IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE:

REVOLUTION GEORGIA LLC,
ASPIRE MEDICAL PARTNERS LLC,
GA BIOSCIENCE RESEARCH INC.,
CURALEAF GA HOLDINGS LLC,
PEACH STATE MEDICINALS LLC,
PURE BEAUTY GA LLC,
CUMBERLAND CURATIVE LLC,
SYMPHONY MEDICAL LLC,
PURE PEACH ORGANIC INC.,
ACC LLC, PEACH HEALTH
ALTERNATIVES LLC,
HARVEST CONNECT LLC,
SILVERLEAF HEALTH ALTERNATIVES
INC., and
REMEDIUM LIFE SCIENCE OF GEORGIA
LLC,

Petitioners,

v.

FFD GA HOLDINGS, LLC;
THERATRUE GEORGIA, LLC;
NATURES GA, LLC;
and TREEVANA REMEDY, INC.,

Respondents.

Case No. 2022CV370799

NONPARTY GEORGIA FIRST AMENDMENT FOUNDATION'S REPLY MEMORANDUM TO THE RESPONSE OF CURALEAF GA HOLDINGS LLC, FFD GA HOLDINGS, LLC, THERATRUE GEORGIA, LLC, NATURES GA, LLC, AND TREEVANA REMEDY, INC., IN OPPOSITION TO MOTION TO UNSEAL

The following is the Georgia First Amendment Foundation's reply to both Responses in Opposition to the Foundation's Motion to Unseal in the nature of an appeal.

I. THE FOUNDATION IS AN "AGGRIEVED PARTY" FOR PURPOSES OF THE ADMINISTRATIVE PROCEDURE ACT

The Respondents argue that the Foundation must bring its appeal under the Administrative Procedure Act. Assuming that OSAH has not incorporated Rule 21 in its Rules of Procedure 616-1-2-.02 or 616-1-2-.23, the Foundation still meets the standard of an "aggrieved party" as defined in Ga. Code Ann. § 50-13-19 (a), which provides both jurisdiction and standing.[1]

The Administrative Procedure Act provides that "any person" who is "aggrieved by a final decision in a contested case" is entitled to judicial review. Ga. Code Ann. § 50-13-19 (a). One need not be a party to this dispute to obtain standing under the APA. *See Georgia Power Co. v. Campaign For a Prosperous Georgia,* 255 Ga. 253, 254–56, 336 S.E.2d 790, 792–93 (1985); *see also N. Fulton Med. Ctr., Inc. v. Roach*, 263 Ga. 814, 815, 440 S.E.2d 18, 20 (1994) (explaining that a nonparty may be "aggrieved" and maintain standing for purposes of the APA).

In the context of the Administrative Practice Act, the word "aggrieved" means that the appellant must show that it has an interest in the agency decision that has been specially and adversely affected thereby. *See Georgia Dep't of Cmty. Health v. Northside Hosp., Inc.,* 324 Ga. App. 326, 329–30, 750 S.E.2d 401, 406 (2013), rev'd on other grounds, 295 Ga. 446, 761 S.E.2d 74 (2014), and vacated, 330 Ga. App. 478, 767 S.E.2d 290 (2014) (citing *Chattahoochee Valley Home Health Care, Inc. v. Healthmaster, Inc.,* 191 Ga.App. 42, 43(1)(a), 381 S.E.2d 56 (1989)); *see also Zitrin v. Georgia Composite State Bd. of Med. Examiners*, 288 Ga. App. 295, 299, 653 S.E.2d 758, 763 (2007) (citing *Bd. of Nat. Resources v. Ga. Emission Testing Co.,* 249 Ga.App. 817, 819(1), 548 S.E.2d 141 (2001)). Federal precedent is helpful in filling gaps in Georgia case law to explain what distinguishes a "special" injury from a generalized injury. The United States

[1] The Foundation included the Administrative Procedure Act in its initial filing as a co-existent basis for jurisdiction and venue. *See* Motion to Unseal, paragraph 1.

