



ADMINISTRATIVE HEARING COMMISSION OF MISSOURI

DELTA EXTRACTION, LLC,)	
)	
Petitioner,)	
)	
v.)	No. 23-0608
)	
MISSOURI DEPARTMENT OF)	
HEALTH AND SENIOR SERVICES,)	
)	
Respondent.)	

DECISION

Delta Extraction, LLC’s (Delta) comprehensive manufacturing license is revoked. Grounds exist for the issuance and maintenance of the administrative hold and recall of Delta’s products in an amended scope consistent with this decision. Grounds exist for the order of immediate suspension of operations.

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Procedure

On August 3, 2023, Delta filed a complaint appealing an order of the Department of Health and Senior Services (Department) issued through its Division of Cannabis Regulation (DCR) imposing an immediate suspension of Delta’s operations. On August 9, 2023, Delta filed an emergency motion for stay. The Department filed a response in opposition to the emergency motion for stay on August 14, 2023. An evidentiary hearing was held on the motion on August 14, 2023, and the motion was denied on August 29, 2023. Conte Enterprise Holdings, LLC filed a motion to intervene on August 25, 2023, and a superseding amended motion on August 28, 2023. On August 31, the amended motion was denied.

On September 1, 2023, Delta filed an amended complaint appealing from a final decision of the Department ordering an immediate suspension of operations, placing an administrative hold on Delta’s products, and issuing a recall of Delta’s products. On September 11, 2023, the Department filed its answer to the amended complaint. With our leave, Delta filed its second amended complaint on November 22, 2023, appealing from final decisions of the Department: (1) ordering an immediate suspension of operations, (2) placing an administrative hold on Delta’s products, (3) issuing a recall of Delta’s products, and (4) revoking Delta’s marijuana infused products manufacturer license. These are the four administrative decisions before this Commission in this appeal. On December 4, 2023, the Department filed its answer to the second amended complaint. A hearing was held on the second amended complaint on March 4 – 6, 2024. Delta was represented at hearing by Charles W. Hatfield and Alixandra S. Cossette of Stinson LLP and Lowell D. Pearson of Husch Blackwell LLP. The Department was represented by Joshua E. Douglass and Bethany M. Kirk of Mickes O’Toole, LLC. This matter came ready for decision on May 22, 2024, with the filing of the last post-hearing briefs.¹

Findings of Fact

Definitions

As used in this decision, the following terms mean:

“Adoption of adult use” refers to voter approval of Mo. Const. art. XIV, § 2 on November 8, 2022, effective December 8, 2022, making marijuana legal in Missouri under state and local law for adults twenty-one years of age or older.

¹ Delta also filed a notice of additional relevant authority on August 1, 2024.

“Medical marijuana” refers to marijuana produced, distributed, purchased, or sold for medical use as authorized by Mo. Const. art. XIV, § 1, adopted November 6, 2018, effective December 6, 2018, and amended November 8, 2022.

“THC” refers to tetrahydrocannabinol. Tetrahydrocannabinol is the primary psychoactive element in a marijuana product.

“THC-A” refers tetrahydrocannabinolic acid. THC-A can be processed through decarboxylation to remove the acid molecules, resulting in THC.²

“Regulated marijuana,” refers to marijuana produced by a Missouri-licensed cultivator at a licensed cultivation facility.

“Regulated biomass” refers to marijuana plants or the flower, stems, pieces, and other parts of marijuana plants grown by a Missouri-licensed cultivator at a licensed cultivation facility.

“Unregulated cannabis” refers to cannabis that was not produced by a Missouri-licensed cultivator at a licensed cultivation facility. Unregulated cannabis can be marijuana that does not meet the definition of regulated marijuana (which is not an issue in this case), or it can be any form of cannabis other than marijuana. Industrial hemp is a form of unregulated cannabis.³

“Unregulated biomass” refers to refers to cannabis plants or the stems, pieces and other parts from cannabis plants that were not grown by a Missouri-licensed cultivator at a licensed a cultivation facility. Industrial hemp biomass is a form of unregulated biomass.

“Regulated THC-A oil” refers to THC-A oil that is derived solely from regulated marijuana.

² Tetrahydrocannabinolic acid is also abbreviated THCA and THCa.

³ “Regulated” and “unregulated” in the context of this case refer to the regulatory scheme applicable to adult use marijuana as set out in Mo. Const. art. XIV, § 2 and regulations promulgated by the Department. Regulations applicable to industrial hemp by any other regulatory entities are not at issue in this case.

“Unregulated THC-A oil” refers to THC-A oil that is derived from unregulated cannabis. Unregulated THC-A can be derived from industrial hemp or industrial hemp biomass.

“THC distillate” refers to the marijuana product created for or by Delta that was produced from a combination of “regulated THC-A oil” and “unregulated THC-A oil.” The resulting “THC distillate” contained high percentages of tetrahydrocannabinol and minimal or non-detectable amounts of other cannabinoids in its cannabinoid profile. THC distillate was used to create Conte-branded vape cartridges and other Conte-branded products and was also sold without further processing as “bulk distillate.”

“Bulk distillate” refers to the THC distillate manufactured under Delta’s license for sale to other Missouri-licensed manufacturers in the wholesale market.

Parties and Participants

Delta Extraction, LLC

1. SLCC, LLC (“SLCC”) was originally awarded a medical marijuana infused-products manufacturing facility license by the Department, identified as license MAN000022 (“MAN22”), that was converted to a comprehensive marijuana infused products manufacturing facility license after the adoption of adult use.

2. At all times relevant to these proceedings, Delta was either managing and operating the MAN22 facility on behalf of SLCC or was operating as the licensee following transfer of the MAN22 license from SLCC to Delta.

3. Entities and individuals associated with SLCC and Delta include: A Joint Operation, LLC, and Ozark Highland, LLC (joint owners of Delta); Jack Maritz (J. Maritz), an owner of Ozark Highland, LLC, and Delta’s general manager and lab manager at the MAN22 facility; Ted Maritz (T. Maritz) an owner of Ozark Highland, LLC, and Director of Operations

for Delta, with responsibility for marketing of Delta-branded products; Rachael Herndon, chief operations officer and compliance officer for Delta; Adam Weiss, an owner of Ozark Highland and manager and head extractor for the Delta-branded products; Charlie Kistner, employee of Delta serving as inventory control manager and responsible for order fulfillment and Metrc recordkeeping;⁴ and Joshua Corson, owner of A Joint Operation, LLC, and Chief Executive Officer for Delta.

Department of Health and Senior Services

4. The Department is the agency granted the authority under Article XIV of the Missouri Constitution to implement the provisions of that article relating to lawful adult use marijuana sales and consumption in the state and to regulate its growth, manufacture, and sales in the state. DCR is a division within the Department created to carry out the responsibilities of the Department in regulating marijuana.

5. The Department filed emergency rules pertaining to the regulation of marijuana on January 20, 2023, following adoption of adult use. The emergency rules were effective February 3, 2023, and expired August 1, 2023. The Department also filed proposed rules on January 20, 2023, that became final rules effective July 30, 2023, and covered the same topics as the emergency rules.⁵

6. Individuals associated with the Department and DCR include Heather Bilyeu, primary compliance officer assigned to Delta; Amy Moore, Director of DCR; Andrea Balkenbush, Deputy Director of DCR; Brittany Kirkweg, Deputy Director of DCR's Section for

⁴ Metrc stands for Marijuana Enforcement Tracking Reporting Compliance. It is the system Missouri licensees are required to use for seed-to-sale tracking in Missouri. Metrc is not specific to Missouri but is used in other states to track legal marijuana cultivation, manufacture, transportation, and sales.

⁵ All citations to Missouri regulations in this decision followed by the parenthetical "(emergency rule)" were effective February 3, 2023 and expired August 1, 2023; all citations to regulations followed by the parenthetical "(final rule)" were effective July 30, 2023 and remain in effect as of the date of this decision.

Compliance & Enforcement; and Adam Whearty, Compliance Team Supervisor of DCR's Section for Compliance and Enforcement.

Conte Enterprise Holdings, LLC

7. Conte Enterprise Holdings, LLC (Conte) is a Missouri limited liability company established in 2021 and solely owned by Tania Conte.

8. Conte is not licensed by the Department as a Missouri manufacturing licensee.

9. Tania Conte also separately owns Conte Enterprise, LLC, an Oklahoma company (Conte Oklahoma). Conte Oklahoma has no ownership interest in the Missouri Conte entity.

10. Jason Sparks is the director of business development for Conte Oklahoma but is not an employee or officer of the Missouri Conte entity.

SND Equipment Leasing LLC

11. SND Equipment Leasing LLC (SND) was a Missouri limited liability company organized, owned, and managed by Jason Sparks, its sole member.

12. SND is not licensed by the Department as a Missouri manufacturing licensee.

13. SND had no employees.

14. Aiden Green was a contract chemist for SND who was present in the Delta facility to perform the distillation process on the SND equipment.

Relationships Among Delta, Conte and SND

15. Originally, Conte and Sparks manufactured Conte products under contract through a licensed manufacturer in Missouri other than Delta.

16. In December of 2021, Herndon learned that Conte had broken off its relationship with the other manufacturer and might be looking for another Missouri manufacturing licensee partner. She met with Sparks to discuss Delta partnering with Conte to manufacture and sell

Conte-branded marijuana products in Missouri. Delta was looking for opportunities with established manufacturers with existing product lines from other jurisdictions. Conte was an experienced manufacturer of marijuana products in multiple states with its own recognized brand.

17. SND and SLCC entered into an equipment lease agreement dated June 30, 2022, under which SND leased specific equipment to SLCC (and subsequently, Delta) for use in manufacturing marijuana products. At the end of the lease period, Delta had the option to purchase the equipment from SND. This equipment was used by Delta to manufacture its brand of products. With the exception of one machine used to fill and cap vape cartridges, this equipment was not used in the manufacture of Conte products or bulk distillate.

18. SLCC and Delta entered into a production management and services agreement relating to the manufacture and sale of Conte-labeled vape cartridges under Delta's license. Conte was to provide the materials and terpenes⁶ for the products and would extract the "Cannabis Concentrate" in Delta's facility. Cannabis Concentrate was defined as "all cannabis distillate necessary to manufacture the Products." Ex. R-AC at 3. Conte was also responsible for covering the cost of the Cannabis Concentrate, which would include the cost of regulated marijuana or marijuana product used in Conte's products. Delta was to provide the equipment and labor for filling the cartridges. Delta was responsible for sourcing the regulated marijuana that was used in Conte's products.

⁶ Terpenes were described as the scent molecules or "flavor" existing in all plants, in general, including cannabis plants. In the extraction and distillation process that Sparks performed, the naturally-occurring terpenes in the biomass and oil were stripped from the product as it went through the distillation process. The final step in the process involved adding Conte's unique flavored terpenes in the process of filling vape cartridges to give them the desired flavoring.

19. As part of its agreement, Conte licensed its brand to SLCC and received a royalty for all products sold under the Conte brand in Missouri.

20. The parameters of the arrangements were not entirely clear, but there were oral arrangements between Delta and SND and SND and Conte under which SND became responsible for (i) providing the unregulated THC-A oil to be used in the Conte products, (ii) extracting and distilling the final THC distillate that would be incorporated into the Conte products, and (iii) manufacturing and packaging the final Conte products. Subsequently, SND and Delta had a separate agreement under which SND manufactured bulk distillate.

21. Delta used its license to facilitate Conte's and SND's access to regulated marijuana or regulated biomass for use by SND in producing distillate. Sparks ordered or arranged for the marijuana biomass he needed for his operations to be shipped to the Delta facility and recorded in Metrc by Delta. On August 2, 2023, when being questioned, J. Maritz told Bilyeu that both Delta and Conte made deals with the cultivators for marijuana biomass but it was all ordered through Delta's accounts with the cultivators. When Conte bought marijuana biomass, it was used solely to produce THC distillate. Ex. R-AF at 3.

22. Although Conte and SND were contractors of SLCC and Delta in relation to the MAN22 license, they commonly and loosely referred to their relationship as a partnership.

Marijuana Product Manufacturing

23. Marijuana is a cannabis plant, either *Cannabis indica*, *Cannabis sativa*, or *Cannabis ruderalis* or hybrids of such plants. 19 CSR 100-1.010(45) (emergency rule) and 19 CSR 100-1.010(48) (final rule).

24. Industrial hemp is a cannabis plant, *Cannabis sativa L.* that contains no more than three-tenths of one percent (0.3%) of THC.

25. Tetrahydrocannabinol is the scientific name for THC. THC is the primary psychoactive element in a marijuana product that gives the consumer a feeling of being high or intoxicated.

26. THC-A and CBD-A are cannabinoids that occur in both marijuana and industrial hemp plants. Neither is psychoactive in their natural or raw state but must be converted to THC to have a psychoactive effect. THC-A is tetrahydrocannabinolic acid (THC-A). CBD-A is cannabidiolic acid. Cannabinoids are chemical constituents of marijuana and other cannabis plants, including hemp, that occur naturally and are biologically active.

27. THC can be derived from hemp biomass by extracting the THC-A or CBD-A from the hemp biomass usually in the form of a THC-A or CBD-A oil, and then converting the THC-A or CBD-A oil into THC through different conversion processes.

28. THC can be derived from marijuana biomass by extracting the THC-A or CBD-A from the marijuana plant, usually in the form of a THC-A oil, and then converting the THC-A oil into THC through different conversion processes.

29. To manufacture marijuana products, a manufacturing licensee does not have to extract the THC-A oil from biomass itself. THC-A oil, regulated and unregulated, is available in the market from other sources. Delta obtained and used unregulated THC-A oil which was combined with regulated THC-A oil in the manufacture of its Conte marijuana products and bulk distillate.⁷ The regulated THC-A oil it used in the Conte marijuana products and bulk distillate was extracted in the Delta facility from marijuana biomass.

⁷ Although unregulated THC-A oil may be available to a manufacturer licensee, that does not mean that it is lawful for the licensee to use the unregulated THC-A oil in its marijuana products. That is one of the central issues in this case.

30. Delta used two different processes for extracting THC-A oil for use in its products. Weiss performed hydrocarbon extraction using butane or propane to produce the THC-A oil used in the manufacture of Delta-branded products, primarily the Midwest Magic product line. Sparks used an ethanol extraction process to produce THC-A oil at the Delta facility that was further processed through distillation in the manufacture of Conte-brand products and bulk distillate.

31. Decarboxylation is the process for obtaining THC from THC-A. When a THC-A molecule is exposed to heat, carbon dioxide is released (“literally, you’ve created a gas that’s left the molecule”) and the result is a THC molecule converted from the THC-A molecule. Tr. vol. III, 177. The process involves removing the acid from the THC-A. The resulting molecule is delta-9 THC (commonly shortened to “THC”). Chemically, this delta-9 THC molecule is a different molecule from the THC-A molecule.

32. The THC produced from decarboxylation of THC-A from marijuana biomass is indistinguishable from the THC produced from decarboxylation of THC-A from hemp biomass. In other words, the THC molecule produced by one plant is the same as the THC molecule produced by the other.

33. It is possible to manufacture an intoxicating THC distillate product from THC-A extracted solely and entirely from hemp biomass. The THC distillate product could be used to create intoxicating products that would be indistinguishable from the regulated marijuana products manufactured and sold in the state.

34. Marijuana products may include CBD or other cannabinoids in a raw, non-converted state. This is referred to as a ratio product, which contains both THC and CBD or

other cannabinoids. *See* Ex. R-DG(a) at 37. CBD in its natural state in a marijuana product provides a non-intoxicating effect that some consumers desire.

35. A product may also contain non-converted THC-A, such as a pre-roll of marijuana plant material, in shake or trim, or in a crystal form referred to as a puck, dab or diamond. The THC-A in these products is converted into THC by lighting or heating the substance. The THC-A in these products can also be used by the consumer to create intoxicating edible products at home by baking them to convert the THC-A to THC.

The Department's Purpose Behind 19 CSR 100-1.170(2)(E)

36. The Department's regulation 19 CSR 100-1.170(2)(E) (emergency and final rules) strictly limits the source of intoxicating substances and compounds in marijuana products by requiring that THC in these products come only from regulated marijuana plants grown under the strict health and safety standards applicable to Missouri-licensed cultivators. The Department's purpose behind this regulation is to protect the public; specifically, to assure the Department and the consuming public that these substances originate from sources that are grown and processed under safe conditions. Cannabinoids that can be converted to THC, such as THC-A, that come from unregulated cannabis may originate from plants exposed to chemicals or contaminants not normally found in marijuana grown in compliance with the regulations applicable to Missouri-licensed cultivators. These harmful chemicals and contaminants may escape detection during the mandatory testing imposed by Missouri regulations. As noted by Delta's proffered expert witness, the state cannot test for everything by its testing protocols. In addition, new techniques for converting cannabinoids to intoxicating compounds for inclusion in marijuana products are common and frequently evolving. These techniques can produce changes at the molecular level,

with even small changes potentially impacting potency and effect of a marijuana product that can result in adverse reactions and unintended results.

MAN22 Operations

Midwest Magic Products

37. SLCC received approval from the Department to commence operations on October 12, 2021.

38. The Delta facility was located on a larger property owned by the Maritzes that was used as a commercial hunting preserve and also had a small amount of acreage set aside for growing hemp.

39. Delta produced its first products on March 13, 2022, but those products failed testing because four strains contained excessive amounts of ethyl acetate.

40. After it entered into its agreements with Conte and SND, Delta manufactured and sold two principal lines of consumer products: the Midwest Magic brand of products and the Conte brand of products. In addition, Delta manufactured bulk distillate to be sold in the wholesale market and “white label” products manufactured for a third party to be sold under that third party’s label.

41. Midwest Magic products were manufactured by Delta employees through the butane extraction process only using marijuana biomass.⁸ None of the THC distillate manufactured by Sparks was used in Midwest Magic vape cartridges or other Midwest Magic products.

⁸ There was one exception. The sugar-coated gummies found in the corridor of the facility on August 2, 2023, were made with marijuana-infused sugar created by Sparks and SND using THC distillate. This was the first batch of marijuana-infused sugar-coated gummies that Delta manufactured under the Midwest Magic brand. The gummies never went beyond the baker’s racks on which they were found.

42. Weiss managed or personally performed the hydrocarbon extraction for Delta. He only did this on the weekdays from 9:00 to 5:00, never on the weekends.

43. None of the THC extracted by Weiss was used in the Conte products or the bulk distillate. Delta neither sold nor manufactured a Midwest Magic distillate for the wholesale market.

44. Early on, Delta manufactured and marketed ratio products combining THC with raw CBD but discontinued these products. It also experimented with pucks. Neither product is at issue in this matter.

Conte-Branded Products

45. Conte products were manufactured by SND in Delta's facility through the ethanol extraction and distillation process using the SND equipment and materials (vape cartridges, packaging, stickers, labeling and shipping materials) provided by Conte. Conte required its products to be manufactured using ethanol extraction as one of the conditions for Delta to manufacture and sell Conte-branded products.

46. Conte products included vape cartridges, sugar-coated gummies and, at one time, syringes. The vape cartridges were filled with THC distillate to which Conte terpenes were added following the extraction-distillation processes. Conte did not include any cannabinoids other than THC derived from THC-A oil in their products.

47. In April of 2023, SND brought in state-of-the-art extraction equipment worth just over \$1 million that it used for manufacturing the THC distillate. This equipment could produce better quality distillate in greater quantities than the SND equipment Sparks used previously.

48. The equipment was put on rollers to allow Sparks to set up his operation in the storage area for the weekend extraction/distillation sessions and then to store away in the facility

when Sparks was finished. Sparks had an electrician install electrical plugs to accommodate the operation of the equipment on the weekends. The equipment took up almost the entire empty space in the main storage area.

49. SND invested in the state-of-the-art equipment to allow Delta to produce and sell more bulk distillate for the wholesale market. The new equipment was needed to manufacture bulk distillate amounts to meet opportunities for wholesale sales brought about by adoption of adult use marijuana in the state. As Tania Conte explained, “So if Delta wanted to enter the wholesale game, they needed better equipment.” Ex. R-DE(a) at 153. Sparks brought in the equipment because Delta was relying on him to help it with entering the wholesale market.

50. The manufacture of Conte products at Delta’s facility occurred on the weekends. Sparks, Tania Conte, and employees of Conte or Conte Oklahoma would drive up from Oklahoma and up to 20 temporary workers were brought in by Sparks from the St. Louis area. The group travelling from Oklahoma usually arrived on Friday and set up the facility for their operations that afternoon and evening. The production and packaging of Conte products was done on Saturdays, usually lasting until 6:00 or 7:00 p.m. These operations usually finished up on Saturday. SND and Conte controlled the scheduling of production of Conte products at the Delta facility.

51. Two or three Conte Oklahoma managers would accompany Tania Conte to the Delta facility. They were responsible for operating the piece of equipment that filled the vape cartridges with distillate and the Conte terpenes, an operation performed in a room separate from the corridor. Filled trays were then brought out to the corridor where the workers brought in from St. Louis would clean the cartridges, cap them, and put them in boxes. If everything was prepped

on Friday, a tray of 100 cartridges could be filled with THC distillate in less than 30 seconds. The biggest production Conte accomplished in one day was 66,000 cartridges.

52. Sparks and Green extracted THC-A oil and distilled it to produce THC distillate in the main storage area of the facility. Mark Dahl, an employee of Delta, assisted SND on occasion in the process using SND's equipment. Tania Conte was usually in the facility overseeing the Conte production team but took no part in the manufacture of THC distillate or oversight of Sparks.

Sparks' Agent ID

53. Individuals who manufacture marijuana products are required to apply for and be issued an agent ID from the Department. Agent IDs are required for employees, contractors, and volunteers before beginning employment, providing contract services, or performing volunteer work at the facility. 19 CSR 100-1.070(2)(A) (emergency and final rules).

54. As part of the application process, the applicant must include a written offer of employment from a licensee sponsoring the application.

55. In August of 2022, Sparks applied for an agent ID and submitted an offer of employment from Delta, signed by Herndon, in support of his application.

56. Sparks' application was denied because he had previously been convicted of conspiracy to distribute cocaine and served a 10-and-a-half-year prison sentence on the conviction. This was a disqualifying conviction for an agent ID.

57. Sparks created distillate in the Delta facility after his agent ID was denied.

58. Sparks again applied for an agent ID sometime between June 13, 2023, and June 20, 2023, submitting an "offer of employment" from Delta and signed by Herndon dated June 13, 2023.

59. Sparks was issued an agent ID on June 20, 2023.

60. According to the Department, Sparks was able to obtain an agent ID in June of 2023, because there was a moratorium on FBI criminal background checks after adult use was adopted and became effective on December 8, 2022.

61. Sparks stated that when he submitted his second application for the agent ID, he did not list the conviction that disqualified him previously because he thought he did not have to identify it based on the length of time that had lapsed since the conviction.

62. Sparks was given Kistner's access code (but not his access card) in order to gain access to the facility and restricted access areas within it. Sparks used Kistner's access code for access whenever he was at the facility.

63. Delta did not identify Sparks as an agent of Delta in Metrc or as working in the facility after his agent ID was issued.

64. Delta said it did not list Sparks as an agent or employee of Delta because it never issued him a Metrc code or agent ID number.

65. Delta did not provide Sparks his own access card or access code to the building or restricted areas even after he received his agent ID from the Department. He continued using Kistner's access code for gaining entry to restricted areas even after the agent ID was issued.

66. Herndon was aware that anyone processing marijuana was required to have an agent ID and that, for a period of time when he was processing marijuana for Delta, Sparks did not have an agent ID, but she failed to enforce the requirement.

Delta's Oversight of Sparks and Conte's Activities

67. Delta would turn its facility over to Sparks and Tania Conte during the time SND and Conte were there making Conte products and THC distillate. Except for Dahl, no one from

Delta was there to observe the operations. J. Maritz, Delta's general manager and lab manager, was not involved in SND's and Conte's activities in the Delta facility other than to obtain the regulated marijuana for SND's and Conte's use and to remotely disarm the alarm to the building so they could access the facility on Saturdays. J. Maritz was not present on the weekends when SND and Conte were in the facility manufacturing products.

68. No one at Delta oversaw SND's and Conte's activities while they were in the Delta facility over the weekends making Conte products. Delta also did not monitor or check that SND and Conte were complying with the Department's regulations.

69. With one or two exceptions, SND and Conte finished the production of the Conte products on Saturday and were not in the facility on Sunday.

70. On Mondays after SND and Conte were in the facility, the facility was messy, with tables and other items that needed to be put away, and product laying around. Delta's employees had to put the facility back in order. Sometimes, Delta's employees would also have to finish packaging and storing marijuana product that Sparks and Conte had manufactured over the previous weekend.

Sparks' Manufacturing Process

71. Sparks brought unregulated THC-A oil into Missouri from outside the state. The Conte products and bulk distillate were manufactured by combining a small amount of THC derived from regulated biomass with a much larger amount of THC derived from the unregulated THC-A oil Sparks brought into Missouri. At all times while they were creating Conte products and bulk distillate for Delta, SND and Sparks used unregulated THC-A oil. They never converted CBD to THC to create their products.

72. The unregulated THC-A oil Sparks used to create the THC distillate was not extracted or distilled from regulated marijuana or regulated marijuana biomass.

73. Sparks did not keep records of where he purchased his unregulated THC-A oil. He paid for it by cash or services.

74. Under the arrangements between Sparks, Delta, Conte and SND, Sparks was solely responsible for obtaining the unregulated THC-A oil used in manufacturing the products he created. Before May of 2023, the unregulated THC-A oil Sparks was bringing into the Delta facility came from Sparks' network of personal associates. Sparks never personally extracted the unregulated THC-A oil from biomass but obtained it in oil form from his network. Sparks believed it was derived from hemp.

75. Beginning in May of 2023 and until the last production run on July 29, 2023, the unregulated THC-A used to create the THC distillate came from Arvida Labs (Arvida), a Florida wholesale company. Corson made the original contact with Arvida, and the first shipment was made May 4, 2023.

76. Delta knew that the unregulated THC-A oil Sparks was using was not derived from regulated marijuana or regulated marijuana biomass. Delta relied on Sparks' representation that the unregulated THC-A oil he was using came from hemp, but it otherwise had no knowledge of its source.

Bulk Distillate

77. The product sold as bulk distillate was the same THC distillate used in manufacturing Conte products. Some of the THC distillate was used in the manufacture of Conte products and some was set aside to be sold in bulk on the wholesale market.

78. Records derived from Metrc entries for Delta's products showed Delta created Conte products from concentrate after the date the emergency rules went into effect on February 3, 2023, through July 29, 2023, except during the month of April.

79. Sparks began producing THC distillate in the Delta facility in March or April of 2022. He brought in equipment through SND and began extracting immediately.

80. Prior to the emergency rules going into effect, Delta had not sold the THC distillate Sparks created on the wholesale market. It was used solely in manufacturing Conte products.

