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12 LLC

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SAN DIEGO – CENTRAL DIVISION**

15 UL CHULA TWO LLC,

16 Petitioner/Plaintiff,

17 vs.

18 CITY OF CHULA VISTA, a California
19 public entity; CHULA VISTA CITY
20 MANAGER, and DOES 1-20,

21 Respondents/Defendants,

22 MARCH AND ASH CHULA VISTA, INC.;
23 TD ENTERPRISE LLC; and DOES 23
24 through 50,

25 Real Parties In Interest

CASE NO. 37-2020-00041554-CU-MC-CTL
[Related Case Nos. 2020-00041802-CUMC-
CTL; 37-2020-00033446-CU-MC-CTL]

**TD ENTERPRISE LLC’S OPPOSITION TO
PETITIONER UL CHULA TWO LLC’S *EX
PARTE* APPLICATION FOR
TEMPORARY RESTRAINING ORDER
OR, IN THE ALTERNATIVE, FOR AN
ORDER ADVANCING THE HEARING ON
MOTION FOR PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF; DECLARATION
OF DAVID KRAMER IN SUPPORT
THEREOF**

[Assigned for All Purposes to:
Judge: Hon. Richard E. L. Strauss, Dept C-75]

Hearing Date: February 4, 2021
Time: 9:00 a.m.
Dept.: C-75

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 By way of this lawsuit, Petitioner seeks to overturn the decision of the City of Chula Vista
4 (“City”) to deny it a single license to open a cannabis retail storefront in District 1. Despite filing
5 a claim that its application for a single license in District 1 was wrongfully denied, Petitioner
6 seeks a temporary restraining order that encompasses all District 1 licenses, of which there are
7 two. As such, for the reasons explained in greater detail herein, Petitioner’s request should be
8 denied because the scope of the requested temporary restraining order is impermissibly overbroad
9 insofar as it seeks a greater restraint than is necessary for the ultimate relief being sought or that
10 can be reasonably expected if it ultimately prevails in this litigation.

11 **II. BACKGROUND**

12 **A. The City’s Cannabis License Application Process**

13 Chapter 5.19 to the Chula Vista Municipal Code (“CVMC”) states that any person who
14 desires to engage in lawful commercial cannabis activity or to operate a commercial cannabis
15 business within the City’s jurisdiction must have a valid State License and a valid City License.
16 CVMC, § 5.19.030.

17 This case concerns one type of cannabis license: a storefront cannabis retail license. The
18 CVMC permits each of the City’s four districts to issue two (2) storefront cannabis retail licenses,
19 for a total of eight (8) storefront cannabis retail licenses across the City. CVMC § 5.19.040(A).
20 Applicants were permitted to apply for only one (1) storefront retail license per District, and no
21 more than four (4) storefront retail licenses City-wide. (See City of Chula Vista Cannabis
22 Regulations (“Regs”) § 0501(C)(1).)

23 Because the City received more applications than available licenses in each District, and
24 in order to “mitigate the negative impacts bought by unregulated Commercial Cannabis Activity”
25 (CVMC, §5.19.010), the City used a merit-based scoring system to determine which applicants
26 would be permitted to move forward with final permitting and licensing (the “Merit Process”).
27 The Merit Process was “Phase One” of the City’s selection process. At the end of Phase One, the
28 top two scoring storefront retail applicants in each District would proceed to Phase Two of the

1 licensing process in that District. (Regs § 0501(N)(2)(a).) Upon obtaining final approval during
2 Phase Two, an applicant would be issued a conditional City approval, which allows the applicant
3 to take all actions necessary to obtain a City License and commence commercial cannabis
4 business. (CVMC § 5.19.050(B)(7).)

5 The CVMC and the Regs set forth the specific criteria used by the City to score applicants
6 during the Merit Process, (*see* Regs., § 0501, subd. (N)(1)), as well as the grounds for
7 disqualifying applicants, (*see* CVMC, § 5.19.050(A)(5)(a)-(g)).

8 **B. Unfilled Districts**

9 To account for the possibility of a District not having two (2) eligible applicants (an
10 “Unfilled District”), the Regs permit qualified applicants not selected for licensure in the specific
11 district in which that applicant applied (the “Application District”) to move into an Unfilled
12 District and obtain an open license therein. More specifically, the qualified applicant that
13 received the *highest*-score during Phase One, but which was not selected to proceed to Phase Two
14 in the Application District, is the first applicant invited to move into the Unfilled District:

15 Should qualified applications for unfilled Council Districts be exhausted, any
16 remaining unselected, qualified applications for filled Council Districts will be
17 placed in rank order based on their aggregate score. ***The highest ranked***
18 ***remaining qualified application for a filled Council District that matches the***
19 ***retailer category in an unfilled Council District and that does not have another***
20 ***retailer license application that was selected in that unfilled Council District will***
obtain a signed, notarized statement from the owner(s) of a site located within that
Council District per the requirements of the Phase One application process.

21 (Regs., § (N)(2)(e) (emphasis added).)

22 At the conclusion of Phase One, District 1 remained an Unfilled District. (*See, e.g.,*
23 Declaration of David Kramer (“Kramer Decl.”) Ex. A., June 12, 2020 Ltr. from City to TD
24 Enterprise (“June 12 Letter”) (“...there is currently an unfilled storefront retail license slot in
25 Council District 1.”).)

