

<p>DISTRICT COURT, MONTROSE COUNTY, COLORADO 1200 NORTH GRAND AVENUE MONTROSE, CO 970-252-</p> <hr/> <p>PEOPLE OF THE STATE OF COLORADO, Plaintiff,</p> <p>v.</p> <p>JOHN WALSH, Defendant.</p> <hr/>	<p>DATE FILED: May 31, 2022 3:29 PM CASE NUMBER: 2021CR192</p> <hr/> <p>Case Numbers: 2021CR192</p> <p>Div.: 3 Ctrm:</p>
<p>ORDER ON DEFENDANT’S MOTION TO DISMISS CHARGES AS UNCONSTITUTIONALLY VAGUE</p>	

This matter came on the Court’s docket on May 18, 2022 for a hearing on the Defendant’s Motion to Dismiss Charges as Unconstitutionally Vague. The Defendant appeared in person with Mr. Mochulsky and Mr. Schumacher, and Mr. Eads appeared for the People. Mr. Blackmon and Mr. Coker testified; Defendant’s Exhibits A-C were admitted and have been uploaded to the court record. Based on the information contained therein and the applicable law, the Court grants the motion as follows:

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

In making the following findings of fact, the Court specifically finds that the testimony of both Mr. Blackmon and Mr. Coker was credible. In so finding, the Court notes that it had the opportunity to observe the witnesses' demeanor while on the stand and to evaluate their testimony in light of other known facts.

On June 8, 2021, the Defendant was charged with two counts of farm products violations pursuant to C.R.S. § 35-37-118(1)(b) and (1)(e), both class 6 felonies. Count 1 alleges that between and including October 1, 2019 and January 31, 2020, the Defendant “unlawfully and feloniously acted as a farm products dealer, small-volume dealer, or agent without having obtained a license.” Count 2 alleges that between and including October 1, 2019 and January 31, 2020, the Defendant “unlawfully, feloniously, and willfully failed or refused, within the time and in the manner required by law, to pay for farm products received.”

The above charges are based on the following facts. On October 15, 2019, Paradox Ventures, Inc. (“Paradox”) contracted to sell 5,000 pounds of industrial hemp biomass to UC Colorado Corporation (“UCCO”) for a total of \$54,812.80. Ex. A. The contract was signed by Paradox Chief Executive Officer (“CEO”) David Coker and by UCCO CEO Earnest Blackmon.¹ *Id.* At the time of the contract, UCCO was operating without a farm products license in violation of Title 35. UCCO was a subsidiary of a large publicly-traded company—United Cannibas Corporation (“UCANN”). At the time of the contract, the Defendant was the Chief Financial Officer (“CFO”) of UCCO and UCANN.

¹ Mr. Blackmon did not sign the contract but confirmed the contract in several e-mails.

Mr. Blackmon testified that UCCO's former officer Mr. Poricelli had a contact at Paradox and reached out to set up the contract at issue. Mr. Poricelli and UCCO's Chief Operating Officer ("COO") Mr. Ruby worked out the terms of the contract. The e-mails leading up to the contract involved Mr. Coker from Paradox and Mr. Poricelli and Mr. Ruby from UCCO. Ex. C. No one else from UCCO had any part in negotiating the contract, including the Defendant. Once UCANN became delinquent in paying the amounts owed to Paradox, the communications were mainly between Mr. Coker, Mr. Blackmon, and Administrative Assistant Erica Davis. *Id.*

UCANN never paid the amount owed after actually receiving the industrial hemp biomass from Paradox. On April 21, 2020, Paradox, through Mr. Coker, lodged a complaint against UCANN with the Colorado Department of Agriculture. The verified statement of claims provides that on or about September 24, 2019, "Mike Porcelli [sic] of [UCCO] met with David Coker and Gene Chuchuru of Paradox... to discuss bringing material from Paradox to process at UCANN location." Ex. B. It further states that Mr. Blackmon from UCCO/ UCANN communicated with Paradox on several occasions indicating that they would pay the amount due, but at some point Mr. Blackmon ceased communications. *Id.*

Mr. Blackmon testified that he has been in business with the Defendant for around 6-7 years, including at UCCO. UCCO is no longer in business, but while in operation, it extracted CBD isolate from hemp biomass. The Defendant's role as CFO at UCCO included coordinating signing checks for large transactions and managing a small accounting team. The Defendant also worked for UCANN

as CFO, and his roles there included acting as a liaison with auditors and the SEC attorney and managing the accounting team. As CFO, the Defendant would not have been responsible for the licensing of either corporation; indeed, he would have had no involvement whatsoever in the licensing of UCCO or UCANN. He would not have had occasion to even know about the licensure status. Licensing duties were handled by COO Mr. Ruby and legal counsel.