Court of Appeals for the Seventh Circuit has explained that a citizen has suffered a special injury, as opposed to a general injury, when he has "undertaken a 'special burden' or has otherwise altered his behavior in response to the government action. *See, e.g., Books v. Elkhart Cnty., Ind*., 401 F.3d 857, 861 (7th Cir. 2005). When an organization is forced to alter its behavior or intended strategy, there is a special, distinct injury. *See id*.

The Foundation has suffered such an injury. As a nonprofit devoted to First Amendment principles, the Foundation educates Georgians on their rights to access judicial records. The Foundation produces many manuals for citizens and journalists that explain how to access public records, how to access judicial records, how to access public meetings, how to comply with the state's Sunshine Laws, and how to access public educational records.[2] It is the Foundation's intention, in accordance with its nonprofit mission, to request these judicial records in order to examine the operational transparency of these government-funded activities, which this order prevents. The Foundation now faces a specific and actual hurdle in its mission as an educational nonprofit that it did not face before the entry of this order, and so cannot fulfill its commitment to the public.

In addition to the injury directly suffered by the Foundation itself, its organizational members and board members have also suffered an injury. The Foundation's board is made up of media law attorneys and journalists who intend to request and report on these specific records.[3] Separate from its nonprofit board, the Foundation has organizational members who directly support its First Amendment and public records advocacy. The Foundation's training and events

[2] *See* Georgia First Amendment Foundation's "Resources" webpage, available at: https://gfaf.org/resources/ (last accessed Oct. 12, 2022).
[3] *See* Georgia First Amendment Foundation's "Leadership" webpage, available at: https://gfaf.org/leadership / (last accessed Oct. 17, 2022).

draw large groups of Georgians who are interested in accessing judicial records and public records.

In *Georgia Power Co. v. Campaign for a Prosperous Georgia*, an organization showed that despite its status as a non-party, it was "aggrieved" by an administrative order that would ultimately increase utility rates because the organization's *members* were Georgia Power ratepayers and an increase in one's utility rates was a "special injury." 255 Ga. 253, 258(2), 336 S.E.2d 790 (1985). Similarly, the Foundation's members are primarily journalists and media lawyers who routinely seek access to court records. They are now unable to request these records pursuant to the order of the administrative law judge. *See Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta,* 281 Ga. 342, 344–45, 638 S.E.2d 307, 312 (2006) (explaining that standing in an administrative appeal "does not require a showing that any particular individual member of the Association has already suffered an actual injury," but may be established by a showing of interests or rights which are or will be affected by the action); *see also Sawnee Elec. Membership Corp. v. Georgia Dep't of Revenue*, 279 Ga. 22, 24–25, 608 S.E.2d 611, 613–14 (2005) (describing the general elements of associational standing).

The sole argument that Respondents offer as to why the Foundation would not be "aggrieved" is because the Foundation has no interest in the outcome of the medical cannabis dispensary licensing protests. *See* Curaleaf Response Brief at 4. This argument would make more sense if the Foundation were challenging the outcome of the medical cannabis dispensary licensing protests. The Foundation is only challenging the order (attached to the initial pleading) that sealed the record. In addition to the Foundation's unique interest as a champion of open government, the First Amendment and the press, the Georgia Supreme Court has declared that *everyone* shares an interest in a transparent judicial process. *See Undisclosed LLC v. State*, 302

Ga. 418, 421-423, 807 S.E.2d 393, 397-398 (2017); *see also Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners*, No. S22G0039, 2022 WL 14147669, at *16 (Ga. Oct. 25, 2022) (holding that citizens, residents, and taxpayers enjoy standing to enforce public rights).

