**IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY**

**STATE OF OKLAHOMA**

KENNETH WOGOMAN and )

GREEN THE VOTE, LLC, )

)

Plaintiff, )

) CASE NO. \_\_\_\_\_\_\_\_\_\_\_\_

vs. ) Judge:

)

THE STATE OF OKLAHOMA, ) ATTORNEY LIEN CLAIMED

GOVERNOR MARY FALLIN, ) JURY TRIAL DEMANDED

THE OKLAHOMA DEPARTMENT OF )

HEALTH, TIMOTHY E. STARKEY, )

individually and in his official capacity as )

a member of the Board of the Oklahoma )

Department of Health, R. MURALI )

KRISHNA M.D., individually and in his )

official capacity as a member of the Board )

of the Oklahoma Department of Health, )

JENNY ALEXOPULOS, D.O., individually )

and in her official capacity as a member of )

the Board of the Oklahoma Department of )

Health, CHARLES E. SKILLINGS, )

Individually and in his official capacity as a )

member of the Board of the Oklahoma )

Department of Health, and TERRY R. )

GERARD II, D.O., individually and in his )

official capacity as a member of the Board )

of the Oklahoma Department of Health, )

)

Defendants. )

**PETITION FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

**COME NOW** the Plaintiffs, Kenneth Wogoman, indivudally, and Green the Vote, LLC, an Oklahoma Limited Liability Company, by and through their attorney of record Ronald E. Durbin, II of Durbin Law Firm, PLLC, and for their causes of action against the Defendants, alleges and states as follows:

**JURISDICTION AND VENUE**

1. Plaintiff Kenneth Wogoman, at all times material to the events described herein, was and is an individual and resident of Muskogee County, State of Oklahoma.
2. Plaintiff Kenneth Wogoman is an honorably discharged veteran of the United States Army having obtained the rank of Staff Sergeant and having served in the 172nd Stryker Brigade, the 25th Army Infantry Brigade, and the 1st Infantry Brigade with combat tours in both Iraq in 2008-2009 and Afghanistan in 2011-2012.
3. Plaintiff Kenneth Wogoman has a vested medical and financial interest in the matters at issue in this litigation and the proper enactment and rule promulgation related to Initiative Petition 788.
4. Plaintiff Green the Vote, LLC is an Oklahoma Limited Liability Company organized under the laws of the State of Oklahoma with its primary business operations located in Tulsa County, State of Oklahoma.
5. Plaintiff Green the Vote, LLC worked to support the passage of Initiative Petition 788, and it has a vested interest in helping all Oklahoma residents obtaining access to medical cannabis for treatment.
6. Plaintiff Green the Vote, LLC participated in the rulemaking process described herein by working with various Oklahoma organizations and the Oklahoma Department of Health to in order to facilitate the implementation of rationale regulations by the Oklahoma Department of Health in order to allow Oklahoma citizens access to medical cannabis as authorized by 788. Their interests were frustrated and destroyed by the actions of the Oklahoma Department of Health.
7. That the Defendant, State of Oklahoma is a State and part of the United States of America.
8. That the Defendant, Mary Fallin, is the Governor of the State of Oklahoma, and as chief executive, oversees and controls the executive functions of the State of Oklahoma.
9. That the Defendant, Mary Fallin, as Governor of the State of Oklahoma, oversees the Oklahoma Department of Health as part of her executive duties.
10. Upon information and belief, the Oklahoma Department of Health is a subdivision of the State of Oklahoma operating under the executive powers of the Governor of the State of Oklahoma.
11. Upon information and belief, Timothy E. Starkey is and was a member of the Oklahoma Department of Health on July 10, 2018 and serves as the President of the Board of the Oklahoma Department of Health;
12. Upon information and belief, Timothy Starkey is also Executive Director of the Great Salt Plains Health Center in Cherokee, Oklahoma, and his employer has/had a vested interest in the Rules at issue in this litigation which created a conflict of interest for Mr. Starkey for which he should have recused himself from participation in the drafting, revisions, and consideration of the proposed Rules.
13. Upon information and belief, R. Murali Krishna, M.D. is and was a member of the Board of the Oklahoma Department of Health on July 10, 2018;
14. Upon information and belief, R. Murali Krishna, M.D. is also senior consultant of Integris Mind-Brain Health, co-founder and president of Integris James L. Hall Jr. Center for Mind, Body and Spirit, and through his employment and consulting business, has/had a vested interest in the Rules at issue in this litigation which created a conflict of interest for Dr. Krishna for which he should have recused himself from participation in the drafting, revisions, and consideration of the proposed Rules.
15. Upon information and belief, Jenny Alexopulos, D.O. is and was a member of the Board of the Oklahoma Department of Health on July 10, 2018;
16. Upon information and belief, Jenny Alexopulos, D.O. is an Associate Dean of Clinical Services and Professor of Family Medicine with the Oklahoma State University College of Osteopathic Medicine, and through her employment, has/had a vested interest in the Rules at issue in this litigation which created a conflict of interest for Dr. Alexopulos for which she should have recused herself from participation in the drafting, revisions, and consideration of the proposed Rules.
17. Upon information and belief, Charles E. Skillings is and was a member of the Board of the Oklahoma Department of Health on July 10, 2018;
18. Upon information and belief, Charles E. Skillings is Chief Executive Officer, President and Director of St. Anthony Shawnee Hospital and serves as a member of the Board of Directors of the Shawnee Economic Development Foundation and is a member of the American College of Healthcare Executives, the Oklahoma Hospital Association, and Shawnee Chamber of Commerce. Through his employment and membership in the above entities, Mr. Skillings has/had a vested interest in the Rules at issue in this litigation which created a conflict of interest for Mr. Skillings for which he should have recused himself from participation in the drafting, revisions, and consideration of the proposed Rules.
19. Upon information and belief, Terry R. Gerard II, D.O. is and was a member of the Board of the Oklahoma Department of Health on July 10, 2018;
20. Upon information and belief, Terry R. Gerard II, D.O. is an Emergency Department Physician at the Medical Center of Southeastern Oklahoma, Durant, Oklahoma, a member of the American Osteopathic Association, and the Oklahoma Osteopathic Association. Through his employment and membership in the above identified entities, Dr. Gerard has/had a vested interest in the Rules at issue in this litigation which created a conflict of interest for Dr. Gerad for which he should have recused from participation in the drafting, revisions, and consideration of the proposed Rules.
21. That meetings conducted by the Oklahoma Department of Health are governed by the Oklahoma Open Meetings Act, 25 Okla. Stat. §301 et seq.
22. That the actions giving rise to this action occurred in Oklahoma County, State of Oklahoma.
23. The Court has subject matter jurisdiction over the claims alleged herein and may properly exercise personal jurisdiction over the Defendants.
24. Venue is proper in Oklahoma County.

**FACTUAL BACKGROUND**

1. Paragraphs 1 through 24 are incorporated by reference.
2. On June 26, 2018, Initiative Petition 788 (hereinafter “788”) was approved by the citizens of the State of Oklahoma by an overwhelming majority of those voting.
3. Under the statutory provisions contained in Initiative Petition 788, the Oklahoma Department of Health (hereinafter the “OKDH”) is tasked with creating regulations for implementation and regulation of the activities authorized by 788.
4. The Board of the Oklahoma Department of Health consists of nine (9) members.
5. On June 26, 2018 the Oklahoma Department of Health released JE OAC 310:681, working draft version 1.5 of Title 310, Chapter 681 which contained proposed regulations for implementation of 788 (hereinafter “the June 26th Draft”). A copy of the June 26th Draft is attached hereto as Exhibit A.
6. OKDH accepted public comments on the June 26th Draft, and the public comment period closed on or about July 3, 2018.
7. On July 7, 2018, OKDH released JE OAC 310:681, working draft version 1.5 of Title 310, Chapter 681 which contained the proposed regulations to be implemented at the OKDH meeting on July 10, 2018. A copy of the July 7th Draft is attached hereto as Exhibit B.
8. The July 7th Draft incorporated OKDH changes to the proposed rules and regulations after the public comment period expired.
9. Prior to the July 10, 2018 Meeting, the OKDH published an Agenda available to the public. The Agenda contained an exact copy of the July 7th Draft attached above as Exhibit B. The full Agenda is attached hereto as Exhibit C.
10. The Oklahoma Open Meetings Act, 25 Okla. Stat. § 303 specifically requires:

All meetings of such public bodies . . . shall be preceded by advance public notice specifying the time and place of each such meeting to be convened **as well as the subject matter or matters to be considered at such meeting**, as hereinafter provided.

(bold emphasis added).

1. Public Notices, including the Agenda at issue herein, are in violation of the Open Meetings Act if they, “are deceptively vague and likely to mislead . . . .” *See* *Wilson v. City of Tecumseh*, 2008 OK CIV APP 84, ¶ 13.
2. The Oklahoma Department of Health constitutes a public body required to comply with the Oklahoma Open Meetings Act. *See* 25 Okla. Stat. § 304 (1) (defining Public Body to include, “all boards, bureaus, commissions, agencies, trusteeships, authorities, councils, committees, public trusts or any entity created by a public trust . . . .”).
3. In addition to § 303 of the Open Meetings Act, 25 Okla. Stat. § 311 further provides that, “All agendas required pursuant to the provisions of this section shall identify **all items of business** to be transacted by a public body at a meeting . . . .” (bold emphasis added)
4. Section IV of the Agenda stated as follows:

Consideration, possible action and vote on proposed emergency rules creating the Oklahoma Medical Marijuana Authority program\*\*

1. Consideration, possible action and vote to open the rulemaking record.
2. Consideration, possible action and vote for final adoption of rules.

*See Agenda at Section V attached hereto as* Exhibit C.