As CFO, Mr. Blackmon explained that the Defendant had no authority to enter into a contract such as the one at issue here. Any contracts over about \$10,000 required approval by two of the three corporate board members; the Defendant was not a board member. The Defendant had no discretion or unilateral authority to pay Paradox under the contract and therefore had no responsibility for failing to pay Paradox. UCCO went bankrupt, and they never paid Paradox for the transaction as a result.

The Court takes judicial notice of the following facts. Mr. Blackmon, Mr. Poricelli, Mr. Ruby, and UCCO were all prosecuted for the same crimes as this Defendant. Mr. Ruby pleaded guilty by way of deferred judgment and sentence to a misdemeanor farm products violation in Montrose Case Number 20CR427. Mr. Blackmon took a conviction on a misdemeanor farm products violation in Montrose Case Number 20CR425. Mr. Poricelli's case is sealed. UCCO pleaded guilty to a misdemeanor farm products violation in Montrose Case Number 20CR429. The People previously dismissed identical charges against this Defendant Mr. Walsh in Montrose Case Number 20CR428; it is unclear why they

re-filed approximately three months after the dismissal, but that is what has occurred here.

II. CONCLUSIONS OF LAW

i. Facial Statutory Challenge

The Defendant challenges C.R.S. § 18-1-607 regarding personal criminal liability for corporate acts—he does not challenge the farm products statutes.

Statutes are presumed to be constitutional, and one challenging the validity of it has the burden of proving it to be unconstitutional beyond a reasonable doubt. *Watso v. Colorado Dept. of Social Services*, 841 P.2d 299, 304 (Colo. 1992) (citing *People v. Fuller*, 791 P.2d 702 (Colo. 1990) and *Anderson v. State Dept. of Personnel*, 756 P.2d 969 (Colo. 1988)). Both the Fourteenth Amendment to the U.S. Constitution and article II, section 25 of the Colorado Constitution “protect individuals from arbitrary governmental restrictions on property and liberty interests.” *Id.* In addressing a statutory vagueness challenge, the court is to determine whether the statute “either forbids or requires the doing of an act in terms so vague that [persons] of ordinary intelligence must necessarily guess as to its meaning and differ as to its application....” *People by and Through City of Longmont v. Gomez*, 843 P.2d 1321, 1322 (Colo. 1993). Criminal statutes should be sufficiently clear so as to “inform persons subject to such laws of the standards of conduct imposed, i.e., give a fair warning of the forbidden acts.” *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

While the Defendant's motion initially argued that the statute at issue is vague on its face, his argument was modified at the hearing to an as-applied challenge. In any event, the Defendant has not proven beyond a reasonable doubt that the statute is unconstitutionally vague on its face. The Court specifically finds that the statute is not vague and properly puts those working for a corporation on notice that they may be held criminally liable for unlawful acts of a corporation if they performed or caused to occur said acts. The Court will turn to the Defendant's as-applied arguments.

ii. As-Applied Statutory Challenge

A statute may be challenged as unconstitutionally vague as applied to particular conduct. A statute is vague as applied "if it does not, with sufficient clarity, prohibit the conduct against which it is enforced." *People v. Stotz*, 381 P.3d 357, 363 (Colo. App. 2016) (citing *People v. Devorss*, 277 P.3d 829, 835 (Colo. App. 2011)). If a defendant's conduct is clearly proscribed by the statute, the defendant cannot challenge the vagueness of the law either on its face or as applied. *Id.* To succeed with an as-applied challenge, "a defendant has the burden of establishing the unconstitutionality of a statute, as applied [to him] beyond a reasonable doubt." *People v. Perez-Hernandez*, 348 P.3d 451, 455-456 (Colo. App. 2013); *see also People v. Gutierrez*, 622 P.2d 547, 555 (Colo. 1981). A statute that is unconstitutionally applied may nonetheless be facially valid "if there are conceivable circumstances in which it can be constitutionally applied." *Id.* at 455.