81. On February 3, 2023, when the emergency rules went into effect, Delta had 400 liters of distillate in the facility that had been manufactured prior to that date. Delta continued to use this distillate in Conte products after the emergency rules went into effect.

82. With the adoption of adult use marijuana in November of 2022, and the adult use market opening in February of 2023, there was a massive shortage of regulated marijuana biomass in the market. Delta, Sparks and SND decided they could meet the demand by creating bulk distillate from unregulated cannabis brought in from outside the state.

83. On April 25, 2023, as the last of the state-of-the-art equipment was being brought in, Sparks, on behalf of himself and SND raised how SND, Sparks, and Delta would proceed with producing and selling bulk distillate once the new equipment became operational:

Moving forward with SND. SND has brought in (last of the equipment being shipped Friday) just over a million dollars worth of extraction equipment. 1. No one is to operate any extraction/distillation equipment brought in by SND unless a SND representative is physically present. 2. Any bulk oil, produced by SND, will be sold at current market price, which SND decides what that current market price is. We will not be selling any liters (as the current market is) for less than \$14,000 per liter COD. SND's portion of this number will be \$10,000 per liter. 3. As Metrc currently states, there are 20,999g submitted on 4/11/23

(still waiting on testing). These 20,999g will be used for Conte carts to be filled at a later date. Yesterday, Jack informed me there are another 49L [liters] that will be available. As of this email, those DO NOT exist in Metrc. If and when those appear on Metrc, we will sell those as bulk liters at no less than \$14,000 per liter. Once my extraction equipment is fully operational, by my calculations, there should be 794,000g (Agri-Genesis material) [biomass] remaining to be extracted. . . . Once this is fully extracted, distilled, and properly entered into Metrc, I will then determine how many I will keep for Conte and the remaining will be sold to the market at market price. Any liters sold, will not be released/transferred until full payment has been verified by account holders.

Exhibit L to Ex. R-DE(a).

84. T. Maritz responded on behalf of Delta, noting the clarity provided by Sparks' and Conte's visions and the "huge changes, not only in operations, but also in the market, in regulations and in competition." Exhibit T to Ex. R-DE(a). The email is also found as Exhibit B to Ex. R-DG(a). T. Maritz also agreed with Sparks taking control of production and sale of the bulk distillate and how Delta could take advantage of the current market conditions:

I agree with everything related to SND as well. Jason, this is your insight and your game so I think having you in control is the best option. We are happy to support by finding/selling to customers once everything is made and set and ready, but you will need to set price for clarity (price is clear right now we just have to assume it will change in future). Conte had more foresight than anyone in this industry and those decisions put us in a place where I am still getting calls (even yesterday!) from new manufacturers coming out of the wood works. This is key information for us, right now it seems no one (else) is truly stepping up to the plate to fulfill these market needs. The last litres made before rec were all sold for 7500, this market price has just about doubled since we have been sold out for a month. Growers are prioritizing selling 8ths. I've told the customers I've talked to that we will figure out this round of availability and get back with them, but that there would be no more made until the new machine is arrived and installed. Personally, I think that if things didn't happen the way they did – we'd still be at a 7500 a litre. However, cards were dealt differently to us and because of that the market is in dire condition and willing to pay more as time goes by. Let us use this to our

advantage. Time is one of the most luxurious factors that can either destroy or create something incredible depending on how you use it. I truly believe that by this time the market will be so hungry and SND can raise prices again.

Exhibit T to Ex. R-DE(a); Exhibit B to Ex. R-DG(a) (quoted as it appeared in the original). T. Maritz also identified what he considered Delta's biggest concern: "My biggest concern right now is our own supply, rachael [Herndon] and I are prioritizing getting out THCA sop [standard operating procedure] this week to try and continue the old show that we were told by the state to stop doing. I hope to receive the news we all want." Exhibit T to Ex. R-DE(a); Exhibit B to Ex. R-DG(a) (quoted as it appeared in the original). He also revealed that he was working on acquiring a cultivator's license from an existing cultivator "where the plan is we have sole control to supply conte/mwm [Midwest Magic]," in pursuit of which he cautioned "so we need to ensure delta is clean until this licenses transfer and to not have them pull back from letting us run a grow." Exhibit T to Ex. R-DE(a); Exhibit B to, Ex. R-DG(a) (quoted as it appeared in the original).

85. SND saw the use of unregulated THC-A oil from hemp cannabis as the solution to the shortage of regulated biomass following the adoption of adult use.

86. T. Maritz and Corson assisted in promoting the sales of bulk distillate Delta was manufacturing, but neither disclosed to potential buyers that the distillate included unregulated THC-A oil from hemp cannabis.

87. Delta listed its bulk distillate on Leaf Link, a two-way online marketplace for cannabis products, but did not take orders for the bulk distillate because the price was skyrocketing. Instead, the distillate was sold through connections. J. Maritz explained, "People were pretty, you know, desperate for it because there's such a flower shortage at one point when recreational passed. . . . Even, you know, other manufacturers are going to try to buy it just so

they could resell it because so many people wanted it. And the market is so segmented like that because it's so relationship based, you know[.]” Ex. R-AF at MO-39864 (page 2245 of the pdf).⁹

88. The evidence varied on the effect the shortage of marijuana biomass in the market had on market price for wholesale distillate. Before the adoption of adult use, wholesale distillate was selling in a range of \$6,000 to \$10,000 a liter. After adult use went into effect and the shortage of marijuana biomass occurred, wholesale distillate was selling between \$14,000 and \$20,000 per liter.

89. Sparks purchased his unregulated THC-A oil for \$4,200 per liter and billed Delta \$5,000 a liter for the bulk distillate he manufactured until his email of April 25, 2023. After April 25, 2023, Sparks was paid \$10,000 per liter for the bulk distillate.

90. SND invoiced SLCC over \$21 million for the production of THC distillate. SND invoiced SLCC \$9,450,520 for distillate created on the weekends of July 10, 24, and 29, 2023.

91. Delta had 1,107 liters of THC distillate in stock on August 2, 2023, most of which had been manufactured on July 29, 2023, to create a stockpile that would be available to it after July 30, 2023. In addition to the unregulated THC-A oil used in the creation of this stockpile, Delta brought in 1,000 pounds of regulated biomass for the July 29 production.

92. Delta intended to sell the THC distillate created on July 29, 2023, after the final version of 19 CSR 100-1.170(2)(E) went into effect on July 30, 2023. Delta believed it could continue to sell the THC distillate after that date so long as it was manufactured before that date. This belief was based, in part, on the fact the Department did not stop Delta from selling Conte

⁹ Respondent's Ex. R-AF is a 2,391 page document. The Bates-stamp numbering of the document begins with MO-37620. For ease of citing to the document, reference is given to both the Bates-stamp number and the actual page in the pdf where the reference may be found.

products it manufactured with THC distillate and stockpiled prior to February 3, 2023, but which became unlawful on February 3, 2023.

Certificates of Analysis

93. When Sparks acquired the unregulated THC-A oil from his network of providers, he was not provided with Certificates of Analysis (COAs). Nor did his network identify the source of the unregulated THC-A oil.

94. At the time that Sparks was bringing the unregulated THC-A oil into Delta's facility, Delta had not received or seen any COAs or testing related to the unregulated THC-A oil that was being used to make the THC distillate.

95. Prior to May 2023, Delta did not have COAs, sales receipts, packing slips or other documentation for the unregulated THC-A distillate used to create Delta's THC distillate.

96. During the course of discovery, Delta produced what it identified as COAs and shipping receipts for the unregulated THC-A oil used to create the THC distillate. The source of these documents was an email dated August 8, 2023, that originated from Sparks.

97. The COAs provided include:

- a. An R&D COA from Encore Labs showing that 1 unit of distillate was collected and received on February 14, 2023, and tested on February 15, 2023. The COA does not identify the source of the sample tested or the client for whom the testing was performed.
- b. A potency test COA of concentrate prepared by SC Labs for Binoid that was received on March 14, 2023, and test results reported on March 17, 2023. As a potency test, the COA only reports the percentages of cannabinoids present in the test sample but does not report any pesticides or other chemicals present.
- c. A potency test COA of concentrate prepared by SC Labs for Herbal Pharm Rx that was received on January 30, 2023, and test results reported on February 1, 2023. As a potency test, the COA only reports the percentages of cannabinoids present in the test sample but does not report any pesticides or other chemicals present.

- d. An R&D COA from Nature Safe Labs showing that concentrate was tested on May 25, 2023. The COA does not identify the source of the sample tested or the client for whom the testing was performed.

98. Seven packing slips from Arvida Labs show seven shipments to Ozark Highland Extraction/Delta Extraction c/o SND at a Robertsville, Missouri address between May 4, 2023, and July 26, 2023:

- (1) 200 liters of THC-A oil were shipped on May 4, 2023;
- (2) 166 liters of THC-A oil were shipped on May 17, 2023;
- (3) 200 liters of THC-A were shipped on May 24, 2023;
- (4) 180 liters of THC-A oil were shipped on June 11, 2023;
- (5) 350 liters of THC-A oil were shipped on July 3, 2023;
- (6) 101 liters of THC-A oil were shipped on July 13, 2023; and
- (7) 489 liters of THC-A oil were shipped on July 26, 2023.

Ex. R-BK at 13-19.

99. There were no shipments from Arvida to Delta or SND prior to those listed in the packing slips identified in the prior paragraph. Prior to May 4, 2023, the THC-A oil used in the THC distillate Sparks created came from a source other than Arvida.

100. There is no information in the COAs from SC Labs or Nature Safe Labs tying the COAs to the seven shipments from Arvida or to any delivery of THC-A oil from a source other than Arvida. There is no information in these COAs tying them to a specific batch of unregulated THC-A oil that Sparks used in creating THC distillate at Delta's facility.

101. Delta was originally provided a copy of the Encore Labs COA on May 4, 2023,¹⁰ as an attachment to a text message that was part of a continuing text exchange between Corson and Lex Kaplan with Arvida. Kaplan indicated that he would act as a middleman, providing the THC-A oil from an unidentified manufacturer he dealt with on a daily basis. As part of the exchange, on May 4, 2023, Corson stated “We will need COAs too,” to which Kaplan replied, “Every item we sell has a COA.” Ex. 48.

102. There is no evidence that the COA texted on May 4, 2023, accompanied the first order of unregulated THC-A oil from Arvida or that the first shipment came from the sample of THC-A tested by Encore Labs. At most, the Encore Labs COA provided along with the text message applied to the shipment of 200 liters of THC-A oil on May 4, 2023, the same date that the COA was provided in the text message. Delta did not have and was not provided a COA for the remaining 1,480 liters received in the six shipments between May 17, 2023, and July 23, 2023. Kaplan at Arvida represented to Corson in his text message that every item it sold had a COA, but the evidence in the record lacks any COA that was submitted by Arvida Labs in relation to the packing slips from Arvida between May 17 and July 23.

Metrc

103. Metrc is the Department’s seed-to-sale track and trace system. Its function is to track the production and sale of marijuana products from 8-inch seedling to the final product sold to a consumer in a dispensary facility. It is the state’s official inventory record of marijuana and marijuana products being produced by its licensees.

¹⁰ There are three versions of the Encore COA in the record. Two are identical: the one attached to Kaplan’s text to Corson and the one Sparks provided to Delta on August 8, 2023. Pet. Ex. 48 and Ex. R-BK at 5. The COA that J. Maritz provided to Bilyeu is identical to the other Encore Labs COA except in one material respect. The words “Hemp Derived” were added on page two of the COA, so that it read, “THCa Hemp Derived.” Ex. R-BY at 11. The words “Hemp Derived” do not appear in either the original COA texted to Corson or the one provided by Sparks. *Compare* Ex. R-BY at 11, *with* Pet. Ex. 48 at 9 *and* Ex. R-BK at 5-6.

104. Metrc allows the Department to track marijuana products forward and backwards from any point of production between growth and final sale. It also provides a record of the original source of regulated marijuana in a product, its transformation to a marijuana product, its ingredients, testing data and the location of the product.

105. Licensees are required to use Metrc.

106. A new Metrc tag was required whenever something new was being added to an existing product, even if the new material added was not THC. A new tag would also be required when the quantity of an existing Metrc package changed, such as when removing product from a Metrc package to ship to a dispensary.¹¹

107. The only persons authorized to access Metrc and make entries for Delta were Kistner, J. Maritz, Jon Gann, and Brenton Clover.

108. Kistner took the Department's required training for recording information in Metrc. He also took online training offered by the vendor of the Metrc system and obtained a designation from that company referred to as a Metrc guru.

109. Delta made many adjustments to Metrc entries. A large number of adjustments, although labeled "Typing Error," resulted from product being rejected by the dispensary and returned either because of overpulls, underpulls, or defective products; few appeared to be actual data entry errors.¹²

¹¹ A Metrc "tag" was both the record entry made in Metrc and a label with the unique identifying Metrc number that was attached to marijuana product. A Metrc "package" is the completed product lot that is given a Metrc tag. For example, if biomass was used to create 1,000 grams of THC distillate, that distillate would be a "package" given a Metrc tag. If 500 grams of that THC distillate was used to create 500 one-gram vape cartridges, the 500 one-gram cartridges are collectively a new "package" requiring its own Metrc tag.

¹² An overpull occurs when more product is removed from a package than the amount recorded in Metrc. For example, if a licensee received an order for 100 vape cartridges from a dispensary and the licensee accidentally put 120 cartridges in the shipment but recorded the transaction in Metrc as involving 100 cartridges, that would be an overpull. An underpull occurs when the amount of product actually pulled from inventory is less than the amount reported in Metrc.

110. Before adoption of adult use, Kistner made Metrc entries that “Conte CBD oil” or “CBD oil” was added to the marijuana product as an ingredient. He did this by specifying it in the notes section for the Metrc record. Later he decided it was better to include it in the ingredients line. He would add this information because someone, usually J. Maritz, would tell him that Conte CBD oil or CBD oil was an ingredient. Kistner believed he stopped including this information in Metrc entries after adult use was legalized and Department regulations prohibited adding unregulated CBD oil to marijuana products.

111. After adoption of adult use, Kistner did not remember Maritz ever telling him to add THC-A as an ingredient in Metrc, nor could Kistner say with certainty that he ever listed THC-A as a product ingredient for a package in Metrc.

112. Kistner was responsible for creating Metrc tags for product manufactured by Sparks and Conte on the weekends. He testified that he would create the tag first thing Monday morning when he arrived, however, Metrc records showed that sometimes the entry was made later in the week. The Metrc records indicated that the product was created during the week, while Sparks and Conte completed their production activities on the preceding Saturday.

113. SND did not keep a production log for what it created over the weekend. Tania Conte kept a personal log of the Conte products manufactured in the Delta facility.

114. Tania Conte related instances where she knew Metrc information was wrong. She was told in March of 2023 that all the Conte vape cartridges were made from “atomic cherry distillate,” which she knew was not true. In another instance in 2023, Delta mistakenly entered the tag number of a package consisting of 250 Conte vape cartridges for a package of distillate, causing the 250 vape cartridges to disappear in Metrc. On another occasion, Tania Conte found Conte product under the desk in the office without any manifest or invoices associated with it.

“So my biggest question is, what is this box doing under the desk without any paperwork not in the vault? We later asked Jack [Maritz] and Jack told us, ‘Oh, that’s stuff that’s not on Metrc.’ ‘Like what do you mean it’s not on Metrc?’ ‘Oh, it’s, like, some – some batches had more and other ones had less, so this is the extra.” Ex. R-DE(a) at 35-36.

115. Conte or Sparks let Kistner know how much marijuana biomass had been used in creating THC product over the weekend and the type and amount of product that was created. They conveyed this information either by leaving notes on his desk, by email, or by phone calls.

116. During her annual inspection of Delta, Bilyeu found Delta’s inventory and Metrc records did not match. Bilyeu pulled three to five Metrc records and none of the tags had a physical count that matched the count in Metrc.

117. The Department referred to seven specific instances occurring after February 23, 2023, in which Metrc entries recorded product packages created by Delta involving a small amount of regulated marijuana used to create a much larger marijuana product package.

118. Metrc package tag ending in 2177 indicated 160,286 grams of “crude distillate” had been created from 4,400 grams of crude distillate from package ending in Metrc tag number 2176. The Metrc entry indicated package 2177 was created on Tuesday, May 9, 2023,¹³ and that the record of the package was entered in Metrc at 2:04 p.m. on May 9, 2023, by Kistner. The Metrc entry does not list the ingredients of the material that was added to the 4,400 grams of “crude distillate” to make the total distillate package amount of 160,286 grams. Ex. R-AU.

119. Metrc package tag ending in 2752 indicated 223,897 grams of “distillate” had been created from 43,897 grams of “distillate” from package ending in 2546. The Metrc entry indicates package 2752 was created on Wednesday, May 24, 2023, and that the record of the

¹³ We take official notice of the 2023 calendar. Section 536.070(6). All statutory citations are to the Revised Statutes of Missouri (2016), unless otherwise noted.

package was entered into Metrc at 11:51 a.m. on May 24, 2023, by Kistner. The Metrc entry does not list the ingredients of the material that was added to the 43,897 grams of “distillate” to make the total “distillate” package amount of 223,897 grams. Ex. R-AT.

120. Metrc package tag ending in 3047 indicated 216,150 grams of “distillate” had been created from 2,000 grams of “crude bulk oil” from package ending in 3046. The Metrc entry indicates package 3047 was created on Sunday, June 4, 2023, and that the record of the package was entered into Metrc at 10:32 a.m. on Thursday, June 8, 2023, by Kistner. The Metrc entry does not list the ingredients of the material that was added to the 2,000 grams of “crude bulk oil” to make the total “distillate” package amount of 216,150 grams. The Metrc tag for package 3047 further indicated that the “distillate” from that package was used to create five additional product packages, created and recorded in Metrc on June 12, 2023 (Monday), June 14, 2023 (Wednesday), June 21, 2023 (Wednesday), June 28, 2023 (Wednesday), and July 5, 2023 (Wednesday). The records for those packages were entered in Metrc by Kistner or Gann. Ex. R-AV.

121. Metrc package tag ending in 3411 indicated 359,352 grams of “distillate” had been created from 2,000 grams of “crude bulk oil” from package ending in 3046. The Metrc entry indicates package 3411 was created on Tuesday, June 20, 2023, and that the record of the package was entered into Metrc at 2:34 p.m. on June 20, 2023, by Kistner. The Metrc entry does not list the ingredients of the material that was added to the 2,000 grams of “crude bulk oil” to make the total “distillate” package amount of 359,352 grams. The Metrc tag for package 3411 further indicates that the “distillate” from that package was used to create 36 additional product packages, created July 5, 2023, July 10, 2023, and July 17, 2023. The records for those packages were entered in Metrc by Kistner or Gann on either July 5, July 10 or July 17, the same date as

the date listed for package creation. July 5, 2023, was a Wednesday, while July 10 and 17, 2023, were Mondays. Ex. R-AV.

122. Metrc package tag ending in 4479 indicated 335,017 grams of “distillate” had been created from 2,000 grams of “crude bulk oil” from package ending in 3046. The Metrc entry indicates package 4479 was created on Monday, July 24, 2023, and that the record of the package was entered into Metrc at 1:37 p.m. on July 24, 2023, by Kistner. The Metrc entry does not list the ingredients of the material that was added to the 2,000 grams of “crude bulk oil” to make the total “distillate” package amount of 335,017 grams. Ex. R-AV.

123. Metrc package tag ending in 4482 indicated 99,910 grams of “distillate” had been created from 1,385.47 grams of “distillate” from package ending in 2544. The Metrc entry indicated package 4482 was created on Monday, July 24, 2023, and the record of the package was entered into Metrc at 3:51 p.m. on July 24, 2023, by Kistner. The Metrc entry does not list the ingredients of the material that was added to the 1,385.47 grams of “distillate” to make the total “distillate” package amount of 99,910 grams. Ex. R-AU.

124. Metrc package tag ending in 4636 indicated 490,161 grams of “distillate” had been created from 25,900 grams of “crude bulk oil” from package ending in 3046. The Metrc entry indicated package 4636 was created on Saturday, July 29, 2023, and that the record of the package was entered into Metrc at 4:36 p.m. on July 29, 2023, by Kistner. The Metrc entry does not list the ingredients of the material that was added to the 25,900 grams of “crude bulk oil” to make the total “distillate” package amount of 490,161 grams. The Metrc tag for package 4636 further indicates that the “distillate” from that package was used to create nine additional product packages, all created on Monday, July 31, 2023, and the record of those packages was entered in Metrc by Kistner on July 31, 2023. Ex. R-AV.

125. Kistner was never present in the facility when Conte, SND or Sparks was onsite on the weekend manufacturing marijuana product.

126. Kistner did not create Metrc tag 4636 recorded in Metrc on July 29, 2023.

127. Kistner did not allow anyone to use his Metrc login credentials.

128. Someone present in the Delta facility on July 29, 2023, used Kistner's credentials without his permission to access Metrc and record the creation of Metrc tag 4636 on that date.

129. As to the discrepancies in Metrc, J. Maritz stated that mistakes happen in tracking products in Metrc and it would be "too much work" to keep track.

130. On August 8, 2023, a number of bags marked as shake or trim were discovered. All had Metrc tags. All were in the original bag from the source of the shake or trim. On five of the bags, the Metrc tag number was altered by blacking out the final four numbers on the tag and writing in four new numbers. The tags contained the following information:

<u>Source Package No.</u>	<u>Product Name</u>	<u>Metrc #</u>	<u>Tag Altered</u>
Package 5	Bruce Banner Shake	4364	Yes
Package 6	Bruce Banner Shake	4364	Yes
Package 7	Bruce Banner Shake	4364	Yes
Package 38	Clementine Trim	4365	No
Package 39	Clementine Shake	4365	Yes
Package 40	Clementine Shake	4365	Yes

Ex. R-AD.

131. The bags contained two products which, by their nature and amount, were bulky and could not be packaged in a single bag for purposes of storage and sales to dispensaries.

132. The Department confirmed that Metrc package 4365 was a package created in Metrc by Delta and that it was listed as Clementine Trim. The Department did not present evidence concerning the Bruce Banner Shake, Metrc package 4364, however, Metrc assigns

numbers to new packages sequentially. Therefore, the Metrc tag for the Bruce Banner Shake package was created and recorded by Delta immediately before the Metrc tag for Clementine Trim was created and recorded in Metrc.

Packaging

133. Exhibit R-AZ is a photograph of a package of a White Airhead OG cartridge, identified by Herndon as a “Conte cart.” Tr. vol. II, 258. The package includes a label on the back side that states (among other things) the cannabinoid profile of the product and its ingredients. The cannabinoid profile showed the following percentages: THC – 77.7%; CBD – 0.1823%; CBN – 0.5804%; THCA – 0%; CBDA – 0% and CBG – 2.096%. The ingredients are listed as “Cannabis oil distillate, White Airhead OG terpenes.” Ex. R-AZ.

134. A second label in the record is on a package of Conte Assorted Gummies. The ingredients listed on this product are: “Tapioca Syrup, Organic Cane Sugar, Purified Water, Seaweed Extract, Citric Acid, Tri-Sodium Citrate, Natural Colors and Flavors, Hemp Oil and Cannabis Oil Distillate. Gluten-Free and Vegan.” The cannabinoid profile was THC – 19.73%; CBD – 9.76%; CBN – 0.23%; THCA – 0%; CBDA – 0% and CBG – 0%. *Id.* Stay Hearing Ex. A at 55.¹⁴

Standard Operating Procedures

135. On March 11, 2022, Herndon provided Bilyeu a copy of a standard operating procedure (SOP) for the process to be followed in creating Conte cartridges. The SOP was a copy of a Conte Oklahoma SOP. In addition to describing Conte’s process for filling and capping cartridges, the SOP specifically referred to the extraction and distillation of “CBD isolate,” the

¹⁴ The record from the stay hearing held on August 14, 2023, was offered into evidence and admitted over objection by Delta. Delta has not pursued that objection in its post-hearing briefing. The objection is deemed abandoned.

addition of delta-8, its later removal, and a refinement of the liquid through a “reactor” to separate delta-9. Ex. 49 at 11-12. The SOP had a definition of distillate (“Concentrated oil extracted from the cannabis plant”) and a reference to purchasing distillate from a “licensed vendor.” It did not have a definition of “CBD isolate.” Neither THC-A, THC-A oil, or distillate was mentioned in the document. The SOP suggests that the production of Conte products did not involve the extraction of CBD isolate from raw hemp plants but instead started with pre-extracted CBD isolate purchased from a vendor.

136. The Conte Oklahoma SOP was submitted to Bilyeu in response to Bilyeu’s March 11, 2022, request, “I will now just need an SOP for making/filling carts or update your current SOP to add this information. When you get it, I would love to see how you plan to package carts as well.” Ex. 49 at 1.

137. The Conte Oklahoma SOP was submitted to the Department for the purpose of explaining how Delta was going to make or fill cartridges, not as a statement of the process Delta would be following in creating distillate. Even assuming Delta was following the Conte Oklahoma extraction/distillation process in March of 2022, this was prior to the adoption of adult use in Missouri and the effective date of the Department’s emergency rules related to adult use. As J. Maritz told Bilyeu on February 2, 2023, Delta was changing its processes following February 3, 2023, the effective date of the emergency rules.

138. On March 25, 2022, Bilyeu emailed Herndon about Delta’s Industrial Hemp Processes SOP (initial hemp SOP), acknowledging that she reviewed it and requesting additional information. Bilyeu’s questions and DCR’s concern was “in how the facility plans to prevent cross contamination or confusion between hemp and medical marijuana. . . . They could either update the hemp SOP or send me a separate document on how they will ensure no cross

contamination (when it's not intended to be mixed of course) or a mix up of the two." Ex. 46. In her email, Bilyeu acknowledged Delta's plans to combine whatever was extracted from the hemp with medical marijuana.

139. Delta amended the initial hemp SOP and sent a copy of it to Bilyeu on July 29, 2022, at 9:06 a.m. with the comment, "As you'll see, the team will be storing and processing hemp separately up to the time of the product creation." (July 29, 2022 hemp SOP) Stay Hearing Ex. P-12 at 1; *see also* Ex. R-DS.

140. Bilyeu immediately responded to Delta's July 29, 2022, email, at 9:15 a.m. on that date, stating, "Thank you! I will update your file." Stay Hearing Ex. P-12 at 2. Then two days later, on August 1, 2022, Bilyeu emailed Delta again in response to the July 29, 2022 hemp SOP, stating, "This looks great! All points that I wanted to see have been covered." Stay Hearing Ex. P-12, at 2.

141. Bilyeu's email of August 1, 2022, was an acknowledgement that Delta had responded to the issues she raised in her email of March 25, 2022, which had requested information not included in the initial hemp SOP. Bilyeu did not state in the email and did not intend to communicate to Delta that the Department had considered and approved all of the processes described in the SOP. Kirkweg explained that "compliance officers do not approve facility SOPs" and that an "SOP cannot overrule a [regulatory] requirement." Tr. vol. I, 62.