II. THE RECORDS SOUGHT ARE JUDICIAL RECORDS

Respondents argue that the records sought are not "court" records and therefore, the common law standards of access to court records should not apply. Imagine, for a moment, the far-reaching consequences of holding that an administrative law tribunal is exempt from case law that is applicable to "courts." Under this reasoning, one could argue that the decisions of the Georgia Supreme Court are not binding on an administrative law judge. *See* Ga. Const. art. VI, § 6, ¶ VI ("The decisions of the Supreme Court shall bind all other *courts* as precedents.") (emphasis added); *see also* O.G.C.A. § 50-13-13(7) (providing that failure to comply with a subpoena issued by the administrative law judge shall be cause for punishment as for contempt of *court*) (emphasis added); O.G.C.A. § 50-13-13(9)(b) (providing that the ALJ "shall have the same rights and powers given the *court* under Chapter 11 of Title 9, the "Georgia Civil Practice Act.") (emphasis added); *Georgia Dep't of Hum. Servs. v. Steiner,* 815 S.E.2d 883, 887 (Ga. 2018) (holding that "the superior court erred in reversing the administrative law *court*.") (emphasis added).

Regardless of whether these records were created in a "court," the records are of a judicial nature. An administrative hearing is "judicial" when (1) parties are granted notice and the opportunity to be heard, (2) the hearing officer is required to examine and weigh evidence and to make a decision according to the law, (3) the hearing officer is required to exercise discretion and judgment in application of the law to a particular set of facts, (4) two or more litigants are involved, and (5) the conclusion of the hearing officer is binding. *See Laskar v. Bd.*

of Regents of Univ. Sys. of Georgia, 320 Ga. App. 414, 416–17 (2013) (internal citations and quotations omitted).

As discussed by the respondents, these judicial actions were performed by the administrative law judge in the underlying dispute. The Foundation is appealing a binding order that directly affects its legal rights. It makes no difference whether the judicial process took place at OSAH, this Superior Court, or the Supreme Court of Georgia. The body of case law addressing access to judicial records is not hinged on the technicality of whether the tribunal is a "court." The integrity and transparency of the judicial process must be ensured, regardless of the venue or the setting, because a transparent judicial process is "one of the principal cornerstones of a free society." *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 576 n.1 (1982).

III. ADMINISTRATIVE LAW JUDGES MAY NOT IGNORE GEORGIA CASE LAW WHEN IT DIRECTLY ADDRESSES THE ISSUE BEING DECIDED AND DOES NOT CONFLICT WITH THE APPLICABLE ADMINISTRATIVE RULES

The Licensee Respondents would argue that administrative judges make their decisions in a vacuum of administrative procedural law, completely isolated from the context of Georgia's constitution or common law traditions.

Administrative law judges have great discretion in procedural matters, but they do not possess an unbounded freedom to ignore the precedents of the Georgia Supreme Court, its Court of Appeals, or Uniform Superior Courts, which stress the importance of judicial transparency and the integrity of the judicial process. *See, e.g., Stieberger v. Heckler*, 615 F. Supp. 1315, 1351 (S.D.N.Y. 1985), *vacated sub nom. Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986) (explaining that administrative law judges must make every reasonable effort to follow the trial or appellate court's views regarding procedural or evidentiary matters when handling similar cases). This is especially true when the applicable administrative rules contain limited guidance for sealing

judicial records. Both the Rules of Administrative Procedure and the Commission's Post-Award Protest procedures provide that a hearing record may be sealed, but neither procedural framework contains thorough guidance for doing so. Even the Rules of Administrative Procedure recognize that additional guidance may be required, which is why they specifically instruct administrative law judges to look to Uniform Superior Court Rules and their precedents when ruling on procedural matters. Administrative Rule of Procedure 616-1-2-.02(3).

While exercising her discretion, the administrative law judge is required to consider applicable Georgia case law and common law principles. Repeatedly, the Georgia Supreme Court has explained that there is no distinction between Rule 21 and the common law: "…the common law is not only part of the relevant legal background regarding the right of access, it is the mold in which Rule 21 was cast." *Undisclosed LLC v. State,* 302 Ga. 418, 421, 807 S.E.2d 393, 396 (2017) (citing to *Merchant,* 301 Ga. at 613 (1) (b), 800 S.E.2d 557). "Through Rule 21," the Supreme Court continued, "the common law remains in effect," and, "[t]here is no indication that Rule 21 changed the common law in any way." *See id*.