1. Section V contained two \*\* which references additional information contained at the bottom of the Agenda.
2. No mention was made in the Agenda about amendments being proposed, considered, and/or voted upon.
3. At the bottom of the Agenda, OKDH noted, “\*\* Due to the online public comment period, there will not be an opportunity for public comment on the proposed emergency rules during the board meeting.”
4. On July 10, 2018, OKDH held a meeting of its Board, and said meeting was broadcast via the internet.
5. Plaintiffs, instead of attending the meeting in person, both remotely attended the meeting via electronic means.
6. OKDH did not allow for public comment on Item V of the Agenda during the meeting of the OKDH Board held on July 10, 2018.
7. Upon information and belief, the named Defendants, which sit on the Board of the OKDH, met in groups prior to the July 10, 2018 meeting of the OKDH for purposes of coming up with and agreeing to certain amendments to the July 7th Draft, and the meetings were undertaken outside the public’s presence.
8. The board members identified above constitute five (5) of the nine (9) board seats of the Oklahoma Department of Health.
9. The Oklahoma Open Meeting Act defines a Meeting subject to the Act as follows: "Meeting" means the conduct of business of a public body by a majority of its members being personally together . . . .” 25 Okla. Stat. § 304(2)
10. Because the named Defendant members of the Board of OKDH constitute a majority of the OKDH Board, their informal gatherings prior to the regular meeting constitute a Meeting subject to the Open Meetings Act given that their discussions were about actions to be taken by the Board during the July 10, 2018 full meeting. *See* *25 Okla. Stat. § 304(2)* (stating that, “Meeting shall not include informal gatherings of a majority of the members of the public body when no business of the public body is discussed . . . .”). *25 Okla. Stat. § 304(2)*
11. Despite knowing amendments to the July 7th Draft would be proposed and considered at the OKDH meeting, the named Defendant members of the OKDH Board failed to disclose their intentions to the public prior to the meeting so that the public could be informed of their intentions.
12. Introduction of the Amendments does not constitute “New Business” under the Agenda as the board members knew and/or should have known that the Amendments would be offered, discussed, and voted on prior to the July 10, 2018 meeting. *See* 25 Okla. Stat. § 311 (10) (stating that, “’New business,’ as used herein, shall mean any matter not known about or **which could not have been reasonably foreseen** prior to the time of the posting.”) (bold emphasis added).
13. The named Defendant members of the OKDH knew and/or should have known that they were required under the Oklahoma Open Meetings Act to disclose their intention to introduce, debate, consider, and vote on the Amendments to the July 7th Draft so that the public could be fully informed by the published Agenda and attend the meeting if interested.
14. Instead of disclosing their intention to introduce the Amendments to the July 7th Draft at the July 10, 2018 meeting of OKDH, the named Defendant members of the OKDH sought to hide their nefarious efforts to circumvent the public’s right to know by instead including an item on the agenda which purposely lead people to believe that only the July 7th Draft would be considered at the meeting.
15. During the July 10, 2018 meeting of the OKDH, the named Defendant members of the OKDH introduced and supported a document entitled, “Motions to Amend Rules in a Block” (hereinafter referred to as “Amendments”) *See* Motions to Amend Rules in a Block attached hereto as Exhibit D.
16. Amendments first sought to Amend the Section 310:681-1-4 Definition of Dispensary Manager by altering it from “a person who is knowledgeable in the specialized functions of medical marijuana product preparation and dispensing . . .” and changing it to “a person who is a current licensed pharmacist in good standing with the Oklahoma Board of Pharmacy . . . .”
17. Amendments also sought to strike language from the July 7th Draft of the definition of “Dispensary Manager” which stated, “A dispensary manager may also be a licensed healthcare provider (e.g. pharmacist etc.).”
18. The Amendments also sought to amend 310:681-2-11 by adding a subsection (c) and (d) which state:

(c) Medical marijuana products may only be dispensed to a patient or caregiver in the following forms:

(1) pill;

(2) oil;

(3) topical forms, including gels, creams or ointments;

(4) a form medically appropriate for administration by vaporization or nebulization, excluding flower, dry leaf or plant form;

(5) tincture; or

(6) liquid.

(d) Medical marijuana product may not be dispensed to a patient or a caregiver in flower, dry leaf or plant form.

*See* Exhibit D.