142. The July 29, 2022 hemp SOP indicated that Delta would be bringing hemp biomass into the facility and extracting hemp oil from the biomass. The SOP did not specifically mention the use of hemp oil from another source in the process, including CBD oil or THC-A oil, but did state that hemp-derived products might be used in whatever products might be manufactured under the SOP ("Employees document all sources of hemp and hemp-derived

products entering the facility”). Ex. R-DS at 3. It also specified that “[t]his facility has an adjoined licensed hemp license and will be extracting hemp on-site at the medical marijuana facility for use in medical marijuana-infused products or hemp/CBD products.” Ex. R-DS at 3. In the Instruction section, it provided that industrial hemp would be stored separate from medical marijuana and clearly labeled; that it would be processed in separate, designated equipment; that it would not be co-extracted with medical marijuana; that extracted hemp oil was to be stored and utilized as “any other non-medical marijuana ingredient.” Ex. R-DS at 2. The only language relating to mixing hemp with non-hemp products stated, “If at any time hemp or hemp-derived products are combined, extracted or modified into a product that contains more than 0.03% THC [sic], then the end product will be placed into Metrc and stored according to medical marijuana policies and procedures.”¹⁵ Ex. R-DS at 4. The July 29, 2022 hemp SOP did not address how the hemp was to be extracted or distilled, whether resulting product from the extraction would be intoxicating or non-intoxicating, and did not specifically address processing anything other than hemp biomass. Ex. R-DS.

143. The July 29, 2022 hemp SOP applied to processes Delta performed before February 2, 2023. Delta advised the Department that it was changing its processes effective February 3, 2023.

144. On March 16, 2023, Herndon emailed Bilyeu, “Find attached SOPs for the new distillation improvements.” Ex. 22 at 1. Although the email referred to SOPs, there was only one SOP attached, the Wiped Film Distillation SOP. The distillation process described in the SOP starts with “crude oil” but there is nothing in the SOP about the source of the crude oil, and

¹⁵ The reference to “0.03% THC” appears to be an error, since the first page of the SOP indicates Delta would ensure that all hemp products accepted at the facility would be “below 0.3% THC,” which is the legal limit for THC content in industrial hemp.

nothing to suggest that it would be derived from anything other than regulated marijuana. *Id.* at 2.

145. On April 25, 2023, Bilyeu sent Herndon an email asking for an updated list of drivers used by Delta. She suggested, “I know you list your driver’s [sic] in your SOP, but you can just list these on a word document with the Agent’s name and ID information. This way you do not have to update your SOP every time you hire a new driver.” Ex. O to Ex. R-DH(a).

146. Herndon responded on May 1, 2023, by email, with multiple SOPs attached, including an updated Industrial Hemp Processes SOP (April 15, 2023 hemp SOP) and the manufacturing SOP (discussed below). The email stated, “Attached are the reformatted SOPs to reflect this change for ongoing use and fresh exports across the board. Please advise if you have any questions.” Ex. O to Ex. R-DH(a).

147. The April 15, 2023 hemp SOP sent to Bilyeu on May 1, 2023 included a notation that it was updated on April 15, 2023, but also stated it was originally added to Delta’s state file by Heather Bilyeu on July 29, 2022. The scope and instructions section was unchanged from the July 29, 2022 hemp SOP. The inventory control section included the reference to the hemp field adjacent to the facility but also added the following language: “This facility will only intake, store, produce, test, and utilize in products non-psychoactive, federally-compliant hemp-derived products.” Stay Hearing Ex. P-13 at 2. The April 15, 2023 hemp SOP had identical language about requiring a COA for hemp coming into the facility and requiring an end product to be entered in Metrc when a hemp-derived product was combined with a product that contained “more than 0.03% THC [sic].” *Id.* at 4. The April 15, 2023 hemp SOP did not address how the hemp was to be extracted and/or distilled and did not provide for processing anything other than hemp plants.

148. Bilyeu did not look at the April 15, 2023 hemp SOP when she received it by email. The attachment to the email was titled “hemp SOP.” Ex. 34 at 76-77. She did not open the attachment but simply moved it to Delta’s file. Bilyeu did not know what changes were made by the April 15, 2023 hemp SOP, but her understanding of its purpose “was so that they could use CBD from the hemp that they grow on-site in their product.” Tr. vol. II, 104-05.

149. On May 3, 2023, Herndon forwarded her May 1, 2023 response to Bilyeu to J. Maritz with the message, “Here it is! Highlight: non-psychoactive, federally-legal, hemp-derived, COA (provided and filed) cannabinoids.” Ex. O to Ex. R-DH(a). Herndon’s email to Bilyeu transmitting the SOP did not include similar language about the SOP’s “highlight.”

150. Other SOPs maintained by Delta included an Extraction SOP, which referred to “biomass” but nothing in the SOP stated that the biomass could be something other than regulated marijuana. Ex. 59.

151. Delta’s Falling Film SOP referred only to “oil” but nothing in the SOP suggested that the oil would be derived from anything other than regulated marijuana. Ex. 60.

152. Delta’s Decarboxylation SOP referred only to “oil” but nothing in the SOP suggested that the oil would be derived from anything other than regulated marijuana. Ex. 61.

153. Delta’s Wiped Film Terp Pass SOP referred only to “crude oil” but nothing in the SOP suggested that the crude oil would be derived from anything other than regulated marijuana. Ex. 62.

154. Delta also maintained an SOP titled “Manufacturing Standard Operating Procedures” (manufacturing SOP). The manufacturing SOP was a comprehensive document covering all aspects of operations at the facility. Although Herndon referred to it as a living document, constantly being updated, there are references throughout the SOP to “medical

marijuana,” which were not supplemented or deleted after the adoption of adult use. With respect to the extraction processes, the SOP stated, “The Company will utilize butane extraction equipment for extraction.” Ex. 23 at 79. In terms of source material used for extraction, the manufacturing SOP referred only to cannabis (“Pack the material [cannabis] into the column”). Ex. 23 at 82 (brackets in original). There is also a reference to raw cannabis and dried and processed cannabis products in respect to waste product. Ex. 23 at 41. In the context of the limited references to “cannabis” in the SOP, the term could be interpreted to mean marijuana only. The SOP also referenced and restated provisions of the Department’s regulations on permitted and prohibited sources of THC in marijuana products and the requirement to list all ingredients in Metrc:

Source Materials

REFERENCE: 19 CSR 100-1.170(2)

SCOPE: These procedures apply to all employees, contractors, and vendors who engage in the inventory control process including procurement, facility management, intake, production, testing, and dispensary distribution.

INSTRUCTIONS:

Any tetrahydrocannabinol in a marijuana product manufactured by a manufacturing licensee shall only be derived from marijuana cultivated in Missouri by a licensed cultivator;

Manufactured product may not contain chemical modification, conversion, or synthetic derivation of cannabinoids to produce intoxicating cannabinoid isomers, and all cannabinoids acquired from entities other than marijuana facilities for purpose of inclusion in marijuana product must be accompanied by a Certificate of Analysis at time of acquisition that identifies the testing lab that tested the product and lists the product’s ingredients; and

Manufacturing licensees shall track all ingredients used in any given manufactured product.

Ex. 23 at 38.

155. The manufacturing SOP did not cover Sparks' manufacture of THC distillate. Sparks made his THC distillate through ethanol extraction and distillation. The manufacturing SOP applied to Weiss' manufacture of the Midwest Magic products, which were processed through butane extraction.

156. Bilyeu received the manufacturing SOP, glanced through it but made no edits or suggestions to it.

157. Delta never submitted an SOP to the Department that specifically stated how Delta was going to convert THC-A into THC. None of the SOPs Delta submitted to the Department said the purpose of the process was to convert THC-A derived from hemp into THC.

158. Bilyeu never reviewed an SOP from Delta that she understood to involve converting THC-A from hemp into THC.

159. Bilyeu knew that Delta grew hemp in a field adjacent to the facility and wanted to extract it. She believed that Delta intended to extract CBD from the hemp in Delta's facility using its extraction equipment. She was not aware that Delta would be using unregulated THC derived from hemp in its products.

Testing

160. Regulated marijuana and marijuana products are required to be tested by licensed testing laboratories.

161. Two types of testing are conducted. Mandatory testing is the testing required by the Department's regulation and is subject to strict processes and procedures. Research and Development testing (R&D testing) is conducted by the licensees, usually manufacturers, for their quality control purposes, such as potency and presence of particular solvents..

162. In mandatory testing, someone from the testing laboratory comes to the licensed facility to collect the samples to be tested. The person from the testing facility randomly selects samples of the product from a process lot to be taken back to the testing facility to be tested. Mandatory testing evaluates product safety by checking for the presence of solvents and other potentially harmful chemicals that are identified in the regulation. The solvents tested for are those that are commonly used in marijuana manufacturing processes. Missouri's regulations do not test for all solvents that might be used to create THC.

163. A marijuana product's cannabinoid profile shows the percentages of the different cannabinoids present in a product, and includes percentages of delta-9 THC, THC-A, CBD, CBDA, CBN, THCV, CBDV, and delta-8 THC. The listing of THCV, CBDV and delta-8 THC as part of the cannabinoid profile was not required by the Department's testing regulation until July 30, 2023, when the final rules went into effect. Ex. R-AZ; 19 CSR 100-1.110(4)(E) (emergency rule); 19 CSR 100-1.110(7)(E) (final rule).

164. With distillate, the percentage of THC is important because it reflects the potency of the distillate. The higher the potency, i.e., the level of THC present, the less distillate will be needed in creating other products from it.

165. Testing of Delta's THC distillate showed high concentrations of delta-9 THC and minimum or non-detectable amounts of THC-A.

166. Delta's expert witness stated that even with robust testing requirements like Missouri's, "you can't test for everything. But what you are testing for are the main issues that might happen." Tr. vol. III, 189. Since regulators cannot test for everything out there, he added, the states have to control the method by which the regulated marijuana is produced to ensure

public safety and rely on the entirety of the regulatory system, not just one component of it. Tr. vol. III, 215-17.

Facility Security

Remote Electronic Video Monitoring System

167. Remote access to Delta's electronic video monitoring system was via the internet, and could be accessed remotely using the Transcendent application.

168. Delta relied on satellite internet for remote access. Delta had frequent interruption of internet service which went down whenever the weather was bad. Herndon blamed the internet outages on the fact that the facility was located in the woods with trees all around. "[I]t's regularly happened where we have what could be a malfunction because of trees specifically."

Ex. R-AF at MO 39933 (page 2314 of the pdf).

169. On September 3, 2023, Delta replaced the server on which it stored security video. On October 31, 2023, internet service was still a major issue with the remote video access and was likely an issue that was not capable of being resolved. Burns-Citadel, the company that installed the security equipment, advised Delta:

The remote connection to our equipment depends on the Internet. Generally, once it is set up the only way there can be any interruption is going to be due to an interruption in the internet services. This is why we recommend using one of the major Internet service providers. We have found that wireless internet services for our equipment is unreliable. Justin is available Wednesday the 22nd. I will block out the time for him to come out to check all systems. But I do want to stress that I do not think there is anything we can do, the issue appears to be with the Internet services fluctuating.

Ex. R-AF at MO 39954 (page 2335 of the pdf).

170. There is no evidence that Delta resolved its internet connectivity problem by finding a provider that could provide the necessary level of service to maintain a remote access system that met regulatory requirements.

171. Herndon summarized Delta's interpretation of the remote access requirement as: "If the internet goes down, remote access is severed. That doesn't mean the system is not recording. The system continues to record regardless of whether you can log in on your phone or not. And whenever we talk about remote access, that[']s what it means to me." Tr. vol. II, 189.

172. Bilyeu conducted a security audit of Delta on September 6, 2023, and verified that the remote access was working that day.

Intrusion Alarm System

173. Notification of intrusions that were received by Delta employees were sent by cellphone service, not the internet.

174. Notification of local law enforcement of an intrusion at the facility required the facility's alarm system to be armed. If the alarm system was not armed, notification did not go out to the sheriff's office when a break-in or other emergency occurred. The alarm system could not be armed if the magnetic locks on any of the doors at the facility were not working, or if a door was open.

175. On Friday, August 4, 2023, J. Maritz observed that the alarm was not armed but he was not concerned about it because the problem arming the alarm was widely known and Delta had not had any security problems previously. He would have known it was not armed at the time he left the facility – "You'll click 'arm,' and it tries to do it, but it doesn't; it fails." Ex. R-DH at 220. As he told the Department, "Uh, and I mean we had never had any kind of security

issue before. And so I truthfully wasn't like super concerned about it." Ex. R-AF, at MO 37634, MO 39867 (pages 15, 2248 of the pdf).

Response to the Intrusion at the Facility

176. The security application that notified Delta employees of an intrusion was the Alarm.com app. It had been set up to notify a variety of people, including J. Maritz, T. Maritz, and Adam Weiss; however, Weiss had been removed from the application as a person to receive notifications sometime before August 7, 2023. If J. Maritz saw something on the app, it would be up to him to notify everyone else.

177. At 4:03 a.m. on August 7, 2023, the security app detected that the office window was opened and then closed, and at 4:04 a.m. that the window was being tampered with. Ex. R-V at 3. The app provided notice to J. Maritz of these events through his phone at the time the events were occurring and being recorded on the security application. *Id.*

178. J. Maritz was in Wisconsin on August 7, 2023, and happened to check the security application around 10:00 or 11:00 a.m., because he knew the alarm had not armed. A screenshot showed it was 11:17 a.m. when J. Maritz saw the alert. He then saw the notice of the intrusion at the facility, so he notified Delta's security director, Joe Patterson.

179. Weiss lived closest to the facility. He had not been included in the notifications about the break-in or asked to check out the situation. He did not learn of the break-in until after 8:00 p.m. on August 7, 2023, when Mark Dahl called the sheriff's department. Dahl called Weiss and told him he had noticed a window was broken, said he was calling the police, and asked Weiss to go meet them.

180. There had been false alarms before. According to J. Maritz:

[Y]ou get an email, like a notification on your phone, and then the security company will call you and ask if it's a false alarm or a real

one. And so when there were the false alarms, I was actually living basically right next to the lab. I live in Kirkwood now, but I just went down and checked and it was at like two in the morning and I had to do that. I think a couple of times I [sic] was two times. So yeah, I just go down and check and obviously there is nothing wrong with the building or up. And it was just one of the sensors had been off and you could see which sensor.

Ex. R-AF at MO 39869 (page 2250 of the pdf).

181. The false alarms that occurred were at night during windstorms. The wind would rattle the garage door and set off the alarm. The alert that was sent out by the intrusion alert application would list the sensor that was triggered. There had never been an alert involving a broken window, broken door, or damage to the building.

182. In the earlier cases, Weiss would get to the facility quickly enough to determine there was no problem and then contact the sheriff's office to notify it that the alarm was a false alarm.

183. According to the sheriff's department's report, Dahl saw the broken window around 2:30 p.m. Dahl called T. Maritz sometime before 8:00 p.m. and reported seeing the broken window. The sheriff's department was not notified until this time.

184. J. Maritz sent a screenshot of the alert to Joe Patterson and Herndon. T. Maritz was also in on the group chat, although the time this occurred is unknown.

185. Weiss went to the facility after being asked by Dahl to meet the sheriff's deputies. Weiss entered with the officers. Inside the office, Weiss saw that the wires to the server had been cut, that the server and external hard drives were taken, that the office toolbox was open and some of the tools appeared to have been used to remove the server.

186. At the time of the hearing in this case, no one had been arrested or charged in connection with the break-in and removal of the server.

Facility Access

187. Keycards were issued to individuals based on their need to enter limited access areas of the facility. Individuals who had been issued keycards could also gain entrance to limited access areas by using their assigned access code. The access code was specific to the individual. A keycard and access code did not necessarily allow a person access to all of the restricted areas in the facility. The access cards and access codes could be programmed to allow an individual to enter some but not all of the limited access areas.

188. It was common for Delta employees to prop open doors to limited access areas and for multiple persons to enter together, while only one person used his or her credentials to gain entry. As explained by J. Maritz: “Because it it it [sic] just kind of becomes a huge hassle when you're actually moving people around the facility and everything. And if multiple people are carrying boxes like, the you know, packaging room and the oven room, if everyone's carrying a box and then everyone has to like put the box down, swipe in, go back and pick the box back up. You're doubling or tripling your movement of just moving this stuff. It's completely inefficient. So if you can just prop the door open and everyone carries the boxes through stuff, then it's you're saving a lot of energy.” Ex. R-AF at MO 39869-70 (page 2250-51 of the pdf).

189. In a security audit report prepared by Delta's security consultant and dated May 15, 2023, Delta was put on notice that these practices were security violations. Ex. 42.

190. J. Maritz said they did better about complying with the requirement once they received the security audit report, but the violations continued.

191. On weekends when SND and Conte were to be in the facility, J. Maritz would remotely turn off the intrusion alarm to the facility to allow SND and Conte to access the building.

192. The access logs for July 22, 2023, and July 29, 2023, record both Tania Conte and Jason Sparks (using Kistner's access code) accessing the facility and limited access areas within it.

Visitor Log

193. In addition to the access log, a visitor log was kept at the facility. The log required entry of information including: the first and last name of the visitor, the purpose of the visit, the date, time in, and time out.

194. On weekends when SND, Sparks, and Conte were in the facility, they brought in a crew of 10 – 15 persons, or more, to assist in the manufacture of Conte products.

195. These individuals were required to log in to the visitor log. When they logged in, they failed to complete all fields of the log. In many instances, only the person's first name was listed. There were five weekend dates, however, where both first and last names were entered for some of the individuals in the facility that day. The purpose of the visit was rarely entered and when it was, the purpose was listed as "Visit." None of the logs included information indicating the individuals listed were assisting in the manufacture of products. The "time in" and "time out" fields on the log were sporadically completed.

196. J. Maritz was in charge of reviewing and submitting access and visitor logs but he said he had no reason to inspect them with great detail until the order of suspension.

197. Herndon knew how Sparks was staffing the work at the facility on the weekends, but she did not know the identity of any of the workers listed on the visitor logs except for David Sparks, who was Jason Sparks' father.

198. Sparks did not have contact information for the people he brought into the Delta facility on the weekends to fill Conte vape cartridges and package Conte marijuana product. He

paid the people in cash as casual labor, so he had no employee information for them.

Access Logs

199. On August 2, 2023, the Department requested that Delta provide access logs to the facility. J. Maritz uploaded the access logs in an electronic file format.

200. The access log file was printed out by DCR and included as an exhibit to its investigation report. The access log, when printed, was 767 pages in length. Under the printed version of the access log, the data for the date and time of entry appeared as multiple hashtags and could not be accessed in the format provided.

201. DCR was later provided with an access log in an Excel worksheet format. This document recorded 34,565 instances of entry to limited access areas at the facility from October 6, 2021, through September 22, 2023. Because it is in Excel format, the date and time information could be accessed by DCR by expanding the width of the cells.

202. The original electronic access log file provided by J. Maritz to DCR on August 2, 2023, included the dates and times for the access recorded and went back more than one year. When DCR accessed this electronic file, it did so in a manner that failed to display the date and time information, but that information was available on the file.

203. The order of immediate suspension required Delta to “provide a daily electronic log of controlled entry for the facility to DCR . . . by 9am CST for the previous day until the Licensee receives written notice from DCR.” Ex. R-A at 2.

204. Delta failed to provide the daily access logs on multiple occasions.

Office Window

205. There was only one exterior window in the facility. It was in the office area.

206. The window was a normal house window that opened and closed with a lock. The glass used in the window was not security glass or covered with a break-resistant film. It also did not have security bars or a cage outside or inside the window to prevent intrusion.]

Access to 60-days Stored Video Footage

207. Poor internet service prevented Delta from backing up a copy of the past 60 days of security video footage to the internet. Delta's only copy of the 60 days' video footage was on its server. It did not have the files backed up in any other location from which it could make copies available to DCR on request. In order to provide the 60 days of video footage to DCR when requested on August 4, 2023, Delta needed to download the files from the server onto external hard drives, which it had to go out and purchase specifically for that purpose. Delta was unable to download the files onto the external hard drives on Friday, August 4, 2023, and did not download the files at any time before August 7, 2023, when the server storing the video files was removed from the facility during a break-in.

208. After Monday, August 7, 2023, when someone broke into the office and took the server with the only copy of the video footage files, the 60 days of video footage were gone.

Miscellaneous Security Issues

209. On September 6, 2023, during a security audit of the facility requested by Delta, Bilyeu observed three cameras were malfunctioning. The Work Hall and Freezer Front 3 cameras were inoperable and did not appear to be connected to the server for video cameras.¹⁶ Camera Freezer 360 had accumulated frost on the camera lens. The malfunctioning resulted in inadequate monitoring of the areas covered by the cameras.

¹⁶ At the time of the September 6 audit, the server that had been removed had been replaced and was operating.

Contacts Between Delta and DCR Prior to Suspension

210. On February 2, 2023 (the day before the emergency rules went into effect), Bilyeu did an unannounced visit to the Delta facility. It was her first unannounced visit to the facility and the purpose was to do an inventory of the distillate in the building. She and J. Maritz weighed every jar of distillate and determined there were 400 liters. During that visit, Bilyeu and J. Maritz discussed Delta's practice of converting CBD to THC and combining it with THC from regulated marijuana. Bilyeu told Maritz that the emergency rules were going into effect the next day and that chemically modifying CBD would not be compliant. J. Maritz told Bilyeu that Delta would stop converting CBD to THC after the emergency rules went into effect because it knew that it was not allowed after that date, but other than that he was not sure what the next step would be for producing Conte products. Bilyeu asked what Delta intended to do with the distillate it had created from CBD once the emergency rules went into effect. J. Maritz told her they were going to continue to put it in Conte carts and sell it. Bilyeu responded by looking at J. Maritz but did not say anything.

211. Herndon and Bilyeu had a number of conversations and email communications in 2023 before July 28, 2023. At no time did Herndon tell Bilyeu that Delta was converting unregulated THC-A oil to THC for use in Delta's marijuana products.

212. In July 2023, Delta made a remediation request related to some marijuana products that had failed mandatory testing. In looking into the request, Bilyeu found a Metrc tag that indicated Delta had used a small amount of regulated marijuana to create a marijuana product that was more than five times the weight of the regulated marijuana in the product. Bilyeu asked Delta for an explanation.

213. In an email sent on July 26, 2023, J. Maritz told Bilyeu that the additional weight was from “non-psychoactive, non-intoxicating” THC-A, which was used by Delta to create distillate. Ex. J. to Ex. R-DH(a) at 1.

214. Bilyeu checked the testing results for the distillate products as listed in Metrc and found they had a cannabinoid ratio with a high percentage of psychoactive THC and a small percentage of THC-A or THC-A in non-detectable amounts in the products. These test results indicated that there was no “non-psychoactive, non-intoxicating” THC-A in the distillate products.

215. On July 27, 2023, Herndon called Bilyeu to ask about a rumor that Delta was under investigation by DCR. Herndon did not talk to Bilyeu then because Bilyeu was unavailable.

216. Bilyeu returned Herndon’s call on Friday, July 28, 2023. At that time, Bilyeu suspected that Delta was using THC-A from unregulated cannabis in its products, but Bilyeu lacked a complete understanding of Delta’s processes and their legal implications. In their testimony, Herndon and Bilyeu provided conflicting details about their conversations (Herndon asserts they spoke twice that day). Specifically, Herndon testified that Bilyeu said “we know what you’re doing. It’s fine. Others are doing it.” Tr. vol. II, 182. Bilyeu denies making these statements, and we find her account credible. In any event, Herndon was put on notice that she could not rely on any such assurances from Bilyeu, because as both witnesses recounted, Herndon asked Bilyeu if Delta should proceed with its plans to create a large amount of distillate over the coming weekend, and Bilyeu responded, “I don’t know.”

217. Specifically, Herndon testified that in their second conversation on July 28:

She [Bilyeu] called back about half an hour later and was, like, “Hey, I don’t know.” And every question I asked her, her answer was, “I don’t

know.” And that was very, very troubling, especially considering it was Friday. We couldn’t find out anything more.

Tr. vol. II, 183. Herndon elaborated further on this second discussion:

In our second phone call, whenever I kept asking her questions and she kept saying she didn't know -- it makes sense now -- I got very frustrated and my final question to her was verbatim, "Heather, do I need to prepare to do a 50 million dollar recall on Monday?" And she said, "I don't know." I was like, well, that's not helpful. And we ended our conversation and I hoped to learn more.

Tr. vol. II, 184.

218. Despite the “very, very troubling” feeling Herndon had from her second conversation with Bilyeu, Delta went ahead with its production run on the following day:

Fast forward – so that weekend we did our last run. After talking to Heather, I talked to both Jack, Corson, Jason and we decided to do our run as we initially planned. It was part of our business plan. We were going to do a huge run right before this rule change because we had previously done the CBD process and been allowed to continue to sell those products. So we had no reason to think that we would not be able to to sell those products, because that wouldn’t make sense.

Tr. vol. II, 183.

DCR Knowledge of Delta’s Activities

219. Based on J. Maritz’s assurance that Delta would not be converting CBD to THC after the emergency rules went into effect on February 3, 2023, Bilyeu believed that Delta was only using THC extracted from regulated marijuana in the products Delta manufactured and sold after that date.

220. Bilyeu became more knowledgeable about what Delta was doing on August 2, 2023, as she questioned J. Maritz and went through the Delta facility with him.

221. Bilyeu never saw any THC-A oil at the Delta facility during her visits or inspections.

222. DCR was not aware that Sparks was creating THC for the THC distillate from both unregulated THC-A oil and regulated THC-A oil in the Delta facility until after it issued the order of immediate suspension.

Site Inspection and Investigation of August 2, 2023

223. On August 2, 2023, shortly after 9:15 a.m., members of DCR arrived at the Delta facility. The purpose for the official visit was to hand-deliver the order of immediate suspension, to ensure that operations ceased, and to obtain information, records, and other evidence relative to the order of immediate suspension.

224. At the time Bilyeu arrived, Delta's access log showed there were eight Delta employees/agents in the facility, although four had been on the premises for less than 25 minutes.

225. While present in the facility, Bilyeu questioned J. Maritz and went through the facility with him.

226. During the questioning, J. Maritz admitted that Delta did not purchase the unregulated THC-A oil, but that Conte brought it in. Maritz admitted that the THC distillate was created on the weekends by Conte with only a small amount of regulated marijuana added and that Conte did this so that the THC distillate could be listed in Metrc. He told Bilyeu there was no THC-A oil in the facility at that time because it had all been used over the previous weekend to make THC distillate.

227. In going through the facility, Bilyeu observed jars of liquid in a glass Pyrex dish sitting on a wire rack in the office. J. Maritz identified the jars as containing marijuana product. The product was in the office awaiting pickup for R&D testing by the testing laboratory.