For centuries, Georgia case law has provided clear and instructive guidance relating to the importance of judicial transparency. The decisions of the ALJ must conform to this precedent when it is applicable, as is the case here.

IV. THE ALJ ERRED IN ITS INTERPRETATION OF THE HOPE ACT AND THIS COURT IS NOT REQUIRED TO DEFER TO THAT ERROR

The Hope Act provides for the confidentiality of information that is obtained by/produced by/disclosed to (past tense) the Commission "pursuant to the activities conducted pursuant to this part." O.C.G.A. § 16-12-220(a). The "activities" referenced by the Hope Act are limited to the licensing process. *See id*. Reviewing Part 2 of the Hope Act, which discusses the Role of the Commission, there is no reference whatsoever to litigation following the licensing process or

post-award protest procedures. *See* O.C.G.A. § 16-12-210 *et seq.* If the parties submitted *new* arguments, raised for the first time in a judicial process that is outside of and in addition to the licensing process contemplated by the Hope Act—none of those new arguments would qualify under the confidentiality protections of the licensing process, except to the extent that they include the information that was submitted to the Commission earlier, as part of the licensing process. *See id*.

The ALJ held, and the Licensee Respondents argue, that when the Legislature writes "confidential data," what they really intend to say is that all judicial records relating to medical cannabis licensing must be sealed in their entirety, and therefore *Blau's* helpful discussion of redaction is inapplicable. *See Blau v. Georgia Dep't of Corr.*, 364 Ga. App. 1, 7-8 (2022) (explaining the importance of redaction for documents that may contain both public and private information). No respondent has offered a legal citation in support of this statutory interpretation. Reading the term "confidential data" in the full statutory context, one could argue that the Legislature simply meant that the information would be confidential for purposes of the Open Records Act. *See* O.C.G.A. § 16-12-220(a) ("…shall be confidential data and shall not be subject to [the Open Records Act]"). "Confidential data" is not a legal operative phrase for the proposition that the information must forever be always secret, in all times, all places, and all spaces. Without question, the Legislature has exempted much of this information from public view by making it unattainable under the Open Records Act. But a different standard applies to judicial records.[4]

Respondents ask this Court to take their word that the entire administrative hearing record consists of nothing more than the exact documents that are made confidential by the Hope

[4] Again, the Open Records Act does not apply to judicial agencies or to judicial records. *See Fathers Are Parents Too Inc. v. Hunstein,* 202 Ga. App. 716 (1992).

Act, but there's no evidence this is the case. It defies reason to believe that the litigants provided raw business data to the hearing officer without argument or allegation. The Post-Award procedures provide that the litigants may submit "briefs, documents, and witness testimony in the form of affidavits." Curaleaf Ex. A at 7. These records would not qualify as "confidential" under the Hope Act's definition of the term. *See* Ga. Code Ann. § 16-12-220(a). Similarly, Curaleaf argues that redaction is inappropriate because the Hope Act exempts entire "documents." However, the Hope Act also exempts "recorded information," which could easily be included in a document that is otherwise public. *See* O.C.G.A. § 16-12-220(a). This is why redaction of the record is required, as opposed to a blanket seal.

Next, the Licensee Respondents attempt to use the Hope Act to argue that the Hearing Officer should not have engaged in the lengthy process of ensuring judicial transparency because the Hope Act states that "[t]he commission shall not promulgate any rules or regulations that would unduly burden access to low THC oil or products by registered patients." O.C.G.A. § 16-12-210(b). First, there's no evidence that a partial seal would "unduly burden" public access to medical cannabis. Second, Respondent's reliance on this provision is misplaced, as this provision governs the actions of the Commission in regard to the licensing process. The provision does not govern the ALJ, who was acting in her capacity as a judicial officer reviewing a legal dispute subsequent to, and distinct from, the licensing process.

