8 “marijuana” and “hemp.”

9 Left unsaid, however, is that the “total THC” definition set forth
10 above refers to the “concentration of psychoactive THC” in a particular product.
11 Both the City and the CCD have both charged M&D with selling items that
12 exceed the per-serving and per-package weights of THC without regard to
13 concentration, and the Cease and Desist order cites lab results and packaging
14 indicating that Wild West sold “Blue Raspberry gummies” that contained 9.9 mg
15 of Δ-9 THC per gummy and 99 mg of Δ-9 THC per package. (Cease and Desist
16 Order Ex. A-1, Dkt. 3 at 83, 86.) Indeed, the gummies were packaged as
17 containing roughly these quantities of THC, according to the Cease and Desist
18 Order. There is nothing in the lab results indicating that THCa was determined or
19 included in the weight. (*Id.*) CCD also tested “Strawberry Gummies,” which
20 returned 9.76 mg of Δ-9 THC per gummy and 97.6 mg of Δ-9 THC per package,
21 greatly exceeding the permissible THC limitations in Mont. Code Ann.
22 § 16-12-117(3). Similarly, the City of Great Falls also cited testing of gummies
23 sold in Wild West that similarly exceeded the permissible THC weight
24 limitations. (Dkt. 3 at 111.) M&D does not dispute in its application the veracity
25 of these lab analyses.

1 Any violation of Mont Code Ann. § 16-12-117, including one
2 under subsection (3), can result in issuance of a cease-and-desist order by the
3 Department of Revenue. Mont. Code Ann. § 16-12-305(3)(a).² Thus, it is unclear
4 at this juncture how a favorable decision on the question of use of THCa in
5 calculating total THC concentration would provide M&D with any relief. At this
6 early stage, M&D has not met its burden of showing a likelihood of success on
7 the merits of this claim.

8 **b. Due Process**

9 Here, M&D contends that CCD has violated its due process rights
10 by preemptively stating it will not be granted a license. First, M&D would need
11 to show why its due process claim does not fail under Mont. Code Ann.
12 § 16-12-207(1), which suggests there is no liberty or property right in marijuana
13 licensing. Second, M&D has not presented any record that would allow the Court
14 to conclude that it likely would obtain a license in the ordinary course of events
15 but for the alleged animus of CCD towards M&D. Third, M&D has not produced
16 a sufficient record to allow the Court to conclude that M&D is likely to show that
17 it has standing and its claim is ripe for review, including whether its claimed
18 injuries are redressable given the alternative zoning-based grounds cited and
19 alleged failures to appeal cited in the City of Great Falls’s cease-and-desist letter.
20 *See Reichert v. State*, 2012 MT 111, ¶¶ 54–56, 365 Mont. 92, 278 P.3d 455
21 (describing ripeness requirements).

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23 ² It is less clear to the Court that the City of Great Falls has this authority, at least under this statute. Mont. Code
24 Ann. § 16-12-305(3) requires the “investigating agency” to issue the cease-and-desist order, and subsection (2)
25 defines the agencies who may conduct investigations, which includes county attorneys, sheriffs, “municipal police
departments,” but not a city or city attorney. Given the overlapping order from the CCD, however, it is not necessary
to decide this point.

1 Finally, the Court does not find any irreparable injury attached to
2 this claim given that M&D has not even applied for a dispensary license. Even if
3 M&D were to apply today, it would likely not complete that process so quickly
4 that the Court should grant a temporary restraining order without first allowing
5 the Defendants to be heard.

6 **c. Search and Seizure of Premises**

7 M&D has not convinced the Court it is likely to succeed on the
8 merits or that it will suffer irreparable injury in the absence of a temporary
9 restraining order.

10 First, it is not clear that CCD or the City violated the consent
11 judgment. To the contrary, both cease-and-desist communications appear to be
12 based on purchases made, presumably during business hours. Wild West is a
13 retail business open to the public, and so it is unclear that it has any expectation
14 of privacy when a government employee enters during business hours, remains in
15 areas open to the public, and makes purchases (which Wild West could have
16 refused to complete) that can be made by the public at large. If the facts are
17 different, M&D has not shown how.

18 Second, the question whether and to what extent the exclusionary
19 rule applies to civil enforcement proceedings is an open question in Montana, as
20 far as the Court can determine. In certain—likely most—civil proceedings, the
21 exclusionary rule is generally viewed as inapplicable. *See, e.g., Martin v.*
22 *Martinez*, 934 F.3d 594, 599 (7th Cir. 2019) (exclusionary rule does not apply to
23 42 U.S.C. § 1983 actions against law enforcement); *but see, e.g., Frimmel Mgmt.,*
24 *LLC v. United States*, 897 F.3d 1045, 1051 (9th Cir. 2018) (egregious Fourth
25 Amendment violations may trigger application of exclusionary rule to certain

1 administrative enforcement proceedings). But again, the burden is on M&D to
2 convince the Court that the exclusionary rule should apply, and it has not done so
3 at this point. If the exclusionary rule does not apply, then there is no relief the
4 Court can provide M&D on these grounds: the searches on which the
5 enforcement actions are predicated have already taken place and the fruits of
6 those searches are already known to law enforcement.

7 In short, M&D has not met its burden of showing a temporary
8 restraining order is needed on these grounds.

9 CONCLUSION

10 M&D has not met its burden of showing a temporary restraining
11 order is appropriate and necessary until the City and CCD can be heard in
12 opposition to its request for a preliminary injunction. At the same time, M&D is
13 entitled to a hearing on the motion. Mont. Code Ann. § 27-19-301; *Flying T*
14 *Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 11–15, 400 Mont. 1,
15 462 P.3d 218. Accordingly,

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