1. The named Defendants of the Board of OKDH knew and/or should have known that the proposed amendments constitute substantial change to the intentions behind 788 and the language contained in both the June 26th and July 7th Drafts.
2. Despite their knowledge, and having written and pre-prepared the Amendments for consideration at the July 10, 2018 meeting of OKDH, the named Defendant board members attempted to hide their behavior by engaging in a fraud which constitutes a criminal violation of the Oklahoma Open Meetings Act.
3. The OKDH adopted and approved the Amendments during the July 10, 2018 meeting with the five (5) named Defendant members of the board voting in favor of the Amendments and the other four (4) members voting against.
4. As outlined in the Jurisdiction and Venue section above, the five (5) named Defendant board members not only failed to disclose their intention to introduce the Amendments, but upon information and belief, they also each have personal and financial interest in the proposed Amendments and Rules via their employment and business interests, and such interests required them to recuse from participation in the consideration of the proposed rules.
5. Governor Mary Fallin approved the Rules promulgated by the OKDH during the July 10, 2018 meeting, including the Amendments thereto, on July 11, 2018.
6. The actions of the OKDH and the individual members listed herein constitute a misdemeanor pursuant to the Open Meetings Act.
7. It is well settled Oklahoma law that a willful violation of the Open Meetings Act, “does not require a showing of bad faith, malice, or wantonness, but, rather, encompasses conscious, purposeful violations of law or **blatant or deliberate disregard** of law by those who **know, or should know** requirements of the Act . . . .” *Wilson v. City of Tecumseh*, 2008 OK CIV APP 84, ¶ 13 (bold emphasis added).
8. The Open Meetings Act provides criminal sanctions for violation of its provisions by stating as follows:
9. Any person or persons willfully violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail for a period not exceeding one (1) year or by both such fine and imprisonment.
10. The District Attorney for Oklahoma is being notified of this Petition for purposes of encouraging the opening of a criminal investigation of the named Defendants of the OKDH board.
11. Aside from the criminal sanctions addressed above, the Open Meetings Act also authorizes any person to bring a civil suit seeking declaratory or injunctive relief, or both. *See* 25 Okla. Stat. § 314 (B)(1).
12. The Open Meetings Act provides for the recovery of Plaintiffs attorney fees and costs. *See* 25 Okla. Stat. § 314 (B)(2).
13. Due to the unlawful acts perpetrated by the named Defendants, the Plaintiff seeks declaratory relief from this Court finding that: (1) the Oklahoma Department of Health violated the Open Meetings Act on July 10, 2018 and (2) that Timothy E. Starkey, R. Murall Krishna, M.D., Jenny Alexopulos, Charles E. Skillings, and Terry G. Gerard II, D.O. violated the Open Meetings Act on and before July 10, 2018.
14. In addition to the violation of the Open Meetings Act, the Actions of the OKDH constitute a violation of the Oklahoma Administrative Procedures Act.
15. Many of the rules promulgated and adopted by the OKDH and subsequently approved by Governor Mary Fallin are arbitrary and capricious having no reasonable basis in law, fact, or reality for that matter. The Rules and/or Regulations this Court deems to be arbitrary and capricious should be declared invalid and held for naught including but not limited to, (1) limits on amount of THC in grown flowers which is beyond the control of growers, (2) limitation on amount of THC in dispensed products, (3) limitation on proximity to businesses other than schools as outlined in 788, (4) restrictions on ability to grow outdoors utilizing sunlight, (5) limitation on the sale of dried flower, (6) prohibition on being open Sundays, and (7) all other rules and/or regulations this Court deems to be arbitrary and capricious and/or outside the authority of the OKDH pursuant to the provisions of 788.
16. Plaintiffs seek declaratory and injunctive relief against those rules and/or regulations which this Court determines are arbitrary and capricious and/or otherwise a violation of the authority granted the OKDH pursuant to the Oklahoma Administrative Procedures Act and/or 788.
17. Plaintiffs additionally seek injunctive relief prohibiting the enforcement of the Amendments due to the named Defendants failing to comply with the Open Meetings Act during consideration of said Amendments.
18. Plaintiffs additionally seek injunctive relief ordering the named Defendants to: (i) prospectively comply with the Oklahoma Open Meetings Act during meetings of the Oklahoma Department of Health, (ii) prospectively comply with the Oklahoma Open Meetings Act by refraining from conducting meetings of partial members of the Oklahoma Department of Health without proper notice as required, (iii) prospectively recuse themselves from any action as a member of the Board of the Oklahoma Department of Health when they have a personal financial, employment and/or business interest in the matters being considered and/or their employer has a vested interest in the matters being considered, and (iv) prospectively comply with the Oklahoma Administrative Procedures Act.

**COUNT 1: DECLARATORY RELIEF**

1. Paragraphs 1 through 73 are incorporated by reference.
2. Plaintiffs seek declaratory judgment in accordance with the Open Meetings Act and 12 Okla. Stat. § 1651-1657 as the matters addressed herein constitute an actual, justiciable controversy existing between the parties.
3. Pursuant to the aforementioned facts and allegations, the Plaintiffs are entitled to a declaratory judgment determining that the Defendants:

(a) violated the Oklahoma Open Meetings Act by publishing an intentionally misleading agenda prior to the Oklahoma Department of Health’s July 10, 2018 meeting;

(b) violated the Oklahoma Open Meetings Act by failing to list consideration of Amendments during the July 10, 2018 meeting;

(c) violated the Oklahoma Open Meetings Act by conducting private meetings among a majority of the members of the Board of Oklahoma Department of Health for purposes of discussing and agreeing on the Amendments prior to the July 10, 2018 regular meeting of the Oklahoma Department of Health;

(d) declaring that the Amendments are invalid and void pursuant to the Oklahoma Open Meetings Act; and

(e) declaring that certain rules and/or regulations adopted by the Board of the OKDH are void due to the fact that they are arbitrary and capricious.