The Licensee Respondents argue that "great deference" must be afforded to the ALJ's erroneous interpretation of the Hope Act. Licensee Respondent's Response at 10. But "[w]hile judicial deference is afforded an agency's interpretation of statutes it is charged with enforcing or administering, the agency's interpretation is not binding on the courts, which have the ultimate authority to construe statutes." *Eagle W., LLC v. Georgia Dep't of Transp.,* 312 Ga. App. 882,

885–86, 720 S.E.2d 317, 321 (2011). "It is the role of the judicial branch to interpret the statutes enacted by the legislative branch and enforced by the executive branch, and administrative rulings will be adopted only when they conform to the meaning which the court deems should properly be given." *Id*. This Court is under no obligation to adopt the ALJ's interpretation of the Hope Act.

This is especially true when the interpretation was plainly erroneous. When interpreting statutes, we look to the plain language. *See Deal v. Coleman,* 294 Ga. 170,173 (2013) ("…if the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end."). The Hope Act is problematic for open government advocates in many aspects, and yet it does not provide blanket confidentiality. Respondents lobbied for complete secrecy, [5] but they are now bound by the plain language of the statute. A seal for judicial records is not expressly mandated by the Hope Act, nor is it implied by necessity. And in the absence of express language providing for a mandated seal, Georgia's case law provides comprehensive, on-point guidance for the factors to be considered before the public right of access can be revoked.

V. THE BUSINESS INTEREST OF CURALEAF DOES NOT OUTWEIGH THE PUBLIC'S INTEREST IN THE PERFORMANCE OF ITS GOVERNMENT

Respondents argue that "the business interests in maintaining the seal on the ALJ hearing records as to parties not a part of the protest and licensing proceedings outweighs any potential interest of the general public in unsealing the documents."

These private parties chose to engage in this government process. They chose to compete to contract for a government function in pursuit of immense profit. And although there are rules

[5] Niesse, Mark, *Medical Marijuana Companies Influenced Passage of Georgia Law*, Atlanta-Journal Constitution, available at https://www.ajc.com/news/state--regional-govt--politics/medical-marijuana-companies-influenced-passage-georgia-law/3VO8pNHguFw1eRs7JB1nOP/ (last visited November 2, 2022).

in place to protect Respondents' trade secret information, we have yet to hear any argument as to (1) what information they actually submitted and (2) how that information meets the definition of a "trade secret." A conclusory statement that the records are trade secret will not suffice. *See, e.g., State Rd. & Tollway Auth. v. Elec. Transaction Consultants Corp.*, 306 Ga. App. 487, 490 (2010) ("The conclusory statement…that the method by which it allocates costs and pricing for the services it provides is unique, provides no specific basis to evaluate its claims…On this record, Electronic failed to support its contention that its detailed price proposal contains its trade secrets."). Respondents have not made the effort to name a single document or even a vague category of information submitted to OSAH that they consider to be a protectable trade secret.

The unsealing process proposed by the Foundation includes *in camera* review and thorough legal analysis that would protect trade secret information. It would also observe the limitations of the Hope Act. But it is certain that *some* information was submitted during the hearing that would not be eligible for either protection. Georgia case law is full of examples of commercial information that does not constitute trade secret information because of how it is stored and treated by a party, its content, or a variety of other factors.[6]

Contrary to Respondents' assertions, public interest is appropriate at this stage in the process. The public has a right to know why some bidders were overlooked and whether the successful bidders are qualified to fulfill the government contract they were recently awarded. The government performance in this case is not just the performance of successful bidders in their contract duties, but also the performance of the Commission in awarding the contracts solely on merit and the integrity of the judicial process that followed the award. How the

[6] *See, e.g., Capital Asset Research Corp. v. Finnegan*, 160 F.3d 683 (1998) (a process for evaluating an amount to be bid on a tax deed was not a trade secret); *Allen v. Hub Cap Heaven, Inc.*, 225 Ga.App. 533 (1997), reconsideration denied ("secret" sales technique was not a trade secret); *Sutter Capital Management, LLC v. Wells Capital, Inc*., 310 Ga. App. 831 (2011) (lists of investors were not trade secrets); *Avnet, Inc. v. Wyle Lab'ys, Inc.,* 263 Ga. 615, 619, 437 S.E.2d 302, 305 (1993) (customer lists are not trade secret unless specific elements are met).

government selects its vendors, what influences may be affecting the awards of millions of dollars' worth of contracts, whether the elected and appointed public officials are carrying out their duties appropriately, and above all, the judicial process determining the rights of the parties—every citizen in Georgia has an overwhelming interest in the integrity of these activities.