The vagueness doctrine “is rooted in the right to due process of law, which requires that a law provide ‘fair notice of the conduct that has been determined to be unlawful.’” *People v. Komar*, 411 P.3d 978, 983 (Colo. App. 2015) (citing *People v. Shell*, 148 P.3d 162, 172 (Colo. 2006)).

It is unlawful under C.R.S § 35-37-118(1)(b)² for any person to, “willfully fail or refuse to render a true account of sales or storage or to make a settlement on sales or storage or to pay for farm products received within the time and in the manner required [by law]...” It is unlawful under C.R.S. § 35-37-118(1)(e) for any person to “act as a dealer, small-volume dealer, or agent without having obtained a license ...” While these Title 35 crimes are those of strict liability, they still require the People to prove a “voluntary act or the omission to perform an act which he is physically capable of performing.” C.R.S. § 18-1-502. Although the Complaint and Information contains no reference to C.R.S. § 18-1-607, the parties concede that the People’s theory of prosecution rests on the language in C.R.S. § 18-1-607.

C.R.S. § 18-1-607 provides in full, “A person is criminally liable for conduct constituting an offense **which he performs or causes to occur** in the name of or in behalf of a corporation to the same extent as if that conduct were performed or caused by him in his own name or behalf.” (emphasis added). A corporate officer may be held criminally responsible where the unlawful act “was performed by the individual officer, or at his direction, or by his permission.” *Hartson v. People*, 240 P.2d 907, 910 (Colo. 1951). An officer need not be involved in every

² The statutes are now located at C.R.S. § 35-36-313(1)(b) and (1)(e).

act constituting the unlawful act if he was the “moving force” behind the corporation’s actions. *See People v. Treat*, 568 p.2d 473, 476 (Colo. 1977).

The uncontroverted evidence presented to the Court shows beyond a reasonable doubt that the Defendant had no responsibility for licensing or for the contract at issue. He did not cause the acts to occur, and they did not occur at his direction or by his permission. Mr. Blackmon testified credibly that the Defendant as CFO had no involvement whatsoever in licensing matters—such issues were handled by the COO and legal counsel. Nor did the Defendant even have the ability to enter into an industrial biomass hemp contract such as the one at issue in this case. Therefore, he neither performed nor caused to occur: 1) UCCO’s lack of licensing; or 2) UCCO’s failure to pay on the contract.

The Defendant also did not unlawfully fail to act since he had no control or authority to cause licensing or to enter into the at issue contract. In other words, he did not fail to perform an act that he was physically capable of performing as required under C.R.S. § 18-1-502. The Defendant was not empowered to license the corporation or to unilaterally pay Paradox under the contract. Under the circumstances, the application of C.R.S. § 18-1-607 as applied to this Defendant is unconstitutional, violating his due process rights. Nothing in the statute put the Defendant on notice that his position as CFO could expose him to criminal liability for the company’s failure to gain licensure or pay on a contract with which he had no involvement. His conduct, or lack thereof, was not clearly proscribed by the statute.

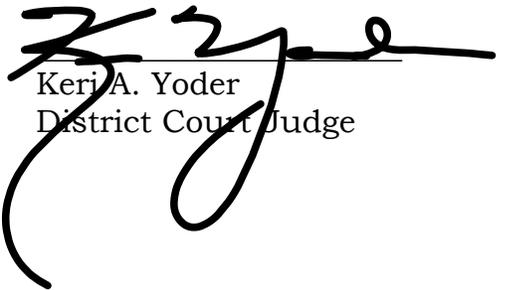
Based on the above, the Court finds that C.R.S. § 18-1-607 is unconstitutionally vague as applied to the Defendant under these set of facts. The Court therefore will dismiss both counts against him.

III. ORDER

For the foregoing reasons, the Defendant's Motion to Dismiss Charges as Unconstitutionally Vague is GRANTED.

DONE this 31st day of May, 2022.

BY THE COURT:



Keri A. Yoder
District Court Judge