J. Maritz had Metrc tags for the product to be tested on his desk to be given to the person who picked up the jars.

228. There was only one camera angle in the office covering the marijuana product.

229. Bilyeu also observed three racks of gummies on baker's racks in the facility's corridor. Both the racks and the products lacked traceability information. The only identifying information on the racks were post-it notes: one that read "Watermelon" and another that read "#1".

230. J. Maritz admitted that some of the gummies were coated with marijuana-infused sugar, and that Delta was still in the process of completing the batch. Testing of samples of the gummies ordered by DCR showed they contained THC.

231. Sparks had prepared the sugar for the gummies some four or five weeks before August 2, 2023. The baker's racks had been stored in the main storage room on the previous weekend, but they were in the way of Sparks setting up and operating his equipment. He moved them to the corridor.

232. The process lot of the gummies was still in production on August 2, 2023, although no processing of the gummies occurred on August 2, 2023. J. Maritz also related to Bilyeu and Whearty that Delta did not have anything currently in production that morning because the power was out.

233. Four pallets of marijuana product without Metrc tags were found in the facility on August 2, 2023. Next to the pallets were two large silver bins (referred to by the witnesses as "totes") that contained several thousand filled vape cartridges, also without Metrc tags. J. Maritz identified the items in the boxes on the pallets and in the totes as marijuana products. Weiss said

he had observed the pallets in the vault area two weeks prior to the order of immediate suspension when he returned from a trip.

234. J. Maritz claimed to have Metrc tags in the office for the product on the pallets. The tags were in the office to facilitate delivery of testing samples to the testing laboratory.

235. Black plastic bags of marijuana biomass were stored in the corridor of the facility with Metrc tags on them.

236. J. Maritz identified the bags as containing marijuana.

237. Most of the packages stored in the corridor were designated in Metrc as stored in the vault. Other packages were split with one part of the package stored in the corridor and another part stored in the extraction room; however, Metrc designated all these packages as being stored in the vault (sometimes referred to as “the cage”).

238. The approved areas in the Delta facility for storage of marijuana product were the vault, the freezer and the oven room, the latter for product package lots in process of being manufactured. Delta’s manufacturing SOP also stated that marijuana products were to be stored in the “vault” “to prevent diversion.” Ex. 23 at 54.

239. Delta did not request or receive a change of space approval to perform extraction in the loading/storage area or to store marijuana in the hallway.

240. Delta’s placement of bags of marijuana in the hallway was intentional, as admitted by J. Maritz to DCR: “We just, uh, got to a point where we were extracting so much that we’d have to order them in big amounts. And when you order more, its obviously a little bit less of a price because you’re getting it in bulk. And so we just needed a place to put it. And so we kind of just have weed all over the ground the whole time. So we built shelves to store it up

and then obviously got that 360 camera to cover it so that we could have the angles on it.” Ex. R-AF at MO 39856 (page 2237 of the pdf).

241. Since Delta’s storage of the marijuana in the corridor and extraction room was intentional, the Metrc record for the marijuana showing its location in the vault was intentionally false.

242. Bilyeu also observed a jar that contained what appeared to be marijuana buds mixed with water that did not contain a Metrc tag or traceability information.

243. J. Maritz identified the jar as being a “jar test” and that the material included marijuana.

244. A jar test involves adding marijuana buds to super cold water and freezing it. The purpose of the test is to determine whether the particular strain is more suitable for creating bubble hash or for hydrocarbon extraction.

245. J. Maritz admitted that Delta did not have a system for labeling the test in Metrc and was confused about how it should be recorded. Consequently, it did not enter the jar test into Metrc or prepare a Metrc tag for it. Maritz said the person conducting the test would know the source of the marijuana. .

246. During a second visit to the facility on August 8, 2023, DCR personnel observed containers in the extraction room between the ovens. The containers held partially filled cartridges and syringes, which DCR described as what appeared to be marijuana product.

247. Both Tania Conte and Kistner testified that there could be issues with filling and capping cartridges in the packaging process, requiring full or partial cartridges to be wasted.

248. From the description of the cartridges and syringes in the extraction room between the ovens, these may have been in the process of being wasted.

249. DCR collected samples of material from the Delta facility and sent it for testing for a cannabinoid profile; however, it did not collect samples from the cartridges and syringes in the extraction room between the ovens. There is no evidence that the cartridges or syringes contained marijuana product.

Order of Immediate Suspension

250. DCR received a report on June 30, 2023, from the director of MoCannTrade (Missouri Cannabis Trade Association), expressing concern about some licensees engaging in product inversion. The report DCR received also included a copy of an alert the association sent to its members cautioning them about “companies and individuals reportedly attempting to skirt the Missouri rules through the introduction of unlawful biomass, distillate, Delta 8 and/or other THC commodities into the Missouri regulated system, also known as inversion.” Stay Hearing Exhibit F. The association also provided DCR with an email from an Oklahoma distillate producer advertising that it had THC-A distillate made from hemp available for sale and that it was already shipping its THC-A distillate into Missouri.

251. Separately, DCR received a complaint from an anonymous source that implicated Delta in the inversion of marijuana product. DCR did not interview the source because the person insisted on security and DCR could not provide it.

252. DCR began reviewing Metrc records for Delta and determined that records indicated that inversion was occurring. Its investigation also found what it believed was evidence that Delta was distributing products in the market without the products being compliantly tested.

253. DCR issued and served its order of immediate suspension on Delta on August 2, 2023. The order required Delta to: immediately suspend all operations and activities; refrain from moving or altering any marijuana product either physically or in Metrc; secure all

marijuana product in the facility; secure and keep all personnel from entering the facility. The reasons given for the order were (1) a credible report of inversion of marijuana product at the facility; and (2) a credible report that Delta was permitting marijuana product to enter the regulated market without being compliantly tested.

254. In a conference call on August 7, 2023, between Delta and DCR about the order of immediate suspension, Delta's attorneys asked how Delta could cure any of the alleged violations. Delta reiterated its willingness to cure violations in a letter the following day.

Amended Notice of Pending Revocation and Response

255. DCR issued a notice of pending revocation (NOPR) on August 11, 2023. The NOPR was superseded on September 1, 2023, by DCR's issuance of an amended notice of pending revocation (ANOPR).

256. The ANOPR listed multiple bases for revocation, some of which had been listed in the NOPR and some that were new bases listed in the ANOPR. The notice provided:

The revocation will not take effect until at least 30 days from the date of this notice. During the 30-day period, the Licensee will have the opportunity to respond to the allegations in this notice and submit records or information demonstrating why the license should not be revoked. At the end of the response period, DCR will notify the Licensee whether the license is revoked, other penalties are issued, or the Notice of Pending Revocation is withdrawn.

Ex. R-G at 2. After stating the bases for DCR's action, the ANOPR reiterated that Delta had 30 days from the date of the notice, which it stated was October 2, 2023, to respond to the notice and submit records or information showing why the license should not be revoked. It added: "A response should include any information the Licensee believes is relevant to whether the violations described above have occurred. If the Licensee is unable to show through its response

to the satisfaction of the Department that the violations described above did not occur, the license may be revoked without further notice.” Ex. R-G at 5.

257. The ANOPR did not include the exact phrase “the opportunity to cure the deficiencies” found in 19 CSR 100-1.020(3)(G) (final rule). Nor did it expressly exclude an “opportunity to cure” or state that DCR would not consider any efforts to cure deficiencies Delta might take in the 30 days period until the revocation became effective. Ex. R-G at 5.

258. Following the Notice of Pending Revocation, Delta told DCR it would like to cure some of the alleged security deficiencies listed in the NOPR.

259. Delta provided a written response to the ANOPR on October 2, 2023. The response stated Delta’s general position that it had not violated the regulations as asserted in the ANOPR:

[M]uch of the NOPR is based on a fundamental misreading of the law. From February 3, 2023 to July 30, 2023, Delta was producing marijuana product which originated with Missouri-grown marijuana, then added hemp-based THCA. As set out below, this was entirely legal and it was known to and at least tacitly approved by DCR. And other licensees were doing the same things, with no adverse consequences by DCR.

Ex. R-H at 3. The response added, “In sum, under these facts, the draconian remedy of revocation is simply not warranted. Delta respectfully asks that DCR not proceed with the revocation.” Ex. R-H at 4. The essence of Delta’s response to alleged violations of regulations set out in the ANOPR is that Delta’s actions were “entirely legal” or that violations were not factually supported. In response to the allegations of security violations, Delta either argued there was no violation or offered an explanation for the violation. At the same time, it also stated that it had resolved the noted deficiencies. Ex. R-H at 16-19.

260. The Department issued its Notice of Revocation on November 16, 2023, providing the reasons for the revocation. Based on the information provided by Delta, DCR removed one basis for the revocation of the license.¹⁷ The notice recited, “the Licensee was provided the opportunity to cure the deficiencies listed in the [ANOPR] and/or respond to the [ANOPR], including the submission of records or information demonstrating why the license should not be revoked.” Ex. R-I at 1. The notice referenced an agreement between the parties to stay destruction of the products until the matter is finally resolved. The notice delayed the effective date of the revocation until December 2, 2023, to allow Delta to transfer the illegally produced product or to destroy it.

Administrative Hold and Product Recall

Administrative Hold

261. On August 3, 2023, DCR issued an administrative hold related to Delta’s products. Ex. R-E. The Notice of Administrative Hold was not issued to Delta, the licensee whose product is subject to the administrative hold. It is a notice that is directed to licensees shown in Metrc as having received products from Delta. *Id.*

262. The Notice of Administrative Hold advised the licensees receiving the notice:

Marijuana product in your inventory has been placed on administrative hold. Pursuant to 19 CSR 100-1.100(4)(P), the Department of Health and Senior Services may immediately place marijuana product on administrative hold where the product presents a potential threat to health and safety. Product must remain on administrative hold until such time as the Department determines the product is safe, may be remediated, or must be destroyed.

¹⁷ The notice of revocation stated, “DCR withdraws the following as bases of revocation: . . . 1. From paragraph 8, regarding 19 CSR 100-1.090, the Licensee provided information in the NOPR response that ‘the shipping container is not on the licensed area of the property.’ The other violations remain in paragraph 8.” Ex. R-I at 2.

Ex. R-E at 1. The Notice did not mention Delta by name. It stated as the reason for the administrative hold, “As part of an on-going investigation, DCR has determined there is a credible and imminent threat to public health that warrants placing product within this Licensee’s inventory on administrative hold.” Ex. R-E at 2. Dispensary licensees were directed to check Metrc before selling a marijuana product to ensure the product was not on administrative hold. Licensees were required to determine what product they had in inventory that was on administrative hold and quarantine it in the space the licensee had designated for quarantined items. Once quarantined, the product could not be moved or altered. The notified licensees were to acknowledge receipt of the notice and state whether they intended to reply. Finally, the notice advised that there would be further contacts from DCR about the hold as the investigation proceeded.

263. Delta was separately notified of an administrative hold in the Order of Immediate Suspension, “All marijuana in the facility or originating from the Licensee will be placed on administrative hold in Metrc by DCR.” Stay Hearing, Ex. 2 at 1.

264. The administrative hold of August 3, 2023, applied to all products manufactured by Delta that were in Delta’s facility and shown in Metrc to be in the inventory of other licensed facilities. The administrative hold applied to Conte products, bulk distillate, Midwest Magic products and white label products.

265. The administrative hold was partially lifted in conjunction with the updated recall that was issued on October 20, 2023.

266. The products released from administrative hold and recall were identified in accordance with the following process: Delta provided an attestation from J. Maritz as to Metrc product tags that were sourced solely from marijuana grown within the state and that did not

include THC sourced from unregulated cannabis sources; DCR staff then reviewed those Metrc tags and confirmed that the attestation was accurate. Products associated with the tags that DCR was able to verify as having a legal source were removed from administrative hold and the recall list.

Product Recall

267. On August 14, 2023, DCR issued its Division of Cannabis Regulation Notice of Recall. The notice of recall was a public announcement, stating “The Missouri Division of Cannabis Regulation (DCR) is issuing a patient and consumer communication to alert patients and consumers about a mandatory product recall.” Ex. R-C (emphasis added). The notice identified the products recalled as products Delta manufactured and sold to dispensaries and manufacturers. Delta’s license number was referenced (which would have appeared on the product label), and a web link provided to the list of recalled products. The reason given for the recall was, “The recalled products were not compliantly tracked in the statewide track and trace system (Metrc) in order for DCR to verify the products came from marijuana grown in Missouri or that the product passed required testing prior to being sold at dispensaries.” Ex. R-C. Members of the public who had purchased recalled products were advised to discontinue using them and to either discard them or return them to the dispensary where the products were purchased.

268. The recall of August 14, 2023, applied to all products manufactured by Delta, including Conte products, bulk distillate, Midwest Magic, and white label products.

269. On October 20, 2023, DCR issued its Notice of Mandatory Recall – Updated. In referencing the reason for the recall, the updated notice stated, “The products presented a potential threat to public health and safety because the licensee was manufacturing marijuana

products that contained THC sourced from cannabis grown outside of the Missouri regulated market.” Ex. R-D. In explaining the reason for updating the recall, the notice provided:

After review of the marijuana product on recall, DCR has verified in the statewide track and trace system (Metrc) that some of the marijuana products on recall contain THC solely sourced from marijuana grown in the Missouri regulated market. Accordingly, DCR has removed the below referenced marijuana products from the recall list and has lifted any associated administrative hold. The remaining marijuana product will remain on recall and may have an administrative hold. DCR will provide additional guidance to licensees as DCR continues its investigation into the affected products.

Ex. R-D. The notice provided web links to both the products “removed from the recall list and administrative hold,” and to those products remaining on recall. The updated notice of recall was addressed to licensees, as well as members of the public.

270. During the hearing, J. Maritz claimed he found “a ton of examples in just five minutes this morning looking through [the updated recall list] of Midwest Magic products that don’t contain hemp-based THCA that are still locked up.” Tr. vol. III, 76. J. Maritz identified a small number of products by name that were Midwest Magic products that would not have been manufactured using THC-A from hemp sources.

271. J. Maritz had not identified these products in the list Delta provided to DCR, to which he attested, before DCR issued the updated recall or administrative hold.

272. Delta has not identified any products identified in the list provided to DCR and attested to by J. Maritz that remain on the updated recall list.

273. J. Maritz did not do a comprehensive analysis of the recall list to determine what products should not be on the list.

274. Following J. Maritz’s testimony claiming that the recall list contained products that were sourced only from regulated marijuana, Kirkweg reviewed the recall list for the

products J. Maritz identified during his testimony. She determined the products were listed as “Test 11” in Metrc followed by a Metrc tag. Those were not final products at a dispensary but were samples that had been sent out for final testing. Although they could be removed from the list, their removal would not affect patients and consumers because they were test samples.

275. DCR did not use product name, specifically Midwest Magic, as a criterion for releasing products from the recall list and administrative hold. The deciding factor was whether DCR could verify the source of the THC in the product. If Midwest Magic products remained on the recall list and administrative hold, it was because DCR could not verify in Metrc that they were sourced solely from regulated marijuana.

276. The result of lifting the recall would be that a lot of unregulated THC in marijuana product would be distributed to patients and consumers through Delta’s products.

Conclusions of Law

”The function of the [Administrative Hearing Commission] in administrative review proceedings is to render the agency’s final decision, exercising the same authority as the underlying agency.” *State Bd. of Regis’n for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 266 (Mo. App. W.D. 2012), and cases cited therein. We decide the issues that were before the Department. *Cf. Department of Soc. Servs. v. Mellas*, 220 S.W.3d 778, 782-83 (Mo. App. W.D. 2007). Our review is *de novo*, that is, no particular deference is given to the administrative record on which the agency based its decision. *State Bd. of Regis’n for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 264 (Mo. App. W.D. 2012); *Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 53 (Mo. banc 2001). We may exercise the same degree of discretion as the Department and DCR, although we need not exercise it in the same way as the Department and DCR did. *Trueblood*, 368 S.W.3d at 264-267.

This Commission separately and independently determines whether cause exists for the administrative actions under appeal. *Kennedy v. Mo. Real Estate Comm'n*, 762 S.W.2d 454, 457 (Mo. App. E.D. 1988). The party with the burden of proof must establish its case by a preponderance of the evidence. *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000). A preponderance of the evidence is “that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.” *Id.* A party may meet this burden by producing substantial evidence of probative value or by the inferences reasonably drawn from such evidence. *Farnham v. Boone*, 431 S.W.2d 154, 156 (Mo. 1968).

The record in this case includes testimony and exhibits from the August 14, 2023 hearing on Delta’s emergency motion for stay, the hearing held on March 4, 5 and 6, 2024¹⁸ on Delta’s second amended complaint, as well as numerous deposition transcripts and deposition exhibits. The terminology used by the witnesses describing the chemicals and processes involved in Delta’s production of marijuana products was at times imprecise and inconsistent. There was also inconsistent testimony concerning communications between Delta and DCR personnel. In making our separate and independent determination, we judge the credibility of witnesses, as well as the weight and value to be accorded the evidence. *Faenger v. Petty*, 441 S.W.2d 199, 204 (Mo. App. W.D. 2014). We may believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Regis’n for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D. 2001). When there is a direct conflict in the testimony, we make a choice between the conflicting

¹⁸ Exhibits from the Stay Hearing are cited Stay Hearing Ex. ___. Each day of the transcript for the proceedings on March 4, 5 and 6, 2024 is in a separate volume and are cited as Tr. vol. I; Tr. vol. II; and Tr. vol. III, respectively.

testimony. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992). Our findings of fact reflect our credibility determinations.

I. Burden of Proof

The parties dispute who has the burden of proof as to the revocation of Delta's license and the other three administrative decisions at issue in this case. In open hearing, counsel for DCR announced, "This is a license revocation case and I do understand that the – the State needs to demonstrate the appropriateness of the revocation." Tr. vol. I, 6. Although he also asked to brief the issue, his initial assertion is consistent with cases dealing with license revocation. *Queen of Diamonds, Inc. v. Quinn*, 569 S.W.2d 317, 319 (Mo. App. E.D. 1978) (in liquor license revocation proceeding, the burden is on the agency revoking the license to prove the basis for revocation); *Heidebur v. Parker*, 505 S.W.2d 440, 444 (Mo. App. E.D. 1974) (board of police commissioners bore burden to establish cause for peace officer's discharge). The order of immediate suspension, administrative hold, and product recall, like the revocation, are all license discipline matters. Accordingly, the Department has the burden of proof as to all four decisions at issue in this case.

II. Order of Immediate Suspension of Operations

DCR issued its order of August 2, 2023, directing Delta to immediately suspend all operations. The order of immediate suspension is not the final suspension of a license. It is a temporary safety measure initiated on a credible and imminent threat to public safety and serves to protect the public while DCR fully investigates the matter and determines what final action is appropriate. On the requisite finding of a credible and imminent threat to the public safety, the order may be entered and remain in place "until the threat has been eliminated." 19 CSR 100-1.020(3)(G)1 (final rule).

Orders of immediate suspension are authorized by Article XIV of the Constitution, “in instances where there is a credible and imminent threat to public health or public safety.” MO. CONST. art. XIV, § 2.4(1)(a) and § 2.4(4)(a). Consistent with this provision, the Department’s rule, 19 CSR 100-1.020(3)(G) (final rule), provides for immediate suspension of operations of a licensed facility. This regulation defines “imminent threat to public safety” to include, as applicable to this case, a credible report: (1) “that diversion or inversion of marijuana product is occurring at the licensed facility,” or (2) “that a facility’s practices are permitting marijuana product to enter the regulated market without being compliantly tested.” 19 CSR 100-1.020(3)(G)1.B and C (final rule).

The term inversion in 19 CSR 100-1.020(3)(G)1.B is not defined. Under the principles of statutory construction, which apply equally to the construction of administrative regulations, words are generally given their plain and ordinary meaning. *See Doe v. St. Louis Cmty. Coll.*, 526 S.W.3d 329, 336 (Mo. App. E.D. 2017). The dictionary includes a number of definitions of “inversion,” including “a reversal of position, order, form or relationship;” and “the condition of being turned inward or inside out.” *Inversion*, MERRIAM-WEBSTER DICTIONARY (online ed.) www.merriam-webster.com/dictionary/inversion (last visited January 27, 2025). Of these definitions, “the condition of being turned . . . inside out” most closely describes the principle of inversion when read in the context of the phrase “diversion or inversion is occurring at the licensed facility.” However, rather than applying this dictionary definition, we conclude that the term “inversion of marijuana product” as used in this regulation is intended to be applied in a technical sense and given its technical meaning. *See* Section 1.090; *State v. Fox*, 658 S.W.3d 186, 191 (Mo. App. W.D. 2022) (“Words and phrases having a technical meaning are to be applied in their technical sense, unless it appears they were intended to be used otherwise”). We

can ascertain the meaning of technical words and phrases by referring to persons with knowledge of the subject or by consulting reference books. *City of Aurora v. Spectra Communications Grp.*, 592 S.W.3d 764, 784 (Mo. banc 2019). DCR’s Deputy Director of the Section for Compliance & Enforcement qualifies by her background and experience as a person with knowledge on the subject. As explained in her affidavit and testimony at both the stay hearing and the final hearing, inversion involves the introduction of THC derived from unregulated cannabis into marijuana products manufactured and sold in Missouri:

Inversion occurs when cannabis seeds, plants, or products made from them come into the regulatory market from outside the system. This can happen in several ways, including when cannabis seeds, plants, or products come from producers outside of Missouri’s system or when hemp-derived chemically modified (“converted”) cannabinoids are added to products.

Stay Hearing, Ex. R, ¶ 9, at 2; *see also* Tr. vol. I, 54, 70. This explanation corresponds with the definition offered by Delta’s cannabis expert, who explained: “Now there’s an industry term [inversion], which means using something different and putting it into a product from some other source than expected.”¹⁹ Tr. vol. III, 192. Kirkweg’s definition of “inversion” is also consistent with the usage of this term by MoCannTrade in a communication it sent in June 2023 to the trade association’s members, alerting them to “companies and individuals reportedly attempting to skirt the Missouri rules through the introduction of unlawful biomass, distillate, Delta 8 and/or other THC commodities in the Missouri regulated system, *also known as inversion.*” Stay Hearing Ex. F (emphasis in original).

Based on this definition, inversion occurs when THC from an unregulated source (such as THC converted from THC-A in hemp) is added to a marijuana product manufactured in

¹⁹ Delta’s expert witness did not address whether inversion would occur if THC in a product originated from THC-A derived from a source other than regulated marijuana cultivated in Missouri. His testimony suggests he was either unaware of 19 CSR 100-1.170(2)(E), or he simply ignored it.

Missouri. As is explained in more detail in the discussion of the license revocation, the Department's regulations prohibit this practice by specifying that marijuana products can only contain THC derived from marijuana cultivated by a licensed marijuana cultivator in the state. 19 CSR 100-1.170(2)(E) (emergency and final rules).

A "credible report" is also not defined by the regulation. In this instance, the words are not used in a technical sense, so we simply give them their plain and ordinary meanings from the dictionary. *Teague v. Mo. Gaming Comm'n*, 127 S.W.3d 679, 686 (Mo. App. W.D. 2003). "Credible" means "1. Capable of being believed; believable; plausible. 2. Worthy of confidence; reliable." *Credible*, The American Heritage Dictionary at 338 (2nd College ed. 1991).

The evidence established that DCR had credible reports of inversion when it issued the order of immediate suspension to Delta. To the extent THC from an unregulated source was being added as an ingredient to marijuana products in Missouri, an inversion occurred. The Metrc records DCR reviewed before issuing the immediate order of suspension showed a likelihood that THC extracted from unregulated cannabis was being added to Delta's products during the manufacturing process. This was evident from comparing the initial weight of regulated THC (usually distillate) to the final weight of the marijuana product the regulated THC was used to produce, along with the final cannabinoid profile of the product which showed a high THC content and minimal or non-detectable levels of THC-A. DCR's conclusion from this evidence was that THC from unregulated cannabis was being added to the products. This conclusion was plausible, logical, and reasonable (and was ultimately borne out after the immediate suspension went into effect by statements made to DCR by Delta, Sparks, and Conte during DCR's ongoing investigation, as well as the overwhelming amount of evidence presented

in this proceeding). In addition, the information came from a credible report – the Metrc entries that Delta itself entered into DCR’s track and trace system.

DCR had grounds to order the immediate suspension of Delta’s operations. Under 19 CSR 100-1.020(3)(G)1(final rule), the order of suspension remains in place “until the threat has been eliminated.” As explained in more detail in the discussion of the administrative hold placed on Delta’s products, that threat exists so long as the marijuana product manufactured through inversion exists. Contrary to Delta’s argument, the order of revocation did not terminate the order of immediate suspension.

III. Revocation of Delta’s License

A. Violations Related to Marijuana Product Content

The Department asserts that Delta’s license is subject to revocation due to two rule violations stemming from Delta’s use of THC-A oil purchased from outside Missouri. First, because the bulk distillate and Conte products manufactured and sold by Delta did not originate from regulated marijuana, the Department claims Delta has violated 19 CSR 100-1.100(4)(F) (emergency rule). Next, because Delta used THC derived from plants other than regulated marijuana in its bulk distillate and Conte-labeled products, the Department asserts Delta has violated 19 CSR 100-1.170(2)(E) (emergency rule). The underlying facts are not in dispute. Delta admits it produced bulk distillate and Conte-labeled products by mixing a large amount of THC derived from THC-A extracted from hemp plants with a smaller amount of THC derived from THC-A extracted from Missouri-regulated marijuana grown by Missouri-licensed cultivators.

1. Violation of 19 CSR 100-1.100(4)(F)

Department rule 19 CSR 100-1.100(4)(F) (emergency rule) provides:

All marijuana product sold in Missouri, including plants, flowers, pre-rolls, and infused products, shall have originated from marijuana grown and cultivated in a licensed cultivation facility located in Missouri.

The key terms in this provision are “marijuana,” “marijuana product” and “originated.”²⁰ Both marijuana and marijuana product are defined in DCR’s regulations:

“Marijuana” or “marihuana” means *Cannabis indica*, *Cannabis sativa*, and *Cannabis ruderalis*, hybrids of such species, and any other strains commonly understood within the scientific community to constitute marijuana, as well as seeds, clones, and resin extracted from the marijuana plant. “Marijuana” or “marihuana” does not include industrial hemp as defined by Missouri statute, or commodities of products manufactured from industrial hemp.

* * *

“Marijuana product” means marijuana, marijuana-infused products, or other products made using marijuana, including prerolls, as those terms are defined herein, unless otherwise provided for in these rules.

19 CSR 100-1.010(45) and (49) (emergency rule), respectively.²¹ “Originated” is not defined in 19 CSR 100-1.100(4)(F) (emergency rule). Its plain and ordinary meaning, as used in the regulation, is “to come from a particular place, time, situation, etc.” *Originate*, CAMBRIDGE DICTIONARY (online ed.) <https://dictionary.cambridge.org/us/dictionary/english/originate> (last visited January 27, 2025).