VI. CONCLUSION

We respectfully ask this Honorable Court to amend the order of the OSAH to permit access to these records. As part of this process, we ask this Honorable Court (1) to order *in camera* review of the hearing record, (2) to order the objecting parties to submit evidence and argument addressing the specific portions of the record that they deem to be a trade secret and/or exempt under the Hope Act, and (3) provide the Foundation with the opportunity to address that evidence and argument in a hearing.

In the alternative, the Foundation requests that this Honorable Court remand this matter to the OSAH to amend the order in accordance with constitutional transparency principles.

Respectfully submitted this the 7th day of November, 2022.

/s/ Gerald Weber
Gerald Weber
Georgia Bar No. 744878
Post Office Box 5391
Atlanta, Georgia 31107
Phone: (404) 522-0507
Counsel for the Georgia First Amendment Foundation

/s/ Joy Ramsingh
Joy Ramsingh
Admitted *Pro Hac Vice*
4203 Union Deposit Road, #1030
Harrisburg, Pennsylvania 17111
Phone: (717) 461-2174
joy@ramsinghlegal.com

IN THE SUPERIOR COURT OF FULTON COUNTY
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Ga. Code Ann. § 5-6-32, I served a copy of the foregoing via mail on this the 7th day of November 2022 upon the Court and upon the following:

Jane Kwak, Esq.
Abdul Mohamed, Esq.
Revolution Global
1200 North Branch Street
Chicago, Illinois 60642
224-443-6125
jkwak@revcanna.com
amohamed@revcanna.com

Counsel for Revolution Georgia, LLC

Kevin Ward, Esq.
Schulten Ward Turner & Weiss LLP
260 Peachtree Street NW, Suite 2700
Atlanta, Georgia 30303
404-688-6802
k.ward@swtwlaw.com

Counsel for Aspire Medical Partners, LLC

James ("Jake") C. Evans, Esq.
Kevin T. Kucharz, Esq.
Hall Booth Smith, PC
191 Peachtree Street NE
Suite 2900
Atlanta, GA 30303
404-954-5000
jevans@hallboothsmith.com
kkucharz@hallboothsmith.com

Counsel for GA Bioscience Research Inc.

Jennifer L. Andrews, Esq.
Daniel ("Danny") B. Swaja, Esq.
Gunjan R. Talati, Esq.
John P. Jett, Esq.
Ava J. Conger, Esq.
Kilpatrick, Townsend & Stockton LLP
1100 Peachtree Street NE, Suite 2800
Atlanta, Georgia 30309
404-815-6503
jeandrews@kilpatricktownsend.com
dswaja@kilpatricktownsend.com
gtalati@kilpatricktownsend.com

Counsel for Curaleaf GA Holdings, LLC

Robert ("Robbie") L. Ashe III, Esq.
Kamal Ghali, Esq.
Juliana Mesa, Esq.
Bondurant Mixon & Elmore LLP
One Atlantic Center
1201 West Peachtree St. NW
Suite 3900
Atlanta, GA 30309
404-881-4169
ashe@bmelaw.com
ghali@bmelaw.com
mesa@bmelaw.com

Counsel for Peach State Medicinals, LLC

Jeffrey ("Jeff") A. Belkin, Esq.
Arabella Okwara, Esq.
Alston & Bird, LLP
One Atlantic Center
1201 West Peachtree Street
Suite 4900
Atlanta, GA 30309
404-881-7388
jeff.belkin@alston.com
arabella.okwara@alston.com

Counsel for Pure Beauty GA, LLC

William T. Arnold, Esq.
Ayerbe & Arnold, LLC
3608 Vineville Avenue
Macon, Georgia 31204
478-474-2252
bill.arnold@acinjurylaw.com