**COUNT 2: INJUNCTIVE RELIEF**

1. Paragraphs 1 through 76 are incorporated by reference.
2. Plaintiffs seek entry of a permanent injunction compelling the Defendants to comply with the Oklahoma Open Meetings Act and the Oklahoma Administrative Procedures Act.
3. Plaintiffs are **NOT** seeking an emergency temporary injunction, despite the fact that such relief is appropriate, so that the citizens of the State of Oklahoma may at least partially enjoy the medical benefits left standing in 788 after the OKDH butchered the intended purpose and language of 788 in the adoption of the rules at issue herein.
4. No adequate remedy at law exists for Plaintiffs to remedy the harm done by the named Defendants by their failure to comply with the Oklahoma Open Meetings Act or the Oklahoma Administrative Procedure Act.
5. Substantial threat exists that the Plaintiffs, and all citizens of the State of Oklahoma, will suffer permanent and irreparable injury in the absence of the requested injunctive relief.
6. The public policy of the State of Oklahoma, and specifically the Oklahoma Open Meetings Act, encourages an informed citizenry by requiring publication of detailed agendas prior to meetings so that the citizens of this state may fully understand the processes, problems, and actions of the executive branch of the State of Oklahoma.
7. The interests of the public are served by the issuance of injunctive relief as the injunctions sought would undo actions taken by the named Defendants which violate the public’s right to know and participate in the rule making process of the Oklahoma Department of Health.
8. The Plaintiffs are entitled to a permanent injunction ordering the Defendants to: (i) prospectively comply with the Oklahoma Open Meetings Act during meetings of the Oklahoma Department of Health, (ii) prospectively comply with the Oklahoma Open Meetings Act by refraining from conducting meetings of partial members of the Oklahoma Department of Health without proper notice as required, (iii) prospectively recuse themselves from any action as a member of the board of the Oklahoma Department of Health when they have a personal financial interest in the matters being considered and/or their employer has a vested interest in the matters being considered, and (iv) prospectively comply with the Oklahoma Administrative Procedures Act.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray that the Court enter judgment against all Defendants individually and in their official capacity as follows:

1. Declaratory Judgment as requested in Count 1 above;
2. Entry of a permanent injunction compelling the Defendants to: (i) prospectively comply with the Oklahoma Open Meetings Act during meetings of the Oklahoma Department of Health, (ii) prospectively comply with the Oklahoma Open Meetings Act by refraining from conducting meetings of partial members of the Oklahoma Department of Health without proper notice as required, (iii) prospectively recuse themselves from any action as a member of the board of the Oklahoma Department of Health when they have a personal financial interest in the matters being considered and/or their employer has a vested interest in the matters being considered, and (iv) prospectively comply with the Oklahoma Administrative Procedures Act;
3. Award Plaintiffs their costs and attorney’s fees incurred herein; and
4. Such other relief as this Court deems proper under law and equity.

JURY TRIAL DEMANDED

ATTORNEY’S LIEN CLAIMED

Respectfully submitted,

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Ronald E. Durbin, II, OBA #22550

Durbin Law Firm, PLLC

1502 South Denver Avenue

Tulsa, OK 74119

918.712.7400

918.712.4299 ~ Facsimile

[durbin@durbinlawfirm.net](mailto:durbin@durbinlawfirm.net)

***Attorney for Plaintiffs***