To understand Delta’s alleged violation of this regulation, it is necessary to first understand the basics of marijuana product manufacturing. Consumers of marijuana products are interested in the high or intoxication created by consumption of the product, which may be eaten, smoked, vaped or otherwise ingested by the consumer. The psychoactive chemical that produces

²⁰ This rule is found at 19 CSR 100-1.100(4)(I) in the final rule and reads, “All marijuana product sold in Missouri shall have originated from marijuana grown and cultivated in a licensed cultivation facility located in Missouri.”

²¹ These definitions were also included in the Department’s final rules at 19 CSR 100-1.010 (48) and (52).

this desired intoxication is tetrahydrocannabinol, otherwise known as THC. THC does not occur naturally in either the marijuana plant or the hemp plant. THC-A does.²² The THC-A found in marijuana plants or hemp plants is extracted from the plants as an oil and then can be converted to THC by decarboxylation, a process that involves the application of heat to THC-A. The THC-A oil used to produce the Conte products and bulk distillate manufactured by Delta was extracted from hemp plants by sources outside Missouri—not by Delta or Sparks in the Delta facility. All the THC-A oil derived from hemp used by Delta to produce these products was converted to THC prior to the sale of the products. It was not resold as THC-A.

Delta argues that 19 CSR 100-1.100(4)(F) (emergency rule) requires only that the production of a marijuana product begin with some THC from a marijuana plant obtained from a licensed Missouri cultivator, to which can be added any amount of THC sourced from THC-A derived from hemp plants. In other words, under Delta’s view, compliance with 19 CSR 100-1.100(4)(F) (emergency rule) can be achieved so long as a single gram of THC sourced from a marijuana plant obtained from a licensed Missouri cultivator is included in a batch of product that might contain hundreds or thousands of grams of psychoactive THC that come from non-marijuana cannabis plants, including hemp plants. This interpretation is unreasonable.

We construe 19 CSR 100-1.100(4)(F) (emergency rule) to mean that the THC in marijuana products can come only from marijuana plants grown and cultivated in licensed Missouri cultivation facilities. THC originating from other sources is prohibited. The language “shall have originated from marijuana grown and cultivated in a licensed cultivation facility,” 19 CSR 100-1.100(4)(F) (emergency rule) (emphasis added), supports this interpretation. If marijuana products shall originate from marijuana plants, and the definition of marijuana

²² CBD also occurs naturally in hemp plants and can be converted to delta-8 THC. The Delta products at issue here contained THC produced by the conversion of THC-A to delta-9 THC.

specifically excludes industrial hemp plants, then it follows that industrial hemp cannot be the origin of marijuana products.

Delta has violated 19 CSR 100-1.100(4)(F) (emergency rule) by adding THC originating from industrial hemp to its products.

2. Violation of 19 CSR 100-1.170(2)(E)

The Department also alleges that Delta has violated 19 CSR 100-1.170(2)(E) (emergency rule). This regulation applies specifically to manufacturing facilities, in contrast to 19 CSR 100-1.100(4)(F) (emergency rule), which applies generally to all licensee facilities. 19 CSR 100-1.170(2)(E) (emergency rule) provides:

Any tetrahydrocannabinol in a marijuana product manufactured by a manufacturing licensee shall only be derived from marijuana cultivated in Missouri by a licensed cultivator[.]

As noted above, tetrahydrocannabinol is the scientific name for THC.

Tetrahydrocannabinol, MERRIAM-WEBSTER DICTIONARY, online ed., www.merriam-webster.com/dictionary/tetrahydrocannabinol (last visited January 27, 2025). This rule unambiguously provides that any THC present in Missouri-manufactured marijuana products can only be derived from marijuana plants grown in Missouri. The word “derive” means to “take, receive, or obtain especially from a specified source.” *Derived*, MERRIAM-WEBSTER DICTIONARY, online ed., www.merriam-webster.com/dictionary/derive (last visited January 27, 2025). The Department’s regulation thus prohibits licensees from using THC derived from any source other than marijuana cultivated by a licensed cultivator in Missouri. This provision prohibited Delta’s use of THC derived from the conversion of THC-A extracted from hemp.

Delta does not dispute that its bulk distillate and Conte products contained THC derived from sources other than marijuana cultivated by a Missouri licensed cultivation facility. The

evidence supports a finding that most, or nearly all, of the THC in the bulk distillate and Conte products came from non-compliant sources. Delta violated 19 CSR 100-1.170(2)(E) (emergency rule).

Delta argues “It was not until DCR issued its final rule in July 2023 that Delta was prohibited from using THC-A that did not originate from Missouri cultivated marijuana.” Pet. Brief at 48. In other words, its position is that the emergency rule did not prohibit the use of THC derived from THC-A extracted from hemp, and the prohibition against this practice did not go into effect until July 30, 2023, the effective date of the final version of 19 CSR 100-1.170(2)(E).

The final version of 19 CSR 100-1.170(2)(E) stated, “Any tetrahydrocannabinol, *such as THC-A, Delta-8, or Delta-10*, in a marijuana product manufactured by a manufacturing licensee shall only be derived from marijuana cultivated in Missouri by a licensed cultivator[.]” 19 CSR 100-1.170(2)(E) (final rule) (italics indicate additions to the text included in the final rule). Delta’s contention is that the italicized language changed the meaning of the rule and that prior to the inclusion of this language, adding THC-A derived from hemp was not prohibited. This is incorrect.

Both the emergency rule and the proposed final rule were filed and published in the *Missouri Register* at the same time. The adoption of adult use marijuana by the voters in Article XIV, § 2, necessitated the filing of the emergency rule during the time the proposed rule was proceeding through the rulemaking process before becoming final. The emergency rule and the proposed rule were identical when filed, and stated, “Any tetrahydrocannabinol in a marijuana product manufactured by a manufacturing licensee shall only be derived from marijuana cultivated in Missouri by a licensed cultivator[.]” *Compare* 19 CSR 100-1.170(2)(E) (emergency rule) *with* 19 CSR 100-1.170(2)(E) (proposed rule), 48 Mo. Reg. at 518. The

Department sought public comments on the proposed rule pursuant to § 536.026, and, in issuing the final order of rulemaking explained the reason for the language as added to the final rule:

COMMENT #7: Missouri Department of Health and Senior Services Staff suggested for 19 CSR 100-1.170(2)(E) to include examples of the tetrahydrocannabinols for clarity purposes.
RESPONSE AND EXPLANATION OF CHANGE: 19 CSR 100.1.170(2)(E) was revised to implement this change.

48 Mo. Reg. at 1120. The final rule did not change the meaning of the proposed or emergency rules. The same tetrahydrocannabinols were prohibited under the emergency rule as were prohibited under the final rule. The final rule did not add new tetrahydrocannabinols to the prohibition – it simply provided examples in a non-inclusive list of tetrahydrocannabinols that are encompassed by the term “any tetrahydrocannabinol” in the emergency rule. Delta was in violation of emergency rule 19 CSR 100-1.170(2)(E) (emergency rule) in the manufacture of its bulk distillate and Conte products.

Delta also challenges this ground for discipline, as well as all the other grounds, with the argument: “It is without doubt that DCR cannot regulate any substance other than marijuana. This leads to the conclusion that DCR may not discipline licensees for their use of hemp-derived ingredients in marijuana products.” Pet. Brief at 64. More specifically, Delta contends that the Missouri Constitution “grants DCR authority only to regulate marijuana. The only conclusion then is that DCR has *no* regulatory authority over non-marijuana products, including industrial hemp, or commodities or products manufactured from industrial hemp.” *Id.* at 65. Delta’s argument focuses solely on the definition of marijuana in Article XIV, §2.2(13), specifically the sentence, “‘Marijuana’ or ‘marihuana’ do not include industrial hemp, as defined by Missouri statute, or commodities of products manufactured from industrial hemp.” MO. CONST. art. XIV, § 2.2(13).

The fallacy of Delta’s argument is that the Department and its regulations, 19 CSR 100-1.170(2)(E) (emergency and final rules) and 19 CSR 100-1.100(4)(I) (emergency and final rules), are regulating marijuana products legalized under Article XIV of the Constitution by designating the permissible sources of THC that can be included in marijuana products manufactured and sold by licensed marijuana facilities. Among the purposes of the regulation of the commercial production and distribution of marijuana products authorized by Article XIV of the Missouri Constitution is to “protect public health by ensuring the safety of marijuana and products containing marijuana.” MO. CONST. art. XIV, § 2.1 (emphasis added). Article XIV also authorizes the Department to promulgate regulations setting “[r]equirements and standards for safe cultivation, processing, and distribution of marijuana and marijuana-infused products by marijuana facilities, including health standards to ensure the safe preparation of marijuana-infused products[.]” MO. CONST. art. XIV, § 4(4)(b) (emphasis added). Consistent with and pursuant to this constitutional authority, DCR is regulating the content and ingredients of the marijuana products manufactured in marijuana-infused products facilities and sold to consumers in licensed dispensary facilities. It is not regulating industrial hemp, what hemp commodities or hemp products can be manufactured from industrial hemp, or the processes for manufacturing hemp products.²³ Further, nothing in the sentence appended to the definition of marijuana in Article XIV referencing hemp is an affirmative grant of a benefit to the hemp industry or a directive to the Department to permit the inclusion of hemp-derived THC in marijuana products manufactured in Missouri. Finally, nothing in that definition is a prohibition against the

²³ As shown by the excerpts quoted from Delta’s brief, it believes Article XIV only allows DCR to regulate the marijuana that goes into marijuana products and leaves it powerless to control any other substance that is added to the products. Under Delta’s interpretation, any number of harmful or otherwise unregulated substances could be added to marijuana product and DCR would have no power to prohibit it or respond to threats to the public from such products being introduced into the market. This narrow interpretation of the power granted DCR under Article XIV should be rejected, as it would produce an absurd result.

Department limiting the source or sources of THC in marijuana products manufactured in Missouri-licensed facilities to only marijuana plants that are grown in Missouri by licensed cultivation facilities. Rules 19 CSR 100-1.170(2)(E) (emergency rule) and 19 CSR 100-1.100(4)(F) (emergency rule) are wholly within the authority granted DCR under Article XIV. Delta's argument is without merit.

Delta also references 19 CSR 100-1.170(2)(F) (emergency rule) three times in the Findings of Fact in its post-hearing brief. Delta Brief, Finding of Fact (FOF) 37, FOF 53, and FOF 64. Delta does not discuss this provision in either the legal argument it made at the beginning of its post-hearing brief or in its proposed conclusions of law. Nor does it explain how it applies to the matter before this Commission. This particular subdivision of the regulation is also not cited in Delta's Second Amended Complaint. Delta has not raised the application of this provision before the Commission.

The subdivision in question provides:

(F) Manufactured product may not contain chemical modification, conversion or synthetic derivation of cannabinoids to produce intoxicating cannabinoid isomers, and all cannabinoids acquired from entities other than marijuana facilities for inclusion in marijuana product must be accompanied by a Certificate of Analysis at time of acquisition that identifies the testing lab that tested the product and lists the product's ingredients[.]

19 CSR 100-1.170(2)(F) (emergency rule). This provision does not allow what the immediately preceding provision, 19 CSR 100-1.170(2)(E) (emergency rule), prohibits with respect to the source of THC permitted in marijuana products. The Certificate of Analysis requirement in 19 CSR 100-1.170(2)(F) (emergency rule) would apply in those instances in which raw or unconverted cannabinoids (i.e. cannabinoids that have not been converted to THC) are mixed with regulated THC. Delta manufactured these "ratio products" early in its business. As the

evidence shows, CBD is a cannabinoid that is sometimes added to marijuana products in its raw form for the non-intoxicating effects it produces. This provision provides that when non-intoxicating cannabinoids are added to marijuana product, a COA must be obtained to establish that the product does not include unsafe chemicals. The COA would also establish that the cannabinoids do not include THC. Delta's products do not come within this provision of 19 CSR 100-1.170(2)(F) (emergency rule) because Delta was not adding non-marijuana cannabinoids to its products in a raw, non-intoxicating state. We read 19 CSR 100-1.170(2)(E) (emergency rule) and 19 CSR 100-1.170(2)(F) (emergency rule), *in pari materia* and harmonize them. *State ex rel. Evans v. Brown Builders Electrical Co., Inc.* 254 S.W.3d 31, 35 (Mo. banc 2008). Read together the provisions are clear: THC in marijuana products must come from regulated marijuana; other cannabinoids in marijuana products cannot be in the form of intoxicating cannabinoids; and if non-intoxicating cannabinoids are ingredients in a marijuana product, there must be an accompanying COA that identifies the testing lab and the ingredients.

Even if the second phrase of 19 CSR 100-1.170(2)(F) (emergency rule) applied to Delta's situation, it was still in violation of 19 CSR 100-1.170(2)(E) (emergency rule) by using hemp-derived THC in its products. Additionally, the COAs it produced were not acquired at the time it acquired the THC-A oil. It was not until after the order of immediate suspension that Delta obtained copies of COAs and, with the possible exception of the Encore Labs COA entered into evidence, the COAs it produced are either not tied to a particular shipment of THC-A oil Delta received or are non-compliant in terms of what was tested for and reported.

B. Seed-to-Sale Tracking Violations

The Department's authority to require a seed-to-sale tracking system and implement regulations to carry out that requirement is found in Article XIV. MO. CONST. art. XIV, § (1)(d).

The emergency rules generally applicable to tracking marijuana are found in 19 CSR 100-1.130 (emergency rule).

The alleged violations fall in essentially three categories: (1) failure to accurately list ingredients for products entered into Metrc, (2) entry of false information into Metrc, and (3) inventory control issues. Under the Department’s seed-to-sale tracking regulation, all facility licensees are required to use the statewide track and trace system to track marijuana product coming into, located in, and going out of the facility. 19 CSR 100-1.130(1)(D) (emergency rule). Metrc is the Department’s statewide track and trace system. “All marijuana product in a medical or marijuana facility must be traceable in the statewide track and trace system at all times[.]” 19 CSR 100-1.130(1)(E) (emergency rule). With respect to entering information into Metrc:

Licensees must enter into the statewide track and trace system each day’s beginning inventory, harvests, acquisitions, sales, disbursements, remediations, disposals, transfers, deliveries, ending inventories, and any other data necessary to complete the inventory control records in the statewide track and trace system. Records will not be considered complete unless all available fields for a particular action are completed, including the identity of the facility agent making the records[.]

19 CSR 100-1.130(1)(F) (emergency rule). A new Metrc traceability tag and entry of that tag into Metrc is required when a marijuana product changes product category (for example, when THC-A is extracted from marijuana biomass in the creation of crude oil), or when the product is incorporated into a different marijuana product (for example, when bulk distillate is loaded into vape cartridges). 19 CSR 100-1.130(1)(E)3 (emergency rule). Among the requirements applicable to manufacturing licensees is that they must “[r]ecord in the statewide track and trace system all active and inactive ingredients in each final manufactured product[.]” 19 CSR 100-

1.130(1)(J)3 (emergency rule).²⁴ Finally, “[a]ll facility licensees must ensure the accuracy of information entered into the statewide track and trace system on a daily basis[.]” 19 CSR 100-1.130(1)(L) (emergency rule).

1. Failure to Properly List Ingredients

The Department provided evidence that in multiple instances, Delta failed to properly track marijuana product in Metrc by failing to properly list ingredients. The Department’s position is that the information recorded in Metrc fails to document that hemp-derived THC is among the products’ ingredients. Some of these instances occurred prior to February 3, 2023, the effective date of the emergency rule. There can be no violation of the emergency rule in those instances because the provisions on which the Department relies were not in effect at the time.

The evidence established seven instances after February 3, 2023, in which Metrc entries were recorded for new product packages created by Delta that combined a small amount of regulated marijuana from an existing Metrc package with a large amount of unidentified psychoactive ingredients into the resulting new package. These seven product packages were identified by Metrc package tags ending in 2177, 2752, 3411, 3047, 4479, 4482, and 4636. None of the Metrc entries list any ingredients that were added to the product. For example, for Metrc package tag ending in 2177, the entry recites that Delta created 160,286 grams of crude distillate from 4,400 grams of crude distillate from package ending in Metrc tag number 2176. However, it does not identify the substance added to the 4,400 grams of crude distillate to make the total distillate package amount of 160,286 grams. Kistner could not confirm that he ever added unregulated THC-A oil (for example, hemp THC-A oil) to Metrc entries after Delta stopped manufacturing marijuana products from CBD.

²⁴ DCR cites to the final rule in its brief, 19 CSR 100-1.130(1)(K)3, not the emergency rule. There is no difference in language between 19 CSR 100-1.130(1)(J)3 (emergency rule) and 19 CSR 100.130(K)3(final rule).

As noted, 19 CSR 100-1.130(1)(J)3 (emergency rule) required manufacturing licensees to “[r]ecord in the statewide track and trace system all active and inactive ingredients in each final manufactured product[.]” An “ingredient” is “something that enters into a compound or is a component part of any combination or mixture: CONSTITUENT[.]” *Ingredient*, MERRIAM-WEBSTER DICTIONARY, online ed., <https://www.merriam-webster.com/dictionary/ingredient> (last visited January 27, 2025). By regulation, Delta was required to separately list in Metrc all ingredients that went into its products, including THC that was derived from hemp and then mixed with THC derived from regulated marijuana. Delta’s compliance officer recognized that the hemp-derived THC was an ingredient or component part of Delta’s distillate products, admitting that the THC from the hemp was mixed with the THC from marijuana and commenting on the tracking of marijuana in Metrc:

Q. And so this idea that you extract hemp-derived product separately from MMJ [regulated marijuana], how does that make it better, or does it, for tracking?

A. I would say its neutral on tracking because you’re still tracking your medical marijuana. The only change to the process is ingredients and listing the ingredients accurately.

Tr. vol. II, 142-43 (emphasis added). By omitting any separate reference to the THC derived from hemp in the Metrc records, Delta was not listing all the active and inactive ingredients in its final manufactured products. On prior occasions, Kistner, who was responsible for entering products into Metrc, listed “Conte CBD distillate” in the Metrc records, so it is clear that Delta understood the requirement.

Delta violated 19 CSR 100-1.130(1)(J)3 (emergency rule) by failing to record in Metrc all active and inactive ingredients in each of its final manufactured products. It is subject to the penalties specified under 19 CSR 100-1.130(2)(E)1.A (emergency rule) for this violation.

2. Accuracy of the Information in Metrc

As a licensee, Delta “must ensure the accuracy of information entered into the statewide track and trace system on a daily basis[.]” 19 CSR 100-1.130(1)(L) (emergency rule). “Ensure” means “to make sure, certain, or safe: GUARANTEE.” *Ensure*, MERRIAM-WEBSTER DICTIONARY, online ed., <https://www.merriam-webster.com/dictionary/ensure> (last visited January 27, 2025). “Accuracy” means “freedom from mistake or error: CORRECTNESS.” *Accuracy*, MERRIAM-WEBSTER DICTIONARY, online ed., <https://www.merriam-webster.com/dictionary/accuracy> (last visited January 27, 2025). Pursuant to 19 CSR 100-1.130(1)(L)(emergency rule), Delta was required to make certain that the information it entered into Metrc was free from mistake or error.

On this issue, we only consider the accuracy of the information entered into Metrc on or after February 3, 2023, the date the emergency rules went into effect. The specific Metrc entries on which the Department relies are those that stated, “Mixed w/ Conte CBD Distillate.” While Sparks and Tania Conte both stated in their deposition testimony that there was no such thing as “Conte CBD Distillate,” the entries the Department identified with this notation pre-date the effective date of the emergency rules. Because the inaccurate Metrc entries the Department identified were entered in Metrc before the rules went into effect, we find that Delta did not violate 19 CSR 100-1.130(1)(L) (emergency rule).

The Department cites no comparable provision under the medical marijuana regulations which were rescinded effective February 3, 2023, that can be applied to these entries. A review of those regulations shows that there was no regulation prior to February 3, 2023 specifying that a licensee was required to ensure the accuracy of the information entered in Metrc. *See* 19 CSR 30-95.040(G), 19 CSR 30-95.090, 19 CSR 30-95.010(39), and 19 CSR 30-95.025(7), rescinded

effective February 3, 2023. There is no basis for finding a violation of the Department’s regulations for the “Mixed w/ Conte CBD Distillate” entries in Metrc.

3. Inventory Control Issues

With respect to inventory control, the Department’s regulations provide that all marijuana product is to “bear a tag with traceability information,” and that a new package tag is to be placed on marijuana product when it changes type of marijuana product or is incorporated into a different marijuana product. 19 CSR 100-1.130(E)2 and 3 (emergency and final rules). On a daily basis, a licensee is to enter the day’s beginning and the day’s ending inventory “and any other data necessary to complete the inventory control records in the statewide track and trace system.” 19 CSR 100-1.130(F) (emergency rule). An identical requirement existed under the medical marijuana rules effective through February 2, 2023. In addition, the location of marijuana product within the facility is one of the fields that must be completed in Metrc.

The evidence establishes violations of inventory control rules as follows:

(1) Failure to enter required inventory information on a daily basis. Delta was required to perform a beginning inventory in the morning and an ending inventory at the end of the day and enter those in Metrc. 19 CSR 100-1.130(1)(F) (emergency rule), and 19 CSR 30-95.040(4)(G)3 (rescinded effective February 3, 2023). In addition, manufacturing licensees are required to provide a monthly report to the Department that reconciles their physical inventory with the inventory recorded in Metrc. 19 CSR 100-1.130(1)(J)5 (emergency rule).²⁵ Kistner, who was responsible for making Metrc entries and reconciling the daily inventory in Metrc, testified that inventories were only performed once a week. The accuracy of the inventories that were performed is also in doubt. In one instance, an adjustment was made to a Metrc package created

²⁵ 19 CSR 100-1.130(1)(J)5 (emergency rule) was moved to 19 CSR 100-1.130(1)(I) (final rule). *See* Comment #21, 48 Mo. Reg. at 1113.

and tagged in Metrc on January 17, 2023, to account for 100 vape cartridges that were discovered in the back of the vault on June 26, 2023. Similarly, product manufactured and tagged on July 14, 2022, was adjusted by 40 vape cartridges on October 5, 2022. In both instances, an accurate inventory of the product in the facility (whether on a daily, weekly or monthly basis) should have disclosed the existence of this missing product much sooner than the six months and two-and-a-half months, respectively, that it took for Delta to discover the product. Delta violated 19 CSR 100-1.130(1)(F) and (J)5 (emergency rules), and 19 CSR 30-95.040(4)(G)3(rescinded effective February 3, 2023).

Delta's response is that these are just discrepancies as defined in 19 CSR 100-1.130(1)(G) (final rule), and that since the Department's rules recognize that discrepancies may occur, they are excused when they exist. The definition that Delta cites was added in the final rule and was not in the emergency rule. 48 Mo. Reg. at 1112. It was added to distinguish discrepancies covered by 19 CSR 100-1.130(1)(G) (final rule) and errors covered under 19 CSR 100.1.130(1)(M) (final rule). As with the addition of the language to 19 CSR 100-1.170(2)(E) (final rule), these definitions do not change the meaning of the rule but are clarifications. A discrepancy is "a situation where the marijuana product may not be accounted for physically or in the state-wide track and trace system," 10 CSR 100-1.130(1)(G) (final rule), while "[a]n error occurs when information is recorded incorrectly into the state-wide track and trace system, but the marijuana product can be accounted for." 10 CSR 100-1.130(1)(M)1 (final rule). Recognizing that discrepancies can occur in the regulation does not excuse or exempt Delta from discovering the existence of those discrepancies as required by other provisions in the regulations.

There are other instances in which Metrc was not being updated on a daily basis, as

seen in the instances of the seven Metrc entries detailed above. In each one of those instances, the creation of the product packages was recorded on a weekday, varying between Monday and Wednesday. Those packages, however, were all created by Sparks and his team on the preceding Saturday. Those packages sat in Delta's inventory unaccounted for in Metrc for two days and sometimes longer, when the information in Metrc should have been updated at the end of the weekend day on which the packages were created.

(2) Products without Metrc tags. Four pallets and two silver totes of marijuana product were found in the facility on August 2, 2023, with no traceability information on or with them. The totes contained thousands of filled vape cartridges. J. Maritz admitted that none of this product had a Metrc tag or traceability information physically with it. As to the pallets, he said that tags had been prepared but he had them in his office because they were associated with the samples that were being sent out for R&D testing. They were there, as opposed to on the product, as a matter of convenience for the testing lab, who was required to scan in the Metrc tags created for the samples, as well as the Metrc tag on the product from which the samples had been collected. Maritz said Delta knew which tags in the office went with which pallet of product. With respect to the totes, he stated that one of the totes had the Metrc tag with it and it was sitting next to the tote without the tag, so it should have been obvious what Metrc tag applied to it.

The Department's regulations require that tags shall be placed on the product, that "product must be traceable in the state-wide track and trace system at all times," and "[a]ll packaged marijuana product shall bear a tag with traceability information." 19 CSR 100-1.130(1)(E) and (E)2 (final rule) (emphasis added). Traceability information must be on and with the product itself. Delta's reasons for not having traceability information on these products do

not excuse its noncompliance with the regulatory requirement. Delta violated 19 CSR 100-1.130(1)(E) (final rule).

(3) “Jar test” package without traceability information. On August 2, 2023, biomass and flower mixed with water was seen in the facility without a Metrc tag on it. J. Maritz identified this as a “jar test,” in which strains of marijuana biomass is mixed with super cold water and then frozen as part of a process to determine whether the particular strain is more suitable for creating bubble hash or for hydrocarbon extraction. Adding the marijuana to the water for purposes of the jar test is a new package, requiring the creation of a new package tag in Metrc. 19 CSR 100-1.130(1)(E)2 and 3 (final rule). There was no traceability information on the jar test. When asked about the traceability of the marijuana in the jar test, J. Maritz admitted that Delta was unsure of how to record the jar test in Metrc but that those processing the test could identify the source of the marijuana being tested. This is a violation of 19 CSR 100-1.130(1)(E)2 and 3 (final rule).