Fisher K. Law
Evans Law Firm
117 N. Erwin Street
P.O. Box 3022
Cartersville, GA 30120
770-382-4374
fisher@evansfirm.com

Counsel for Cumberland Curative LLC

Robert ("Bob") Brazier, Esq.
Jonathan Stuart, Esq.
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC
3414 Peachtree Road NE
Suite 1500
Atlanta, GA 30326
404-221-6516
rbrazier@bakerdonelson.com
jstuart@bakerdonelson.com

Mike Williams, Esq.
mike@williamsbusinesslaw.com

Counsel for Peach Health Alternatives LLC

Rhonda L. Klein, Esq.
Les Schneider, Esq.
Sheri Oluyemi, Esq.
Wimberly, Lawson, Steckel, Schneider & Stine, P.C.
Lenox Towers, Suite 400
3400 Peachtree Road, N.E.
Atlanta, GA 30326-1107
(404) 365-0900
rlk@wimlaw.com
las@wimlaw.com
seo@wimlaw.com

Counsel for Pure Peach Organic Inc.

Jonathan Bledsoe, Esq.
Azurae K. Orie, Esq.
The Minor Firm LLC
745 College Drive, Suite B
P.O. Box 2586
Dalton, Georgia 30722
706-259-2586
jbledsoe@minorfirm.com
aorie@minorfirm.com

Counsel for ACC, LLC

Reginald ("Reggie") Snyder, Esq.
Taylor English Duma LLP
1600 Parkwood Circle, Suite 200
Atlanta, Georgia 30339
678-336-7219
404-877-8966
rsnyder@taylorenglish.com

Counsel for Harvest Connect LLC

Kristen Goodman, Esq.
Hall Gilligan Roberts & Shanlever LLP
3340 Peachtree Road NE
Suite 1900
Atlanta, GA 30326
404-442-8778
kgoodman@hgrslaw.com

Counsel for Symphony Medical, LLC

Jefferson M. Allen, Esq.
Cohen Cooper Estep & Allen
3330 Cumberland Boulevard, Suite 600
Atlanta, Georgia 30339
404-814-0000
jallen@ccealaw.com

Counsel for Silverleaf Health Alternatives Inc.

J. Matthew Maguire, Jr., Esq.
Melissa D. Andrews, Esq.
Parks, Chesin, and Walbert, PC
75 Fourteenth Street, Suite 2600
Atlanta, Georgia 30309
404-873-8009
mmaguire@pcwlawfirm.com
mandrews@pcwlawfirm.com

Counsel for Remedium Life Science Of Georgia, LLC

S. Derek Bauer, Esq.
Jacqueline Menk, Esq.
Baker & Hostetler LLP
1170 Peachtree Street
Suite 2400
Atlanta, Georgia 30309
404-459-0050
dbauer@bakerlaw.com
jmenk@bakerlaw.com

Counsel for FFD GA Holdings, LLC

Vincent R. Russo, Esq.
Matthew T. Parrish, Esq.
Robbins Ross Alloy Belinfante Littlefield LLC
400 14th Street, NW
Atlanta, Georgia 30318
678-701-9381
vrusso@robbinsfirm.com
matt.parrish@robbinsfirm.com

Counsel for Theratrue Georgia, LLC

Joanne Caceres, Esq.
Dentons US LLP
312-876-2862
joanne.caceres@dentons.com

Eric P. Berlin, Esq.
Dentons US LLP
233 South Wacker Drive
Suite 5900
Chicago, IL 60606

Counsel for Natures GA, LLC

William ("Chip") Collins, Jr., Esq.
Joe Stuhrenberg, Esq.
Burr & Forman LLP
171 Seventeenth Street, NW
Suite 1100
Atlanta, Georgia 30363
404-815-3000
wcollins@burr.com
jstuhrenberg@burr.com

Counsel for Treevana Remedy, Inc.

/s/ Gerald Weber
Gerald Weber
Georgia Bar No. 744878