26 ///

27 ///

28 ///

1 **C. TD Enterprise was Invited to Fill the License Gap in District 1 and Will be**
2 **Permitted to do so Regardless of the Outcome of This Action**

3 TD Enterprise (“TD”) submitted applications for storefront retail licenses in Districts 2
4 and 4, where it received the third-highest score in both of those Districts (and therefore did not
5 qualify for a storefront retail license in either District 2 or 4). TD was the *highest-scoring*
6 applicant in *any district, City-wide*, that did not receive a storefront retail permit in its Application
7 District. Accordingly, per the Regs, TD was the first applicant invited to move its application
8 into District 1, an Unfilled District. In a June 12, 2020 letter from the City, TD was informed:
9 *“Your application is currently the highest ranked remaining qualified storefront retail*
10 *application...[The] City would like to offer you the opportunity to select a site for your*
11 *storefront retail business within unfilled Council District 1.”* (Kramer Decl., Ex. A.)

12 TD promptly accepted the City’s invitation and is one of the two applicants in District 1
13 currently progressing through Phase Two. Because TD scored higher than either Petitioner or the
14 other real party in interest here, Marsh and Ash, TD Enterprise will be one of the two District 1
15 applicants permitted to continue to proceed through Phase Two and obtain storefront retail license
16 in District 1 regardless of the outcome of this litigation.

17 **III. ARGUMENT**

18 Petitioner now seeks a temporary restraining order that would temporarily prohibit the
19 City from issuing “any cannabis licenses in the City’s District One.” (Petitioner’s Notice of Ex
20 Parte Application for TRO at 1). Petitioner’s request for a temporary restraining order to stay the
21 issuance of all District 1 licenses is impermissibly overbroad.

22 “[T]rial courts should evaluate two interrelated factors when deciding whether or not to
23 issue [a restraining order]. The first is the likelihood that the plaintiff will prevail on the merits at
24 trial. The second is the interim harm that the plaintiff is likely to sustain if the [restraining order]
25 were denied as compared to the harm that the defendant is likely to suffer if the [order] were
26 issued.” (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251
27 (*citing and quoting IT Corporation v. County of Imperial* (1983) 35 Ca.3d 63, 69-70)). As
28 explained by the California Supreme Court, “[t]he scope of available preliminary relief is

1 necessarily limited by the scope of the relief likely to be obtained at trial on the merits."
2 (*Common Cause v. Board of Supervisors* (1989) 49 Cal. 3d 432, 442).

3 Here, Petitioner seeks preliminary relief that is greater in scope than what it could obtain
4 if this Court ultimately issues a writ of mandate after a hearing on the merits. As set forth in the
5 operative complaint, Petitioner requests an order requiring the City to issue Petitioner one of the
6 two retail storefront licenses in District 1. A more probable order, should Petitioner ultimately
7 prevail on the merits of its claim, is a determination that the City applied an improper analysis to
8 Petitioner's application. Under this result, the Court may simply order the City to re-evaluate
9 Petitioner's application in accordance with the limitation set forth in the Court's order.

10 Regardless of the ultimate determination by this Court on the merits, the issuance of the
11 writ of mandate will not impact both retail storefront licenses in District 1. Under no scenario set
12 forth in the operative complaint, the request for a Preliminary Injunction or the present *ex parte*
13 application for a temporary restraining order, does Petitioner seek both of the District 1 retail
14 storefront licenses. Accordingly, any restraint on the ability the City to move forward on the
15 issuance of *both* District 1 licenses is impermissibly overbroad because it is beyond the relief that
16 Petitioner can obtain—or is even seeking—in this Action.

17 **IV. CONCLUSION**

18 For the reasons herein, TD Enterprise respectfully asks that the Court either: 1) deny
19 Petitioner's temporary restraining order motion on the grounds that it is overbroad, or 2) narrow
20 the scope of the proposed temporary restraining order so that it only prohibits the City from
21 issuing one of the two District 1 licenses prior to the preliminary injunction hearing and allowing
22 all other activity in furtherance of licensing to proceed in District 1. This proposed modified
23 relief pairs the ultimate relief sought by Petitioner with the proper scope of any potential
24 temporary restraining order or preliminary injunction.

25 DATED: February 3, 2021

TENCERSHERMAN LLP

26
27 By: 

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UL CHULA TWO LLC V. CITY OF CHULA VISTA, ET AL.
SAN DIEGO SUPERIOR COURT
CASE NO. 37-2020-00041554-CU-WM-CTL

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is 12520 High Bluff Drive, Suite 230, San Diego, CA 92130. On February 3, 2021, I served true copies of the following document(s):

(1) TD ENTERPRISE LLC's OPPOSITION TO PETITIONER UL CHULA TWO LLC'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER, IN THE ALTERNATIVE, FOR AN ORDER ADVANCING THE HEARING ON MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF DAVID KRAMER IN SUPPORT THEREOF

- ☐ U.S. MAIL – CCP § 1013a(1)) I am personally and readily familiar with the business practice of TENCERSHERMAN LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Diego, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.
- ☐ (BY ELECTRONIC SERVICE VIA ONE LEGAL-Based on court order or an agreement of the parties to accept service by electronic transmission or by e-filing a document with the court, I caused the above-entitled document(s) to be served through One Legal at <https://www.onelegal.com/> addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the One Legal Receipt Page/Confirmation will be maintained with the original document(s) in this office.
- ☒ (BY ELECTRONIC MAIL – CCP § 1010.6(a)(6); CRC Rule 2.251) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused such documents described herein to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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17 I declare under penalty of perjury under the laws of the State of California that the above is true
18 and correct. Executed on February 3, 2021, at San Diego, California.

19 

20 Allison L. Miller