(4) Tagged product stored in wrong location. On August 2, 2023, bags of marijuana with Metrc tags were stored in the facility’s corridor on shelves built onto the wall but were listed in Metrc as stored in the facility’s vault. In other instances, packages had split locations between the corridor and the extraction room but were also listed in Metrc as stored in the vault. J. Maritz admitted that the bags of marijuana were intentionally stored in the corridor because Delta had so much of it, they could not put it anywhere else, so they built shelves in the corridor to hold it. At the same time, they misrepresented the location in Metrc. This is a violation of 19 CSR 100-1.130(E) and (F) (final rule)

The evidence does not establish violations of inventory control rules as follows:

(1) No traceability information on racks of gummies. On arrival shortly after 9:00 a.m. on

August 2, 2023, Bilyeu observed three racks of gummies in the hallway of the facility. There was no Metrc tag or traceability information on the racks. They were identified by stick-on notes attached to the rack that read “Watermelon” or “#1.” On inquiring of J. Maritz what they were, Bilyeu was told they were gummies coated in marijuana-infused sugars. Delta’s position is that, at 9:00 a.m. on August 2, 2023, the gummies were still in the process of being coated with sugar. Some of the 20 sheets of gummies on the rack had been coated and some had not, according to Maritz. Delta was planning on tagging the package when the process of coating had been finished. It is clear from the timing of Bilyeu’s arrival, and the information in the access log identifying the Delta personnel present in the facility, their duties, as well as the amount of time they had been in the facility, that the gummies on the racks that were already coated had not been coated that morning. Further, in his discussion with Bilyeu that morning, J. Maritz stated they were not presently doing any production because of a power outage. Accepting Maritz’s testimony that some gummies remained to be coated with sugar, the gummies were not a new package requiring a “new package tag” until the process lot was completed. A process lot is described as follows in the rules: “once production is complete . . . , any amount of marijuana-infused product or prerolls of the same type and processed using the same ingredients, standard operating procedures, and harvest lots.” 19 CSR 100-1.010(81) (final rule). Further, the product does not become “inventory” until production of the process lot is complete. There is no requirement to enter an incomplete or partial process lot as ending inventory in Metrc.²⁶ 19 CSR 100-1.130(1)(F)(final rule).

(2) Waste material in the extraction room. On August 8, 2023, there were containers

²⁶ As noted later in this decision, there is a violation of DCR regulation related to improper storage of the gummies in the corridor.

of cartridges and syringes in the extraction room between the ovens. The Department stated that the cartridges and syringes “appeared to contain” marijuana product. Although the way these cartridges and syringes were found was consistent with products that were defective, as described by Tania Conte and Kistner, the Department has offered no evidence to confirm that the material did, in fact, contain marijuana product. Although the Department collected and tested multiple samples of marijuana product from the Delta facility, it does not point to any of these samples as being taken from the cartridges and syringes found in the extraction room between the ovens. The Department has failed to prove a violation of 19 CSR 100-1.130(1)(E)(final rule) in regard to these items.

(3) Altered Metrc tags. On August 8, 2023, a number of bags marked as shake or trim were discovered. All had Metrc tags. All were in the original bag from the source of the shake or trim. On five of the bags, the Metrc tag number was altered by blacking out the final four numbers on the tag and writing in four new numbers. The tags with altered numbers identified the product name as Bruce Banner Shake for Metrc tag number 4364 and Clementine Shake for Metrc tag number 4365. A sixth bag with an unaltered Metrc tag numbered 4365 was identified in Metrc as containing Clementine Trim.

Delta explained that the bags contained two products which, by their nature and amount, were bulky and could not be packaged in a single bag for purposes of storage and sales to dispensaries. The evidence was that only one physical label with the traceability information (Metrc number) will be printed out for a process lot, even if the lot is packaged in multiple containers. Accordingly, the Metrc number assigned to the process lot has to be identified on all the containers of the process lot by some means other than the printed label. Delta did this by writing the package number on those bags that did not include the printed label. The Department

presented no evidence to contradict Delta's explanation. The Department did confirm for that the bag with the unaltered Metrc package number 4365 was entered in Metrc as Clementine Trim.

The Department contends that Delta violated the track-and-trace regulation by writing the final four digits on the packages of Clementine Shake and Bruce Banner Shake because the physical tags on the bags could not be read with a scanner. The track-and-trace regulation provides that packages shall contain a tag "with traceability information," and that all marijuana product in a facility must be traceable in the system. 19 CSR 100-1.130(1)(E) (final rule). The Department was able to trace the Clementine Trim product in Metrc from the information on the tags attached to the bags of product. It would have also been able to do the same with the Bruce Banner Shake, had it attempted to do so. The Department cites no provision in the regulations or evidence in the record that requires the tags attached to marijuana product packages to be scannable electronically. The Department has failed to prove a violation of 19 CSR 100-1.130(1)(E) (final rule) as to these two products.

C. Security Violations

The Notice of Revocation asserted that Delta "failed to maintain security of marijuana product and the facility by failing to comply with required security measures and failing to maintain required security equipment, which is a violation of 19 CSR 100-1.090 and cause for revocation pursuant to 19 CSR 100-1.020(3)(A)." Ex. R-I at 2. The security violations at Delta's facility were serious and substantial. They, along with other issues with Delta's operation of its manufacturing facility, evince a corporate culture of lax compliance with regulatory requirements.

1. Remote Access to Video Monitoring System

As part of the requirement to provide continuous video monitoring of the facility, all licensees “shall ensure the security of marijuana product and the facility . . . by taking security measures and maintaining security equipment,” including electronic video monitoring with cameras “that are capable of being accessed remotely at all times by the department or a law enforcement agency in real time[.]” 19 CSR 100-1.090(1)(C) (emergency rule and final rule). Further, “Remote access must be accomplished through https access or other department-approved format.” 19 CSR 100-1.090(1)(C)2 (emergency rule and final rule). These provisions require Delta to maintain electronic video monitoring equipment that is capable of being accessed remotely at all times. “Maintain,” in the context of the regulation is “to keep in an existing state (as of repair, efficiency or validity): preserve from failure or decline.” *Maintain*, MERRIAM-WEBSTER DICTIONARY, online ed., <https://www.merriam-webster.com/dictionary/maintain> (last visited January 27, 2025).

The Department’s regulations acknowledge the possibility of interruptions of monitoring due to unforeseen circumstances. Facilities are required to have battery backup to provide 60 minutes of recording in case of a power outage. 19 CSR 100-1.090(1)(C)10 (emergency rule and final rule). In addition:

(5) Licensees shall notify the department within twenty-four (24) hours after a security system malfunction is discovered and shall make a reasonable effort to repair a malfunction of any security system within seventy-two hours after the malfunction is discovered.

(A) A malfunction occurs when any piece of security equipment fails to work as designed or intended, for more than sixty (60) seconds, either through defect, power outage, security breach, Internet outage, compromise, or other reason.

19 CSR 100-1.090(5) (emergency rule and final rule).

Delta used the Transcendent application to allow remote access to its video monitoring system. This application was dependent on adequate internet service. Delta's internet service was chronically deficient and continually losing its connection, as described by Delta's witnesses and attested to by Burns-Citadel, Delta's provider of the remote access system. Burns-Citadel noted that Delta's "server is unable to get a stable connection due to the terrible internet on location." Ex. R-N. Burns-Citadel's original installation was designed to comply with the Department's guidelines and requirements, as was the system it installed to replace the original one following the loss of the server during the break-in at the facility. Delta's security consultant recognized that the current internet service provider was inadequate to provide reliable internet service. As late as October 31, 2023, after Burns-Citadel had re-installed equipment, remote video access via internet service was still a major impediment to remote video access and was likely an issue that was not capable of being resolved. As Burns-Citadel advised Delta, the problem was with Delta's internet provider, and concluded, "But I do want to stress that I do not think there is anything we can do, the issue appears to be with the Internet services fluctuating." Ex. R-AF at MO 39954 (page 2335 of the pdf).

This evidence establishes that Delta was not maintaining an electronic video system capable of being accessed remotely at all times by the Department or law enforcement as required by 19 CSR 100-1.090(1)(C) (emergency rule and final rule).

Delta counters that the problems it experienced with power and internet outages excused its compliance with the Department's security regulations whenever they occurred. Whenever "weather came through" the internet was likely to go down, Delta claimed. Herndon also blamed the internet outages on the fact that the facility was located in the woods and "it's regularly happened where we have what could be a malfunction because of trees specifically." Ex. R-AF

at 2314. Although 19 CSR 100-1.090(5) recognizes that internet outages may cause malfunctions in a security system, we interpret this provision to refer to the rare occurrence, as opposed to excusing chronic interruptions that are the result of the deficiency of the system used by the licensee. To construe this provision otherwise would violate the principles that regulations “should be interpreted reasonably, and absurd interpretations should not be adopted,” *In the Matter of Trenton Farms RE, LLC v. Mo. Dept. of Nat. Res.*, 504 S.W.3d 157, 164 (Mo. App. W.D. 2016) (citation omitted), and that regulations should not be applied in a manner to lead to illogical results. *Doe*, 526 S.W.3d at 336. Delta chose the site for its facility for its own convenience.²⁷ Having done so, Delta was required to find the technical means to overcome the problems it experienced with its isolated, wooded, rural location. Finding the means to comply with regulatory requirements is the responsibility of one engaging in a highly-regulated activity and will not be excused simply because it is inconvenient or not cost-effective. *See MO CANN Do v. Mo. Dep’t of Health & Senior Servs.*, 686 S.W.3d 642, 648-49 (Mo. banc 2024) (the legalized marijuana industry is a highly regulated industry because of the potential threats its activities pose to the public health and safety; it is incumbent that those “entering the marijuana industry follow the laws and regulations related to the industry so the public can remain safe.”).

Delta violated 19 CSR 100-1.090(1)(C) (emergency rule and final rule).

2. Video Monitoring in Required Areas

The Department’s regulations provide that licensees are to maintain video equipment that meets the following specifications:

3. Video cameras must provide coverage of . . . G. All marijuana product, from at least two (2) angles, where it is grown, cultivated, manufactured, sampled for testing, tested, stored, weighed,

²⁷ As noted in the findings of fact, the facility was located on a larger property owned by the Maritzes that was used as a commercial hunting preserve and also had a small amount of acreage set aside for growing hemp.

packaged, processed for sale, sold/distributed, rendered unusable, disposed, or loaded for transport.

19 CSR 100-1.090(1)(C)3.G (emergency rule and final rule). The Department contends that this rule was violated because marijuana product was stored in the office area of the facility which only had coverage by one camera.

There were at least two occasions on which marijuana product was located in the office area. On August 2, 2023, Bilyeu observed what she described as Pyrex dishes sitting at the bottom of the wire shelf in the office. J. Maritz confirmed that this was marijuana product but explained they were R&D samples awaiting pick-up by the testing facility and that he was in the process of placing Metrc tags on the jars when Bilyeu arrived. Bilyeu also observed that Delta's office was covered by only one camera angle. On another occasion, Tania Conte discovered a box of Conte products under the desk in the office. J. Maritz explained their presence to her as being leftover product from other batches already entered in Metrc.

The term "store" means "to place or leave in a location (such as a warehouse, library or computer memory) for preservation or later use or disposal." *Store*, MERRIAM-WEBSTER DICTIONARY, online ed., <https://www.merriam-webster.com/dictionary/store> (last visited January 27, 2025). In these two instances, the marijuana product was being stored or kept in the office for a later use. In addition, J. Maritz's explanation for the marijuana product observed on August 2, clearly shows that he had the product in the office for the purpose of loading it for transport to the testing facility. Because there was only one camera angle on the area where this marijuana product was being stored, both instances involved a violation of 19 CSR 100-1.090(1)(C)3.G (emergency rule and final rule).

On August 2, Bilyeu also observed that three cameras were malfunctioning. The Work Hall and Freezer Front 3 cameras were inoperable and did not appear to be connected to the

server for video cameras. Camera Freezer 360 had accumulated frost on the camera lens. A month later, when Bilyeu performed a security audit at Delta's request, the issues with these cameras had not been corrected. The Department's evidence establishes that three cameras were malfunctioning and that these malfunctions resulted in inadequate monitoring of the areas being covered by the cameras. Delta does not dispute that the cameras were malfunctioning or that the areas were being covered only by one camera angle. As a result of these circumstances, Delta violated 19 CSR 100-1.090(1)(C)3.G (emergency rule and final rule).

3. Automatic Notification of Local Law Enforcement

The Department claims Delta violated 19 CSR 100-1.090(1)(E) (final rule) because Delta's intrusion alarm system did not immediately notify local law enforcement of the break-in on August 7, 2023. The regulation provides:

(1) All medical and marijuana facility licensees shall ensure the security of marijuana product and the facility, including any offsite warehouses, by taking security measures and maintaining security equipment as follows:

* * *

(E) A method of immediate, automatic notification to alert local law enforcement agencies of an unauthorized breach of security at the facility.

Delta's alarm system failed to automatically notify the sheriff's office of the break-in at the Delta facility at 4:04 a.m. on August 7, 2023. Notices of the intrusion did go out to J. Maritz at 4:03 and 4:04 a.m. by phone; but the notification to the sheriff's department was a separate notification. Unlike the notification sent to J. Maritz, notification to the sheriff's department was sent only when the alarm system was armed. The alarm system at the Delta facility was not armed on August 7, 2023, because one of the magnetic locks on a door was not engaged. As a result, the sheriff's department was not notified of the break-in. This malfunction was not

something new to the facility. Burns-Citadel indicated that the problem had existed for some time. Not only did the problem exist for some time, J. Maritz knew on Friday, August 4, 2023, that the alarm had not been activated, but he was unconcerned. J. Maritz also knew the alarm would not activate when any of the magnetic locks was not engaged, or when any door was open. Delta does not contest that the alarm was not activated and not operating in a manner to give the sheriff's department an immediate and automatic alert of the intrusion. Nor does it contest that this is a violation of the Department's regulations, instead arguing that the violation has since been cured.

By failing to arm its alarm system on August 4, 2023 Delta violated 19 CSR 100-1.090(1)(E) (final rule). The consequence of this violation was the failure of the system to notify law enforcement of the break in on August 7, 2023. This was not a new or unexpected problem. The alarm system's failure to arm was an ongoing problem, known by Delta, prior to August 7, 2023.

4. Failure to Act on Notification of Intrusion

Licenseses are required to establish and follow policies and procedures for "monitoring the security of the facility," and for designating "on-call facility personnel to respond to and be available to law enforcement personnel responding to any alarms[.]" 19 CSR 100-1.090(2)(D) and (E). J. Maritz received notification on his cellphone of tampering with the facility's window at 4:04 a.m. on August 7, 2023. He did not become aware of the notification until six hours later. Even then, he took no action on the notification, believing that the problem had something to do with bad weather in the area of the facility and was simply a false alarm. One of Delta's employees went by the facility at approximately 2:30 p.m. on August 7, and saw that the window was broken. He did not report the problem to local law enforcement and did not report the

broken window to Delta's management until sometime between 7:00 and 8:00 p.m. that evening. It was not until 8:15 p.m., after discussion in a group text between Herndon, J. Maritz, and Delta's security consultant that the sheriff's department was contacted about the break-in.

Delta cannot avoid responsibility for failing to respond to the notice of the tampering with the window simply because the notice occurred in the early hours of the morning. The purpose behind 19 CSR 100-1.090(2)(D) and (E) (final rule) is to ensure that someone with Delta monitors and responds to security alarms on a 24-hour basis and not just during hours of the day that are convenient to the person receiving the notification.

Delta attempts to excuse its failure to respond by explaining that it assumed the notification was a false alarm, since there had been false alarms in the past when weather rolled through. The evidence shows that these prior incidents involved windstorms causing the garage doors to shake and set off the alarm. In these instances, an alarm was sent to local law enforcement, and someone from Delta immediately went to the facility and called off the sheriff's department before they arrived. Delta was therefore capable of responding properly to a notification – even if it was a false alarm.

The Department's security regulation requires Delta to respond to each and every alarm as soon as possible after the alarm goes off. The regulation does not provide that Delta may ignore the alarm based on assumptions about what may have triggered it. Delta was under a duty to investigate the alarm in a timely manner. A 16-hour delay between Delta receiving notification of the tampering with the window and contacting the sheriff's department to investigate a break-in at the facility is a serious failure to monitor the security of the facility and to respond to notification of the break-in. Delta violated 19 CSR 100-1.090(2)(D) and (E) (final rule).

5. Controlled Entry to Limited Access Areas

The Department alleges that Delta failed to control entry to limited access areas in violation of 19 CSR 100-1.090(1)(D) (emergency rule). Among the security measures a licensee must implement is:

Controlled access to limited access areas, which shall be controlled by electronic card access systems, biometric identification systems, or other equivalent means, except that in addition to these means, all external doors shall be equipped with a locking mechanism that may be used in case of power failure. Access information shall be recorded, and all records of entry shall be maintained for at least one (1) year[.]

19 CSR 100-1.090(1)(D) (emergency rule). The Department argues the violation of this provision occurred because (a) Delta remotely deactivated the security system to allow SND and Conte access to the facility on the weekends; (b) Delta allowed Sparks to use Kistner's access code in order to move freely about the facility, including to and from limited access areas; (c) Delta personnel propped doors open or piggy-backed entries so they would not have to continually scan into controlled access areas; (d) Delta failed to timely provide the Department with daily access control logs as required under the order of immediate suspension; and (e) Delta failed to maintain accurate access and visitor logs.

a. Remotely Deactivating the Security System to Allow Access

On weekends when SND and Conte were to be in the facility manufacturing marijuana products, J. Maritz would remotely turn off the intrusion alarm to the facility to allow SND and Conte access to the building. Delta's position is that the alarm had to be deactivated for anyone to enter the building. The Department failed to present any evidence showing that remotely shutting off the alarm affected the operation of the controlled access system. In fact, the evidence shows that it does not. For example, the access logs for July 22 and 29, 2023, record both Tania

Conte and Jason Sparks (using Kistner's access code) accessing the facility and limited access areas within it. J. Maritz's act of remotely disarming the alarm system to allow SND and Conte to enter the facility on weekends to manufacture marijuana product for Delta is not a violation of 19 CSR 100-1.090(1)(D) (emergency rule).

b. Sparks' Use of Kistner's Access Code

Delta does not dispute that Sparks was given Kistner's access code in order to gain access to limited access areas of the facility. Delta offers no justification for doing this, and the only conclusion to be drawn from it is that Delta wanted to hide the fact that Sparks was in the facility.²⁸ Access logs for July 22 and 29, 2023, record multiple accesses by "Kistner, Charles" to different areas of the facility, including the vault. The facility's Metrc records for July 29, 2023, also show Kistner creating a Metrc record for the distillate manufactured that weekend. Kistner testified he was not present in the facility on the weekends when SND and Conte were there creating bulk distillate and Conte products. The evidence establishes that Sparks was, in fact, using Kistner's access code to gain entry to limited access areas of the facility and either Sparks, or someone at his direction, accessed Metrc on July 29, 2023 to record the creation of distillate.

The purpose of 19 CSR 100-1.090(1)(D) (emergency rule) is not limited to simply recording entry into limited access areas. Access "shall be controlled by electronic card access systems, biometric identification systems, or other equivalent means." 19 CSR 100-1.090(1)(D) (emergency rule). For security purposes, who is gaining access to the limited access areas is as important as the fact that someone entered the area. The actions taken by Delta, which had the

²⁸ This conclusion is bolstered even more by the fact that Sparks was issued an agent identification card under the sponsorship of Delta but was never listed as an agent for Delta or provided his own keycard or access code allowing his entry into limited access areas.

effect of hiding Sparks' entry into limited access areas, is a violation of 19 CSR 100-1.090(1)(D) (emergency rule).

c. Propping Open Doors and Piggy-back Entries

Delta admits that it would regularly by-pass the controlled access system by propping open doors when making multiple entries into and out of a controlled access area. It also admits that it permitted multiple persons to enter a controlled access area when only one person entered his or her credentials to gain entry (a practice known as "piggy-backing"). In a security audit report prepared May 15, 2023, by Delta's security consultant, Delta was put on notice that these practices were security violations. Even after the audit, by its own admission, Delta persisted in by-passing the controlled access system by leaving doors open to allow passage back and forth to the limited access areas without logging the access or by piggy-backing access without logging everyone who was entering the facility or limited access areas within it.

Delta's argument is that it was more efficient for it to engage in these practices; however, there is no efficiency exception in the language of 19 CSR 100-1.090(1)(D) (emergency rule). Nor does the rule include any qualifiers about compliance, such as "if practicable." The purpose of the requirement is to record the identity of everyone who gained entry to a limited access area in the facility. Delta's practices clearly circumvented the facility security purpose of the requirement. It is also clear that Delta was aware of the requirement after its security consultant's audit and intentionally continued to violate it because it was not convenient for it to comply. These practices are a violation of 19 CSR 100-1.090(1)(D) (emergency rule).

d. Post-suspension Requirement to Provide Access Logs Daily

The order of immediate suspension required Delta to "provide a daily electronic log of controlled entry for the facility to DCR . . . by 9am CST for the previous day until the Licensee

receives written notice from DCR.” Ex. R-A at 2. Delta failed to provide the daily access logs on multiple occasions. Accordingly, Delta was in violation of the directive issued to it under the order of immediate suspension.

The Department argues that violation of the order of immediate suspension was a violation of 19 CSR 100-1.090(1)(D) (final rule). That provision states, in relevant part, “Access information shall be recorded, and all records of entry shall be maintained for at least one (1) year.” *Id.* There is nothing in this provision that directs when and under what circumstances this information is to be provided to the Department. The record shows that Delta continued to record and maintain access information after the issuance of the order of immediate suspension. The failure to provide access logs on a daily basis to the Department in accordance with the order of immediate suspension was not a violation of 19 CSR 100-1.090(1)(D) (final rule).

e. Accuracy of Access and Visitor Logs

In addition to requiring an electronic card access system (or equivalent means) to control access to “limited access areas” the Department’s rule 19 CSR 100-1.090(1)(D) also requires the licensee to record access information and maintain the records for at least one year. “Limited access areas” are defined by the Department’s regulations to include “all areas within a facility other than any public access points where individuals are screened for approval to enter.” 19 CSR 100-1.010(40) (emergency rule). This means that Delta was required to maintain records of anyone entering its facility. Access by individuals using an electronic access card or code was recorded in Delta’s access logs. Delta maintained a visitor log to record entry by anyone else. Neither of these records accurately reflected exactly who was accessing Delta’s facility.

Delta’s access logs and visitor log failed to accurately reflect the identity of individuals entering its limited access areas from February 2023 through the end of July 2023 when SND

and Conte personnel were on the premises. Sparks was in the facility on a regular basis between the effective date of the emergency rules through July 29, 2023, and never once properly signed in to or out of the visitor log.²⁹ The visitor log indicates that Sparks' and Conte's team of product packagers (individuals recruited from the St. Louis area) may have been in the Delta facility on January 27 – 29, 2023, March 4, 2023, March 27 or 28, 2023, April 1, 2023, April 8, 2023, April 12, 13 or 14, May 21, May 27, July 8, July 22, and July 29, although not all the entries are dated, and none of the entries by multiple individuals on or around those dates explain why they were present. Sparks was present each of those times. Despite their lack of detail, the visitor log entries indicate that these individuals, as well as Sparks, were present in the facility on weekends multiple times before Sparks was issued a facility agent card on June 20, 2023.³⁰ Sparks was originally denied the facility agent card because he had a disqualifying criminal conviction. Because Delta had to sponsor Sparks by making a written offer of employment for him to apply for the facility agent card, Delta knew that Sparks' application for an agent card had been denied and the reason for it. Because Sparks was central to the efforts of Delta to create the bulk distillate and Conte products, we conclude Sparks and Delta intentionally kept his name from appearing on the visitor log. As noted above, his name did not appear in the access logs either. Delta did not issue him an access card or code, so he routinely used Kistner's code when entering the facility.

²⁹ The name "SPARKS" appears in the visitor log only once, with a date of 1-29. The entry does not include a first name or the purpose of the visit. Ex. R-CE at p. 3. Jason Sparks testified he did not sign the visitor log. Entries for other weekends showed another Sparks signing in. This person was identified as Jason Sparks' father.

³⁰ DCR's explanation for the later issuance of a facility agent identification card to Sparks despite his disqualifying conviction, is that there was a moratorium on criminal background checks through the FBI because of the adoption of adult use. It is unclear why DCR could not have relied on the criminal background check already conducted. However, this regulatory enforcement shortcoming inured to the benefit of Sparks and Delta since it led to the issuance of the facility agent identification card.

The personnel Sparks brought in to complete and package the Conte products also failed to properly identify themselves in the visitor log. In many instances, they wrote only their first name in the log, and failed to list the time they signed in, the company with which they were associated, the purpose for which they were in the facility, and the time they signed out of the facility. As with Sparks' failure to sign the visitor log, we conclude this non-compliance was intentional. Neither Sparks nor Tania Conte could identify the individuals who were doing the work. They were paid in cash and Sparks was vague on how or where he found the workers. For its part, Delta simply turned its facility over to SND and Conte for the weekends and did nothing to identify who was in the facility or monitor their compliance with the security requirements. Herndon, Delta's compliance officer, agreed that the visitor log should have included full names of any visitors to the facility and complete information in the other fields listed in the log. She confirmed that she viewed the logs whenever she was at the facility. In carrying out this compliance function, she either failed to notice the non-compliance or failed to address it with Sparks or Tania Conte. She also could not identify who the people were who had been in Delta's facility on many occasions. Delta's non-compliance with the visitor log requirement prevented the later identification and location of the visitors to the facility on the weekends. It also prevented DCR from learning exactly what work they were doing.

The Department also asserts that Delta's access logs were not accurate because of Delta's practice of propping doors open, allowing piggy-backing entry, permitting Sparks' use of Kistner's access PIN, and disarming the controlled access system to allow SND and Conte to access the facility. With the exception of remotely disarming the controlled access system, these actions resulted in a failure to accurately record access to and within the facility. In this regard, Delta violated 19 CSR 100-1.090(1)(D) (emergency rule).

On August 3, 2023, Delta was asked to provide access logs to DCR personnel. J. Maritz uploaded the access logs in an electronic file and provided it to DCR in person. The access log file was printed out by DCR and included as an exhibit to its investigation report. The access log, when printed, was 767 pages in length. On the printed version of the access log, the information for the date and time appeared as multiple hashtags. DCR was later provided a copy of the access log in Excel worksheet format. This document recorded access at the facility through September 22, 2023. As filed in the record, Exhibit R-K also displayed hashtags in the date and time columns, but each individual cell recorded a date and time that could be made visible by simply expanding the size of the cells. We find that the original electronic file provided by J. Maritz to DCR contained dates and times for the access recorded. In addition, DCR received another copy of the access logs (Ex. R-K) with all the required information.

Although there was no violation of 19 CSR 100-1.090(1)(D) for failing to provide the access logs, Delta violated this rule by failing to accurately record access to its limited access areas.

f. Other Access Claims

The Department also claims violations of 19 CSR 100-1.090(1)(D) (emergency rule) occurred in a variety of other ways, including a lack of supervision of the activities occurring on the weekends, a failure to know who was performing work for SND or Conte, and a failure to properly supervise Sparks in his extraction and distillation of product. The Department has failed to explain how these actions come within the language of 19 CSR 100-1.090(1)(D). The Department has failed to meet its burden of proof to establish that this particular regulation was violated by these activities.

6. Devices to detect unauthorized intrusion

“All medical and marijuana facility licensees shall ensure the security of marijuana product and the facility . . . by taking security measures and maintaining security equipment” to include “(A) Devices or a series of devices to detect unauthorized intrusion[.]” 19 CSR 100-1.090(1)(A) (emergency rule and final rule). The Department’s argument is that Delta “failed to ensure that all the doors in the facility were locked, thus the device that was supposed to detect unauthorized intrusion did not work as intended.” Resp. Brief at 119. The evidence shows that Delta’s facility’s alarm would not activate unless every door with a magnetic lock was shut properly, and Delta’s failure to ensure the doors were properly shut was an ongoing problem of some duration. However, the evidence also showed this particular problem with the alarm system only affected notification of local law enforcement of a break-in.

Delta maintained three applications that provided it with information in real-time and remotely regarding activities at the facility. With respect to the alleged violation of 19 CSR 100-1.090(1)(A) (emergency rule and final rule), the Alarm.com application provided alerts to Delta when a camera malfunction occurred, when a door was opened, or when there was an unauthorized intrusion. At 4:03 a.m. on August 7, 2023, the Alarm.com app detected that the office window was opened and then closed, and at 4:04 a.m. that the window was being tampered with. The app notified J. Maritz of these events through his phone at the time the events were recorded. To the extent that the Department is relying on what occurred on the morning of August 7, 2023, to establish a violation of 19 CSR 100-1.090(1)(A) (final rule), the

evidence fails to show a violation occurred. Delta had a working device that detected the unauthorized intrusion and provided notice to Delta.³¹

The Department also argues a violation of 19 CSR 100-1.090(1)(A) (emergency rule and final rule) occurred because power and internet outages at the facility were common and led to failures with the security system. Resp. Brief at 120. Notifications of intrusion, however, were sent and received by cellphone. The Department presented no specific evidence of outages affecting the cellphone service or operation of the Alarm.com application's detection and notification of an intrusion. There is no evidence that the Alarm.com application's function via cellphone was interrupted by a loss of power or internet service. The Department has not met its burden of proof to establish a violation of 19 CSR 100-1.090(1)(A)(emergency rule and final rule)

7. Audible and Visible Notification of Failure in Video Monitoring System

Licensees are required to have and maintain electronic video monitoring by equipment that is "capable of being accessed remotely at all times by the department or a law enforcement agency in real time." 19 CSR 100-1.090(1)(C) (final rule). As part of this electronic video monitoring requirement, "Facilities shall have a failure notification system that provides an audible and visual notification of any failure in the electronic video monitoring system[.]" 19 CSR 100-1.090(1)(C)9 (final rule).

The Department asserts that on August 7, 2023 (the date of the break-in), Delta was not maintaining a video monitoring failure notification system because Delta did not receive an alert that the video monitoring malfunctioned. The evidence it relies on is that local law enforcement

³¹ The requirement to maintain devices to detect unauthorized intrusion is a separate regulatory requirement requiring notification of local law enforcement of an intrusion in 19 CSR 100-1.090(1)(E) (final rule). As noted above, Delta violated 19 CSR 100-1.090(1)(E) (final rule).

did not receive an alert of the break-in to the facility because the alarm system was not armed. The Department failed to prove the nexus, if any, between the application that should have notified the sheriff's department about the break-in at the facility and the application that would have alerted Delta that the video monitoring system was no longer working.

The Alarm.com app was working on the morning of August 7 because it notified J. Maritz at 4:03 a.m. that the office window was opened and then closed; and then again at 4:04 a.m. that something or someone tampered with the window. The Department presented no evidence that the camera malfunction aspect of the Alarm.com app was not working at this time. Since it is part of the same app, we conclude it was functioning and was not registering a camera malfunction at 4:04 a.m. because the cameras were functioning at that point, and continued to function until the server was disconnected. The Department also presented no evidence showing whether the Alarm.com app registered the act of the server being removed during the break-in as a video camera system malfunction. The failure to notify the sheriff of the break-in is not evidence of a failure to maintain a notification system for malfunctions in the video monitoring system required by 19 CSR 100-1.090(C)9.

Delta did, however, violate 19 CSR 100-1.090(C)9 by failing to have the required audible and visual notification system functioning on September 6, 2023. On that date, DCR conducted a security audit of the facility at Delta's request. During the course of the audit, DCR tested the video monitoring notification system and found that no notification of a malfunction occurred when a video camera malfunctioned.

8. Non-compliant Window

Delta's facility was constructed and received approval to operate while the Department's medical marijuana rules were in effect. The original medical marijuana rules provided:

“Facilities with windows in a limited access area must ensure either that the window cannot be opened and is designed to prevent intrusion or that the window is otherwise inaccessible from the outside[.]” 19 CSR 30-95.040(4)(H)4. Following the adoption of adult use, the language was modified by both the emergency rule and final rule to state: “If windows are in a limited access area, the windows cannot be opened and must be designed to prevent intrusion or the window is otherwise inaccessible from the outside.” 19 CSR 100-1.090(1)(H) (emergency rule and final rule).

Substantively, both the medical marijuana and current regulations require the same thing. The term “cannot,” in the context used in the regulation means, “to be unable to do otherwise than,” *Cannot*, MERRIAM-WEBSTER DICTIONARY, online ed., <https://www.merriam-webster.com/dictionary/cannot> (last visited January 27, 2025), or “can not; to be unable or not allowed to.” *Cannot*, CAMBRIDGE DICTIONARY, online ed., <https://dictionary.cambridge.org/us/dictionary/english/cannot> (last visited January 27, 2025). The first requirement of the regulations is that the window must be incapable of being opened. This would require that the window be a single panel and excludes any window with panes that can be raised, lowered, or moved to the side. The second requirement is that the window be designed to resist intrusion. The rule does not specify how this can be accomplished. Shatter-proof glass or security film would be one means, as is required for glass doors and storefronts. *See* 19 CSR 100-1.090(1)(G). A cage around the window as Delta installed following the break-in would be another means designed to resist intrusion, as would iron bars or an iron grill protecting the window.

Delta’s window did not meet the requirements of 19 CSR 30-95.040(4)(H)4 (emergency rule and final rule) or 19 CSR 100-1.090(1)(H). A photo of the window shows that it had at least

one and possibly two movable sashes. The window was capable of being opened, and therefore violated the first requirement of the regulation. The windowpane was also standard glass – there was nothing special about the glass that prevented breakage (and therefore intrusion) or entry into the facility through the window once the glass pane was broken. The window violated the second part of the regulation, as well.

Delta argues that the window satisfied the first requirement because there was a lock on the window that prevented it from being opened if the lock was engaged. The first requirement is that the window be unable to be opened. A window with a movable sash and a lock is still able to be opened if the lock is disengaged. A lock on the window does not satisfy the requirement that “the window cannot be opened.” In contrast to the argument it now raises, Delta’s manufacturing SOP correctly stated what was required: “The facility will be equipped with windows that are not accessible from the outside,” and “Facility windows in the limited access areas are panels only and do not open from the inside nor outside as a means of preventing intrusion.” Ex. R-EA at 18.

Delta also argues that the facility passed its commencement inspection and underwent a second annual inspection, so that the window must have met the regulatory requirements. Bilyeu, who performed the annual inspection, admitted that she did not pay attention to the window when she inspected the facility. The commencement inspection regulation in effect at the time Delta initiated operations provided that the purpose of a commencement inspection is “to confirm the facility is in compliance with all requirements of this chapter.” 19 CSR 30-95.040(5)(B). The provision on annual inspections stated, “The department will enter and inspect at least annually, with or without notice, to ensure compliance with this chapter[.]” 19 CSR 30-95.040(5)(A)1.³² The Department’s failure to note the window’s non-compliant nature either

³² There is no corresponding annual inspection provision in the emergency rules or final rules. These rules simply provide, “The department may conduct an inspection or investigation of a licensee or facility at any time,

during the commencement inspection or the annual inspection is not evidence that Delta's window complied with the regulation. It only shows that the Department failed to note the window's non-compliance in either one of the inspections. The Department's actions and potential shortcomings in carrying out the inspections do not excuse Delta's non-compliance with the requirement. *See MO CANN Do*, 686 S.W.3d at 647-48.

Delta violated 19 CSR 30-95.040(4)(H)4 (medical marijuana rules) and 19 CSR 100-1.090(1)(H) (emergency and final rules).

9. Failure to Store Video Recordings for 60 Days

On September 6, 2023, Bilyeu conducted a security audit of the facility at Delta's request and determined that Delta had security video footage going back only to September 3, 2023, not 60 days. Delta lacked 60 days of video footage due to the break-in at the facility on August 7, 2023, which resulted in the removal of the computer server on which the video footage was stored. Other facts relevant to this alleged violation are: (1) on August 2, 2023, while in the facility, Bilyeu was able to access video footage that went back the requisite 60 days from August 2, 2023, and (2) a new server was installed and became functional on September 3, 2023.

A facility is required to maintain and provide to the Department copies of video camera recordings as follows:

All medical and marijuana facility licensees shall ensure the security of marijuana product and the facility . . . by taking security measures and maintaining security equipment as follows:

* * *

Licensees shall store recordings from the video cameras for at least sixty (60) days in a secure location or through a service or network that allows for providing copies of the recordings, in a department approved format, upon request and at the expense of the licensee[.]

including an inspection of any part of the premises or records of a licensed or certified entity." 19 CSR 100-1.030(2)(B)(emergency and final rules).

19 CSR 100-1.090(1)(C)8 (final rule).

This regulation requires Delta not only to store recordings for 60 days but to do so in a secure location allowing the production of the recordings to the Department when requested. The importance of this requirement to the security of the facility and to the Department's performance of its regulatory duties, particularly in carrying out investigations, is self-evident.

Delta claims there is no violation because it did have 60 days of video footage stored but the footage disappeared with the theft of its server. Delta claims that it was a victim of a crime and, as such, cannot be responsible for the absence of 60 days of video. One of Delta's witnesses posited that the theft was an act of corporate espionage perpetrated by one of its competitors in an attempt to make Delta look bad. The Department argues that Delta is responsible for the absence of the video footage because the purpose of the break-in was to keep the Department from obtaining evidence of wrongdoing that would have been on the video footage. Neither of these theories has been proven by a preponderance of the evidence. We cannot determine who removed the server from the facility based on the record in this case.

While the evidence does not support a finding that Delta intentionally prevented the Department from having access to the stored video footage, Delta still was in violation of 19 CSR 100-1.090(1)(C)8. Delta failed to maintain the video footage in a secure location. J. Maritz failed to arm the alarm that would have alerted the sheriff's department and allowed it to make a timely response to the break-in. Not only did Maritz fail to arm the alarm but he was aware of that failure and did nothing to advise Bilyeu or anyone else with DCR that the facility was unsecured. The server was easily accessible in the office (unlike the replacement server, which was secured in a locked cabinet) through the non-compliant office window, and Delta made no arrangements for maintaining and securing backup files (a system for backing up the

files was part of the replacement system Delta implemented). Delta did not have a designated person to respond to the notice of the intrusion that went out at 4:03 a.m. In sum, the video recordings were not in a secure location or maintained in a manner allowing for copies of the recordings to be provided to the Department on request as a direct result of Delta's non-compliance with security regulations.

Delta violated 19 CSR 100-1.090(1)(C)8 (final rule).

D. Packaging

The Department argues that Delta's package labels violate regulatory requirements because they fail to disclose that Delta's marijuana products include THC derived from unregulated cannabis. There are two labels in the record. Exhibit R-AZ is a photograph of a packaged marijuana product – a White Airhead OG cartridge bearing the Conte logo. The label on the package lists ingredients of “Cannabis oil distillate, White Airhead OG terpenes.” Ex. R-AZ. The cannabinoid profile is also included on the label and showed the following percentages: THC – 77.7%; CBD – 0.1823%; CBN – 0.5804%; THCA – 0%; CBDA – 0% and CBG – 2.096%. *Id.* The second label is on a package of Conte Assorted Gummies. The ingredients listed on this product are: “Tapioca Syrup, Organic Cane Sugar, Purified Water, Seaweed Extract, Citric Acid, Tri-Sodium Citrate, Natural Colors and Flavors, Hemp Oil and Cannabis Oil Distillate. Gluten-Free and Vegan.” Stay Hearing Ex. A at 55. The cannabinoid profile was THC – 19.73%; CBD – 9.76%; CBN – 0.23%; THCA – 0%; CBDA – 0% and CBG – 0%. *Id.* At the hearing and in its post-hearing brief, the Department focused its attention and discussion on the White Airhead cartridge package depicted in Exhibit R-AZ. For its part, Delta does not dispute that this is a Delta label, nor does it challenge the Department's implicit assumption that this label is indicative of other product labels Delta affixed to Conte products.

With respect to labelling, the Department’s final rule on packaging, labeling, and product design provides, “No marijuana product may be manufactured, packaged, or labeled in a false or misleading manner, such as by inaccurately representing product ingredients.” 19 CSR 100-1.120(1)(A). Subdivision (1)(C)2 of this rule sets out the specific information which must be on the label, and the order these items must be listed. They include:

- “All active and other ingredients, which shall not include groupings of ingredients that obscure the actual ingredients, such as ‘natural flavors’ or ‘botanically derived terpenes’ and shall include solvents used in the manufacturing process;”
- “The exact total weight of the marijuana included in the package,” to be listed in grams or milligrams, depending on the product; and
- “The exact delta-9-tetrahydrocannabinol (Δ -9THC), Delta-9-tetrahydrocannabinolic acid (Δ -9THCA), cannabidiol (CBD), cannabidiolic acid (CBDA), cannabinol (CBN), tetrahydrocannabivarin (THCV), cannabidivarin (CBDV), and delta 8 tetrahydrocannabinol (Δ -8THC) per serving/dose, listed in milligrams[.]”

19 CSR 100-1.120(1)(C)2.A, G, and H (final rule). This rule was effective beginning July 30, 2023.

The emergency rule also prohibited licensees from manufacturing, packaging, or labelling marijuana “[i]n a false or misleading manner,” and required the label to include:

- “The total weight of the marijuana included in the package,” to be listed in grams or milligrams depending on the product,
- “The THC, tetrahydrocannabinol acid, cannabidiol, cannabidiol acid, and cannabinol concentration per dosage,” and

- “All active and inactive ingredients, which shall not include groupings of ingredients that obscure the actual ingredients, such as ‘proprietary blend’ or ‘spices.’”

19 CSR 100-1.120(1)(A)1 and (D)1, 3 and 4 (emergency rule). The emergency rule was effective between February 3, 2023, and August 1, 2023.

The Department introduced the photograph of the White Airhead cartridge package through Herndon’s testimony, who identified the product depicted in the photograph as a “final packaged unit of a Conte cart that you would perhaps see at a dispensary.” Ex. R-AZ; Tr. vol. II, 258. Otherwise, the Department offered no evidence concerning the source of the package or the photograph, or when the label on the package was created and placed on the product.

Notwithstanding the Department’s failure to provide a detailed foundation for the introduction of the photograph, we conclude based on Herndon’s testimony that the product shown was produced for sale by Delta and the packaging is representative of that used by Delta for the Conte vape cartridges produced during the time the Department’s emergency and final rules on labelling were in effect. Because the labeling requirements of the emergency and final rules are substantively the same, we consider the Department’s claim that this label violated the rules without having to pinpoint the exact date the label was created and affixed to the product.

For the purposes of the Department’s labelling regulation, the meaning of “ingredient,” is no different than the meaning of this same term for purposes of the Department’s inventory control and seed-to-sale tracking regulation, as discussed above. In both instances, this term is given its plain and ordinary meaning. An “ingredient” is “something that enters into a compound or is a component part of any combination or mixture: CONSTITUENT[.]” *Ingredient*, MERRIAM-

WEBSTER DICTIONARY, online ed., <https://www.merriam-webster.com/dictionary/ingredient> (last visited January 25, 2025).

The Conte vape cartridges produced by Sparks for Delta had two active ingredients: THC created from cannabis oil distillate derived from marijuana grown in Missouri by a licensed cultivator and THC created from cannabis oil distillate derived from unregulated cannabis—identified by Delta as hemp plants grown outside Missouri. Herndon confirmed that the product pictured would have contained distillate from both regulated and unregulated cannabis. The regulations require all ingredients to be listed on the label. The distillate derived from hemp, which was produced from unregulated THC-A oil brought to the facility by Sparks, was a separate ingredient required to be listed on the package label. Herndon opined that listing “Cannabis oil distillate” was sufficient; however, this general term represents a grouping of ingredients that obscures the two types of cannabis oil distillates added to the product and is therefore prohibited by the rules. Herndon also testified that consumers purchasing a Conte product could deduce that the product included unregulated cannabis due to its price, because the Conte carts were the “cheapest cart on the market.” Tr. vol. II, 261. We do not agree that the price of the carts served to inform consumers of the presence of hemp-derived THC in Conte products. Moreover, even if some consumers were aware of the possibility that the carts were produced from unregulated cannabis, the Department’s regulations required that the cannabis oil derived from hemp plants be listed as an ingredient on the label of Conte products. Delta violated 19 CSR 100-1.120(1)(A) and 19 CSR 100-1.120(1)(C)2, and/or 19 CSR 100-1.120(1)(A)1 (final rules) and (D)1, 3 and 4 (emergency rule).

The Department also contends that Delta violated 19 CSR 100-1.120(1)(A) and/or 19 CSR 100-1.120(1)(A)1 as regards the bulk distillate sold to other manufacturers. Delta counters

that the labeling provisions of the regulations do not apply to the wholesale sales of bulk marijuana product distillate. But the language of the regulation cited by the Department covers more than just the labelling of retail products. Under the final rule, “No marijuana product may be manufactured, packaged, or labeled in a false or misleading manner, such as by inaccurately representing product ingredients.” 19 CSR 100-1.120(1)(A) (emphasis added). Under the emergency rule, “Licensees shall not manufacture, package or label marijuana – 1. In a false or misleading manner.” 19 CSR 100-1.120(1)(A)1 (emphasis added)

By failing to inform its customers that its products were made with THC derived from unregulated cannabis, Delta’s manufacture and sale of bulk distillate to other manufacturers was carried out “[i]n a false or misleading manner.” Delta’s Metrc records failed to accurately list the ingredients in its bulk distillate, specifically by failing to disclose that the distillate contained much larger quantities of THC derived from unregulated cannabis plants than from marijuana grown by Missouri licensed cultivators. Without accurately labeling the bulk distillate in Metrc, purchasers had no way to know that the product was not derived solely from regulated marijuana. The Metrc records, which serve as a source of information for Delta’s wholesale customers, were particularly misleading since the use of THC derived from non-regulated sources was prohibited under the Department’s regulations. As correspondence between Sparks and Delta also showed, the sale price of Delta’s bulk distillate was the same as the market price for distillate manufactured solely from regulated marijuana plants. There was no discount for customers of Delta’s partially hemp-derived distillate, even though Delta’s costs were reduced by using less Missouri-regulated marijuana in its product. Delta’s practices were misleading to purchasers due to the price of the bulk distillate and the inaccurate ingredients listing Delta

entered in Metrc. Delta violated 19 CSR 100-1.120(1)(A)(emergency rule) in regard to the bulk distillate it produced and sold and offered for sale to other manufacturers.

E. Testing

The Department contends that Delta violated 19 CSR 10-1.170(2)(B) (emergency rule), which provides, “Marijuana-infused products shall not be transferred to a dispensary facility until the marijuana-infused product has been tested by a testing facility, *according to the provisions of this chapter*, and the manufacturing licensee has received verification from the testing facility that the marijuana-infused product passed all required testing.” (Emphasis added). To establish a violation of 19 CSR 10-1.170(2)(B), the Department must show that the licensee violated a specific testing provision of the Department’s regulations. In its argument, the Department claims Delta violated 19 CSR 100-110(5)(C)4 (final rule). Resp. Brief at 113 n168. That provision states:

(C) A *testing licensee* shall not do any of the following:

* * *

4. Manipulate samples in any way that would alter the sample integrity or homogeneity of the sample. All sample increments must have the same chances of being selected; sampling must be random.

(Emphasis added). Delta is not a testing licensee. A “[m]arijuana testing licensee” is “an entity certified by the department to engage in the testing of marijuana product at a marijuana testing facility.” 1 CSR 100-1.010(56) (final rule). This provision does not apply to Delta.

Nor does the Department prove a violation of any other testing regulation that would apply to a manufacturing facility. The Department points to two specific instances where changes to Metrc records indicated upward adjustments to lots were made after mandatory testing was carried out. One such incident involved testing of a lot which occurred on July 14,

2022. The other involved testing of a lot which occurred on January 17, 2023. In both instances, the testing occurred before the effective date of the testing regulations on which the Department relies.³³

The Department failed to prove that Delta violated 19 CSR 10-1.170(2)(B).

F. Approvals for changes of use of space

Licensees are required to pass a commencement inspection before beginning operations. 19 CSR 100-1.030(3)(A) (emergency rule and final rule). A commencement inspection is also required before a licensee can change the use of any space in its facility. *Id.* To initiate this process, a licensee must submit a request to the Department that complies with the following:

4. Requests to change the use of spaces must be submitted prior to making any changes to the existing space or most recently approved plan for a space, and the request must include at least the following:

A. Descriptions, schematics, or blueprints for the facility clearly indicating the spaces that will be used differently than the most recently approved use of the space;

B. A written explanation of the proposed changes and how all affected spaces will comply with applicable regulations; and

C. SOPs and updated SOPs related to the new use of space.

19 CSR 100-1.030(3)(A)4 (emergency rule and final rule). The rule expressly provides that “[l]icensees may not commence any operations that are subject to a commencement inspection until the department issues written approval to do so.” 19 CSR 100-1.030(3)(D) (emergency rule and final rule).

³³ The final rule added new requirements related to testing, effective July 30, 2023: “At the time of sampling for mandatory testing, the cultivation, manufacturing, or dispensary licensee must make the entire harvest or process lot available to the testing licensee for sample collection.” 19 CSR 100-1.110(6)(B)(final rule). There is no similar provision in the medical marijuana rule or the emergency rule. This provision, which was effective July 30, 2023, was not in effect when the two lots DCR references were tested.

Delta changed the use of various spaces in its facility after the Department's initial commencement inspection without requesting or receiving approval. The most notable change of use occurred with the designated storage area. The storage area was the space utilized by Sparks to make the distillate used in Conte products and sold as bulk distillate. As shown in Exhibit X to Sparks' deposition, and explained by him in his deposition testimony, the designated storage area was filled with extraction and distillation equipment that he used in creating distillate. On the weekends SND and Conte were in the Delta facility creating distillate and Conte products, this equipment would be wheeled into the storage room, set up and used to create the distillate that would go into Conte products and sold as bulk distillate. It is clear the use of the designated storage room had changed to product manufacturing, a change in use that had not been requested by Delta or approved by the Department.

Other areas of the facility were also put to different uses from what was approved. The initial commencement authorization approved the facility's vault and freezer as marijuana product storage areas, while in-process products were to be stored in the oven rooms. Packaging was to be completed in the designated packaging room. The personnel brought in to package the Conte products on the weekends did their work in the hallway, not the packaging room. This work involved, among other things, filling Conte cartridges with distillate. Three racks of gummies that were "in-process" were stored in the hallway, as were bags of marijuana that were placed on shelves in this area. With regard to the bags of marijuana, J. Maritz explained, "We just, uh, got to a point where we were extracting so much that we'd have to order them [bags of biomass] in big amounts. . . . And so we just needed a place to put it. And so we kind of just have weed all over the ground the whole time. So we built shelves to store it up and then obviously got that 360 camera to cover it so that we could have the angles on it." Ex. R-AF at MO-39856,

(page 2237 of the pdf). The gummies had been “in process” of being coated for several days before August 2, 2023; however, Sparks said he moved the racks from the storage area (which was not approved for storage of products in process) to the corridor to get them out of his way on the last weekend in July when he was in the facility. The corridor was not approved for packaging marijuana product, creating marijuana product, or storing marijuana product.

Delta violated 19 CSR 100-1.030(3)(A), (3)(A)4 and (3)(D) (emergency and final rule).

G. Opportunity to Cure

Two provisions of the Missouri Constitution refer to a “reasonable cure period” in the context of the suspension or revocation of marijuana licenses by the Department. MO. CONST. art. XIV, § 2.4(1)(a) grants the Department the authority to:

(a) Grant or refuse state licenses for the cultivation, manufacture, dispensing, and sale of marijuana; suspend, restrict, or revoke such licenses upon a violation of this section or a rule promulgated pursuant to this section; and impose any reasonable administrative penalty authorized by this section or any general law enacted or rule promulgated pursuant to this section, *so long as any procedure related to a suspension or revocation includes **a reasonable cure period**, not less than thirty days, prior to the suspension or revocation, except in instances where there is a credible and imminent threat to public health or public safety; . . .*

(Emphasis added). MO. CONST. art. XIV, § 2.4(4)(a) directs the Department to issue rules or emergency rules relating to suspensions and revocations, and reiterates the requirement for a cure period:

(4) The department may issue any rules or emergency rules necessary for the implementation and enforcement of this section and to ensure the right to, availability, and safe use of marijuana by consumers. In developing such rules or emergency rules, the department may consult or contract with other public agencies. In addition to any other rules or emergency rules necessary to carry out the mandates of this section, the department shall issue rules or emergency rules relating to the following subjects:

(a) Procedures for issuing a license and for renewing, suspending, and revoking a license, *so long as any procedure related to a suspension or revocation includes a reasonable cure period, not less than thirty days, prior to the suspension or revocation, except in instances where there is a credible and imminent threat to public health or public safety; . . .*

(Emphasis added). In accordance with both of these provisions, the Department enacted emergency and final regulations establishing the procedure for revoking a license. The procedure includes a 30-day cure period. The regulation provides:

Prior to revoking or suspending a facility license, the department shall issue a notice to the designated contact for the licensee by sending such notice to the email address provided by the designated contact for the licensee. The notice shall list the basis for a pending revocation or suspension. Except where there is a credible and imminent threat to public safety, the revocation or suspension will not take effect until thirty (30) days from the date the notice is sent. *During the thirty (30) day period, the licensee will have the opportunity to cure the deficiencies listed in the notice and/or respond to the allegations and submit records or information demonstrating why the license should not be revoked or suspended.*

19 CSR 100-1.020(3)(G) (final rule) (emphasis added).

Delta contends that these provisions grant it an absolute right to cure the violations it committed, regardless of the number of violations, the seriousness of the violations, or the type of violations. Delta also contends that the Department's procedures failed to comply with Article XIV, § 2.4(1)(a) and 19 CSR 100-1.020(3)(G), because the ANOPR did not specifically state that Delta had a right to cure its violations.

The Department's procedures did, in fact, provide Delta with a cure period and an opportunity to cure. While the ANOPR did not specifically state that Delta had a "right to cure" the deficiencies, it did in fact grant this right to Delta by stating that Delta had thirty days "to respond to the allegations in this notice and submit records or information demonstrating why the

license should not be revoked.” Ex. R-G at p. 2. It also gave Delta the opportunity to request a conference call to present evidence in its defense. As one means of showing that the license should not be revoked, Delta could have provided records and information showing the efforts Delta made in the 30 days following receipt of the ANOPR to correct the violations. The evidence is also clear that Delta was fully aware of the opportunity to cure afforded it by Article XIV and the Department’s regulation from the time it received the ANOPR until the time its license was revoked. Delta noted in its response to the ANOPR the measures it had taken to correct violations cited by the Department. Delta and the Department were in constant contact between the time the order of immediate suspension was entered and the final order of revocation, and during that time they discussed measures Delta had taken to cure violations. Delta also presented evidence of the efforts it took before and after the issuance of the ANOPR in an attempt to cure the regulatory violations listed in the ANOPR. The notice of revocation correctly recited that Delta had been given the opportunity to cure violations.

Substantively, neither Article XIV, § 2.4(1)(a), nor 19 CSR 100-1.020(3)(G) grant Delta an absolute right to cure regulatory violations, contrary to Delta’s assertions. The constitutional provisions at issue are to be given “the meaning they were understood to have in their proper context when Missouri voters adopted [the] provision.” *Hill v. Mo. Dept. of Conservation*, 550 S.W.3d 463, 467 (Mo. banc 2018). Constitutional terms are interpreted under the same rules of construction as apply to interpreting statutes. *Missouri Chamber of Com. & Indus. v. Mo. Ethics Comm’n*, 581 S.W.3d 89, 92 (Mo. App. W.D. 2019). The words used in the Constitution are to be given their plain, ordinary and natural meaning, while construction of terms should avoid unreasonable meanings or meanings that would lead to absurd results. *Id.* The same rules of construction also apply to the interpretation of regulations. *Hiester v. Dir. of Rev.*, 488 S.W.3d

678, 680 (Mo. App. W.D. 2016). Delta’s reading of these provisions is not consistent with these principles.

The critical phrase in Article XIV, § 2.4(1)(a) and (4)(a) is “reasonable cure period,” while in 19 CSR 100-1.020(3)(G), it is “opportunity to cure the deficiencies.” Delta cites the Teacher Tenure Act, specifically, § 168.116, and cases applying it, in support of its assertion that it is entitled to an unfettered right to “remedy defects” with respect to its violations of the marijuana regulations. Contrary to Delta’s argument, § 168.116.2, is not concerned with “allegations of wrongdoing,” Pet. Brief at 6. Nor does the statute use the term “cure”. The statute states:

At least thirty days before service of notice of charges of incompetency, inefficiency, or insubordination in line of duty, the teacher shall be given by the school board or the superintendent of schools warning in writing, stating specifically the causes which, if not removed, may result in charges. Thereafter, both the superintendent, or his designated representative, and the teacher shall meet and confer in an effort to resolve the matter.

Section 168.116.2. Under this statute, the “meet and confer” provision – what courts have referred to as the “curative provision” – refers to dealing with ongoing performance issues of incompetency, inefficiency or insubordination of the teacher, not to violations of, or noncompliance with laws or regulations. As recognized in *Howard v. Mo. State Bd, of Education*, the purposes behind the professional license discipline statutes and the Teacher Tenure Act are at odds with each other:

We conclude, however, that the purposes served by Missouri’s licensing requirements for teachers differ, in some respects, from those served by the Teacher Tenure Act. “The overriding purpose of the Teacher Tenure Act is to ‘attain stability, certainty and permanence of employment on the part of those who have shown by educational attainment and by a probationary period their fitness for the important profession of teaching.’ Put another way, the tenure law “is to protect competent and qualified teachers in

the security of their positions.” The purpose of the act “is to establish strictly defined grounds and procedures for removing a permanent teacher” and tenured teachers have been referred to as “beneficiaries” of the act.

On the other hand, the focus of licensing laws, and suspension or revocation provisions included therein, is on protection of the public served by such licensed professionals. Cases uniformly reflect this focus with respect to the disciplining of various occupational licenses.

913 S.W.2d 887, 891-92 (Mo. App. S.D. 1995) (citations omitted). As also stated in *Howard*, “[e]mphasis is therefore placed on the remedial purpose of the law expressed in terms of the public good,” with the principal policy of license discipline statutes being “the protection of the public in securing [licensees] ‘of good moral character and honorable and reputable professional conduct.’” *Id.* at 892. The protection of the public is also of foremost concern in this case. Delta’s broad interpretation of the right to cure its violations does not serve that objective.

The Teacher Tenure Act provision cited by Delta is thus inapposite. We note that the concept of a “right to cure” is set out in some Missouri statutes in the context of lending and other commercial transactions. *See, e.g.*, § 408.555 (lender may not enforce a security interest unless it gives a borrower who is in default notice of a right to cure by making payment within 20 days); and § 407.842 (prior to terminating a farm equipment dealership agreement, the dealer must be given ninety days’ notice and an opportunity to cure the reasons for the termination, with certain specific exceptions). However, these very specific statutes shed no light on the meaning of the cure provision at issue here. Cure provisions may also be found in contracts. *See, e.g., Dwyer v. Unit Power, Inc.*, 965 SW2d 301, 304 (Mo. App. W.D. 1998) (employment contract included a provision requiring five days prior written notice for a termination, during which the employee had the right to “cure the stated grounds for termination.”). Delta and DCR are not in a contractual relationship, and therefore the principles set out in cases involving these

provisions do not necessarily apply here. However, *Dwyer* illustrates that cure provisions may be limited in its application. In *Dwyer*, two employees were terminated for dishonesty. Although they disputed the charges, they subsequently attempted to cure their misdeeds by repaying part of the money they took from their employer. The court observed that “[i]t is questionable whether it is possible for an employee to remedy a breach such as occurred here, or ‘to expect [employer] to continue to perform the contract.’” *Id.* at 309 (quoting *Leghorn v. Wieland*, 289 So. 2d 745, 747-48 (Fla. App. 1974) (noting that the charges of disloyalty and dishonesty at issue in that case, if true, would be impossible to remedy)). As the court recognized in the contract context, not all violations are “curable.”

Consistent with this approach, we determine that the “cure” provisions in Article XIV, § 2.4(1)(a) and 19 CSR 100-1.020(3)(G) do not constitute a grant of an absolute right to the licensee to maintain its license following violations of the Department’s regulations. Nothing in Article XIV, § 2.4(1)(a) and (4)(a) indicates that in approving these provisions, the voters intended to strip the Department of the responsibility placed on it by Article XIV to “protect public health by ensuring the safety of marijuana and products containing marijuana.” MO. CONST. art. XIV, §2.1. Neither does anything in the language suggest an intent to grant a second chance to a licensee who has shown by its past violations that it lacks the requisite good moral character to conduct its operations legally, reputably, and with concern for the safety of the public foremost in its actions. Delta’s proposed interpretation of the right to cure would produce an absurd result and one that is contrary to the constitutional mandate that the Department protect the public health and safety through its regulation of marijuana facility licensees.

Delta also contends it has, in fact, cured all its deficiencies. It points to a number of corrections it made to the technical violations, particularly to security violations. Its “cure” also

entails promises to make corrections in the future, such as corrections to information in Metrc if the Department will point out what needs to be corrected, and other promises to comply with regulations, such as properly maintaining visitor and access logs, ending the practices of propping doors open and piggy-backing, and meticulously tagging product with traceability information. Delta points to nothing in the record where it offered specific measures, processes, or procedures it would implement to ensure these promises of future compliance will be realized in practice and not just in words. Our independent review of the record likewise did not reveal any specific proposals that give us confidence in Delta's future compliance.

Delta's efforts at curing its regulatory violations fell short. Foremost among its violations was the manufacture and sale of marijuana product that included THC derived from sources other than regulated marijuana. Delta's apparent "cure" of this violation is that it has stopped this production practice and has cut all ties with Conte and, presumably SND and Sparks. Although Delta stopped producing products with THC from unregulated cannabis in July of 2023 (when it incorrectly argues its activities first became illegal), it made sure to stockpile large amounts of the distillate for sale before the final rule went into effect. When notified of the violation, Delta did not take steps to destroy the illegally manufactured product or recover the product already in the hands of its customers. Instead, the Department ordered the destruction of the unlawful product in its notice of revocation, but agreed to delay this while this matter is pending. Delta's proposed "cure" for this particular violation is no cure at all – it would retain the illegal product and continue to sell that product in the future.

Delta also failed to cure a significant security violation relating to remote, real-time access to Delta's video monitoring system. As the evidence shows, in order to operate, Delta's system depends on reliable internet service with particular capabilities. Delta was unable to cure

this violation and, according to its remote video monitoring system provider, will not be able to overcome these deficiencies from its present location. Remote, real-time access to a facility's video monitoring system is an essential element of the Department's regulation of facilities, allowing the Department and local law enforcement to observe activities and identify individuals within the facility at any time. It also serves as a deterrent to unacceptable behavior by licensees and their employees.

Delta does not have an absolute right to avoid the revocation of its license by curing the rule violations at issue here. Additionally, Delta failed to cure the violations set out in the ANOPR. It is therefore subject to revocation of its license under 19 CSR 100-1.020(3)(G).

H. Appropriate Penalty

1. Authority to Determine Penalties

Article XIV, § 2.4(4)(i) describes the appeal procedure applicable to this case by simply stating, "The licensee may choose to challenge any penalties imposed by the department through the administrative hearing commission, or its successor entity." Similarly, in exercising its authority to issue regulations regarding appeal procedures for penalty decisions, the Department promulgated a rule that states licensees "may seek review" of these decisions at the administrative hearing commission by filing a petition within 30 days of the date the decision is sent to the licensee. 19 CSR 100-1.020(4) (emergency and final rule). Under the procedure applicable here, if this Commission determines there are grounds for imposing a penalty, we then step into the shoes of the Department to determine the appropriate penalty, if any, to be imposed. With respect to determining the penalty, this Commission may exercise any discretion the Department could exercise in setting a penalty. *Mellas*, 220 S.W.3d at 782-83.

As an initial matter, the Department argues that Delta is precluded from asking this Commission to impose any penalty less than revocation because it did not seek this relief in the second amended complaint. Resp. Brief at 140-41. The Department cites this Commission’s regulation 1 CSR 15-3.350(1)(B)3 and § 536.063(2). Delta’s second amended complaint states, “Delta Extraction also appeals Respondent’s decision to revoke Delta’s license because Respondent’s decision was arbitrary, capricious, and unlawful.” Second Amended Complaint ¶34. The relief requested includes a request for this Commission to “issue an Order directing Respondents to reinstate Petitioner’s license . . . , and to allow Petitioner to begin operations.” Second Amended Complaint, Wherefore clause. These statements are sufficient to preserve the issue of whether a lesser penalty is appropriate under the circumstances.

Article XIV, § 2.4(1)(a), grants the Department the authority to “suspend, restrict, or revoke such licenses upon a violation of this section or a rule promulgated pursuant to this section[.]” (Emphasis added) Article XIV, § 2.4(4)(i) reiterates that revocation of a license may be based on “failure to comply with any rule promulgated pursuant to this section or for any violation of rules or regulations adopted pursuant to this section[.]” The Department may therefore revoke a license for the violation of any rule it has promulgated for the regulation of licensed marijuana activities. 19 CSR 100-1.020(3)(A)3. Neither the constitution nor the Department’s regulations mandate revocation of a license when a licensee violates the Department’s regulations. Both recognize that lesser penalties may be imposed, or no penalty at all.

2. Relevant Factors in Determining the Appropriate Penalty

In deciding on the appropriate penalty to impose on Delta for its violations of the Department’s regulations, we consider the number and seriousness of the violations, as well as

the circumstances under which they were committed. The alleged violations that the Department failed to prove are disregarded. Those violations that Delta corrected before the end of its cure period terminated are also weighed in the decision as to the appropriate penalty. Taking into consideration all these factors, this Commission determines that revocation of the license is the appropriate penalty. Accordingly, we revoke Delta's manufacturing license.

The evidence established a number of violations by Delta. Overall, the circumstances of these violations, Delta's explanation for them, and the nature of the violations reveal that Delta put profit and convenience ahead of its duty to comply with the Department's rules.

The most serious of the violations involved the manufacture of marijuana product in violation of 19 CSR 100-1.100(4)(F) (emergency rule) and 19 CSR 100-1.170(2)(E) (emergency and final rule). As the evidence showed, Delta knowingly and intentionally used THC derived from unregulated cannabis in its products in violation of these rules. The evidence also showed that Delta was uncertain about the lawfulness of what it was doing. In spite of this uncertainty, Delta proceeded to engage in the conduct. It was clearly motivated by the fact that the unregulated cannabis was easier to obtain and cheaper than regulated cannabis.

Tellingly, Delta took a number of measures that had the effect of concealing this violation from DCR. Notwithstanding Delta's position that the unregulated cannabis was derived from hemp, and that its use is and always was entirely legal, Delta failed to list unregulated hemp-derived THC as an ingredient in its marijuana products either in Metrc or on its product labels. This failure is particularly suspect, given that it had listed hemp-derived cannabinoids as ingredients in Metrc and on its product labels prior to the emergency rules going into effect. Delta provided numerous SOPs to DCR describing its processes, yet none of them disclosed Delta's practice of producing THC from unregulated cannabis and including the THC in its

marijuana products. When Bilyeu asked Delta what accounted for the significant increase in the weight of its product shown in a Metrc record, J. Maritz informed her it was due to the addition of “non-intoxicating non-psychoactive THC-A.” Ex. J. to Ex. R-DH(a) at 1. But Bilyeu soon discovered that the product in question had almost *no* THC-A in it, so J. Maritz’s explanation could not have been accurate. What J. Maritz omitted from his explanation was that the “non-intoxicating non-psychoactive THC-A” was converted to intoxicating, psychoactive THC before being added to the final product. Indeed, at no time after February 3, 2023 and prior to August 2, 2023 did Delta reveal to DCR that it was converting unregulated THC-A oil to THC and adding it to its products.

Delta also committed several significant inventory control violations. Delta failed to complete an inventory of its products on a daily basis as required. It stored biomass in the corridor, an area not authorized for storage of marijuana product, because it had too much product on hand to store it in the areas designated for marijuana product storage. It stored marijuana product going out for testing in an area that lacked adequate camera coverage out of convenience in transferring the product to the person picking up the samples for transport to the testing lab. It did not tag or enter “jar tests” into Metrc because it was confused about how to do it and believed the lack of compliance was excusable because those processing the test could identify the source of the marijuana being tested, if asked. It failed to secure Metrc tags to four pallets and two large totes containing thousands of vape cartridges. These violations indicate that Delta was unwilling to adjust its operations as necessary to comply with the Department’s regulations.

Similarly, Delta’s numerous security violations demonstrate an attitude of indifference to regulatory compliance. It failed to enforce requirements for entry to limited access areas, by-

passing the controlled access system because it was more convenient to prop open doors and allow piggy-backed entries than it was to provide an accurate record of who was entering its limited access areas. It failed to keep records of the many temporary workers who entered the facility on weekends. It shrugged off its inability to maintain and provide remote access to its video monitoring system due to weather and unreliable internet, rather than incurring the expense of a more reliable internet service. When alerts of an intrusion at the facility in the early morning hours came in, no one was monitoring the alert system and, when the alert was finally noticed later in the morning, Delta did nothing to respond to it, simply assuming it was a weather problem. Delta knew that it had an issue with arming the alarm system that notified local law enforcement of a break-in but did nothing about it until after it was ordered to cease operations and the break-in occurred. The seriousness of Delta's security violations is underscored by the break-in at the facility on August 7, 2023 and the theft of its server. Although the security violations were not the direct cause of the break in, some of the violations facilitated it. Had Delta been more attentive to security issues it may have prevented the intrusion or possibly facilitated the apprehension of the person responsible for removing the server.

During the cure period, Delta fixed some technical violations, did not fix others, and made promises about its future behavior. As noted above, an opportunity to cure is not absolute under Article XIV or the Department's regulations. Contrary to Delta's contention, Article XIV does not allow a licensee to engage in violations of regulations, no matter how serious or numerous, with the assurance that there will be no consequences because the "reasonable cure period" language gives every licensee an unqualified second chance to keep its license.

Moreover, this case does not present the situation in which Delta simply had technical violations of regulations that, if cured, would clean the slate of non-compliance. Delta's "cure" is

based in very large measure on promises of future compliance. There is no clear-cut standard by which to say that a cure has been effected when the “cure” is a promise of compliant behavior in the future. As indicated by the previous discussion of the “cure” requirement, Article XIV, § 2.4(1)(a) does not require that Delta’s promises be taken on faith. With a past history of violations, especially frequent and serious ones arising from a pattern of behavior, Delta’s future compliance is doubtful. Similar to the issue of rehabilitation in professional licensing cases, it is appropriate to consider whether Delta has been rehabilitated sufficiently to avoid engaging in future violations that would jeopardize the safety of those it would serve. In making this determination, we may look to whether Delta has recognized the wrongfulness of its acts, repented of its violations, and embraced a new moral code. *See, e.g., Francois v. State Bd. of Regis’n for the Healing Arts*, 880 S.W.2d 601, 603 (Mo. App. E.D. 1984); *State Bd. of Regis’n for Healing Arts v. Finch*, 414 S.W.2d 608, 615-16 (Mo. App. W.D. 1974); *Casnocha-Jones v. State Bd. of Nursing*, 686 S.W.3d 695, 706-07 (Mo. App. W.D. 2024). In this instance, we find that Delta’s violations were systemic. Further, we find no evidence that Delta has corrected its systemic attitude of non-compliance.

Delta’s response to the actions the Department has taken against it, clearly in evidence in the testimony and demeanor of its witnesses in the hearing before this Commission, is that it has done nothing wrong; it has, in fact, been wronged by the actions the Department and others have taken against it; and that it finds itself in its current circumstances as the result of the fault of others. Delta claims that it will be compliant in the future because it has disassociated itself with SND and Conte and promises it will not do business with them again. Delta has not shown that it recognizes the wrongfulness of its acts, repents of its violations, or embraces a new moral code.

Under the totality of the circumstances and considering the factors set out above, we determine that revocation of Delta’s license is the appropriate penalty to be imposed.

V. Administrative Hold

A. Grounds for Administrative Hold

An “administrative hold” is defined by the Department as “a status given to marijuana product by the department that prohibits any activity with the marijuana product including waste, sale or transfer of the marijuana product until the hold is lifted.” 19 CSR 100-1.010(2) (final rule). An administrative hold can be ordered in connection with an order of immediate suspension of operations: “If there is a credible and imminent threat to public safety, the department may order the licensed facility to immediately suspend all or part of the operations, including placing an administrative hold on marijuana product, until the threat has been eliminated.” 19 CSR 100-1.020(3)(G)1 (final rule). An administrative hold affects not only the licensee whose products are put on hold but any licensee who has the product in its inventory. 19 CSR 100-1.080(2)(B)2.

As noted in the discussion upholding the Department’s order of immediate suspension of operations, there was a credible and imminent threat to public safety pursuant to 19 CSR 100-1.020(3)(G)1.B, because Delta engaged in unlawful inversion in the manufacture of its products in violation of 19 CSR 100-1.100(4)(I) and 19 CSR 100-1.170(2)(E).

In this instance, the inversion involved adding THC derived from unregulated cannabis to Delta’s marijuana products. That practice was unlawful under the Department’s regulations, and the unlawful inversion continues so long as the offending marijuana product exists. As shown by the testimony, the THC derived from regulated marijuana biomass and THC derived from unregulated THC-A oil from non-marijuana cannabis biomass, including hemp, are

indistinguishable. Tr. vol. III, 178. Once mixed together in a product, there is no way to purge the unlawfully derived THC from the product. The threat is only eliminated with the destruction of the product.

Even without reference to 19 CSR 100-1.020(3)(G)1.B, Delta's products present a credible and imminent threat to public safety. "Public safety" involves "the welfare and protection of the general public, usu. expressed as a governmental responsibility." *Public safety*, BLACK'S LAW DICTIONARY (12th ed. 2024). As stated in *Kuba v. Nagel*, 124 S.W.2d 597, 601 (Mo. App. E.D. 1939), public safety measures are those that add to the safety and protection of the public. *See also, e.g., Pope v. Bridge Broom, Inc.*, 770 S.E.2d 702, 715 (N.C. App. 2015) (a public safety law is one that imposes a specific duty for the protection of others); *Industrial Bank of Wyandotte v. Reichert*, 232 N.W. 235, 236 ("public safety" is a broad concept that deals with the protection of people and their property). The rules requiring THC in marijuana products to be sourced solely from regulated marijuana were promulgated to address the public safety concerns presented by THC from unregulated sources in marijuana product. These rules seek to eliminate those threats to public safety by strictly regulating the THC content in marijuana products and limiting the sources of THC to those that were grown under the stringent health and safety standards applicable to Missouri-licensed cultivators. Delta violated the provisions the Department put in place to protect the public from harm. To say that the Department lacks the power to enforce its regulations through an administrative hold on these products is to give Delta permission to violate the Department's rules and to put the consuming public at risk. It also allows Delta to profit from its unlawful activities by the sale of its illicit products in the mainstream of the legal marijuana market in Missouri. This is an absurd result, and the

Department's regulations should not be interpreted to allow such a result. *In the Matter of Trenton Farms*, 504 S.W.3d at 164.

Delta argues that the administrative hold ended when the order of immediate suspension ended, and that the order of immediate suspension ended with the order of revocation. That argument is without merit. Under 19 CSR 100-1.020(3)(G)1, the administrative hold and the order of suspension remains in place "until the threat has been eliminated." As already noted, that threat exists so long as the unlawful product exists. Since the unlawful product remains in existence, the threat from the product has not been eliminated. Grounds existed to order the administrative hold and the administrative hold remains in place.

Delta's argument that the administrative hold ended with the entry of the revocation is also contrary to the nature of the two administrative actions. The license revocation works only against Delta. Essentially, it takes away Delta's authorization to manufacture marijuana products presently and in the future. As 19 CSR 100-1.180(2)(B)2 shows, the administrative hold is directed at other licensees, not just Delta, such as dispensary facilities that have Delta's marijuana product in their inventories. In the absence of the administrative hold, dispensary licensees could continue to sell Delta's products in their inventory even though they have been determined to present a threat to public safety. The revocation does not eliminate the threat to public safety presented by the products already manufactured and in the inventories of Delta's customers. The revocation of Delta's license also does not resolve the question of what is to be ultimately done to the product on administrative hold.

B. Products Subject to Administrative Hold

A secondary issue related to the administrative hold is which products are subject to the administrative hold. Originally, the Department placed the hold on all products that Delta

manufactured. It then amended the administrative hold and recall lists and removed products that it was able to verify were sourced solely from regulated marijuana. When the Department removed products from the two lists, it did so on the basis of the attestation/verification process it had worked out with Delta. Although Delta attested to the products that should have come off the lists, it now claims that the two lists include additional products that were sourced solely from Missouri regulated marijuana. Delta's criteria for removing items from the administrative hold and recall lists is by brand, that brand being Midwest Magic. The Department's criteria for removing products from the lists was the verification process. The evidence established that all Midwest Magic products were sourced solely from regulated marijuana. All Midwest Magic products should be removed from the administrative hold and recall lists.³⁴

The Department has grounds for an administrative hold on Delta's products in accordance with this opinion.

V. Recall of Products

With respect to recalls:

The department may issue notice of marijuana product recall to licensees or the public if, in its judgment, any particular marijuana product presents a threat or potential threat to the health and safety of qualifying patients or consumers. All facilities are responsible for complying with recall notices. Recalled items must be immediately pulled from production or inventory and quarantined until such time as the department determines the item is safe, may be remediated, or must be destroyed.

³⁴ Delta's witness suggested that this Commission should go through the 48,000 lines of product remaining on the recall list and identify the Midwest Magic product that should be removed from the lists. However, these products are not identified by brand name on the list; instead, they might be identified by product type. When Delta had the opportunity in conjunction with DCR to identify products it believed should have been removed from the administrative hold and recall lists, it apparently did an inadequate job. J. Maritz testified that in five minutes of reviewing just a couple of pages of the recall list on the morning of hearing, he found a "ton of examples" of product that should have come off the list. This Commission is not in a position to cull the recall list and identify products that might be the Midwest Magic products; we lack the information necessary to perform this task. DCR controls the removal of specific product items from the two lists. It has the responsibility to identify and remove Midwest Magic products from the list and should be aided by a more diligent effort on Delta's part to identify those products.

19 CSR 100-1.100(4)(P)(final rule).

The threshold for implementing a recall is “a threat or a potential threat to the health and safety of qualifying patients or consumers.” (Emphasis added) Potential means “existing in possibility: capable of development into actuality.” *Potential*, MERRIAM-WEBSTER DICTIONARY, (online ed.) <https://www.merriam-webster.com/dictionary/potential> (last visited January 27, 2025). In this instance, the analysis is the same for the administrative hold ordered by the Department, as is the result. There is a threat or potential threat to qualifying patients and consumers of marijuana products due to Delta’s inversion and use of THC derived from unregulated cannabis.

Delta argues that 19 CSR 100-1.020(3)(G)1.B (final rule), which declares inversion to be a *per se* credible and imminent threat to public safety, does not apply to the recall regulation. Regulations are considered in context and read *in pari materia* with other regulations on the same subject, along with cognate sections. *State ex rel. Evans*, 254 S.W.3d at 35. The inversion regulation concerns a circumstance which adversely affects public safety as determined by the Department in the exercise of authority specifically granted it under the Missouri Constitution. As such, it is *in pari materia* with the regulatory provision allowing the Department to issue a recall of products that threaten or potentially threaten the health and safety of consumers of marijuana products. The Department’s authority to issue a recall for products under 19 CSR 100-1.100(4)(P) (final rule) can be used to deal with the threat to health and safety from the activity prohibited under 19 CSR 100-1.020(3)(G)1.B(final rule). Under Delta’s theory, the Department cannot act to issue a recall for the protection of consumers, even though the products to be recalled have been determined as a matter of law to present a threat to public safety, and even though the Department would have grounds to issue an administrative hold on the same products

for public safety reasons. We disagree and find that the Department can rely on 19 CSR 100-1.020(3)(G)1.B (final rule) to recall Delta's products.

In addition, as set out in the discussion of the administrative hold, Delta's violation in manufacturing the Conte products and bulk distillate constitutes a threat or potential threat to the health and safety of consumers of marijuana products without applying 19 CSR 100-1.020(3)(G)1.B (final rule).

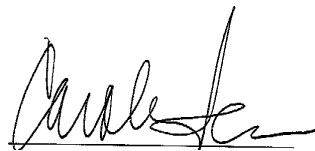
For the reasons noted in the discussion of the administrative hold, any Delta Midwest Magic-branded products remaining on the amended recall list should be removed from that list.

The Department has grounds for a recall of Delta's products in accordance with this opinion.

Summary

Delta's comprehensive manufacturing license is revoked. Grounds exist for the administrative hold and recall of Delta's products in an amended scope consistent with this decision. The administrative hold and recall remain in force and effect. Grounds exist for the order of immediate suspension of operations.

SO ORDERED on February 18, 2025.



CAROLE L. ILES
Commissioner