

CV-22-739
ARKANSAS SUPREME COURT

**BENNETT SCOTT “STORM” NOLAN II and
RIVER VALLEY PRODUCTION, LLC D/B/A
RIVER VALLEY RELIEF CULTIVATION**

APPELLANTS

v.

**2600 HOLDINGS, LLC d/b/a
SOUTHERN ROOTS CULTIVATION
ARKANSAS DEPARTMENT OF FINANCE
AND ADMINISTRATION; ARKANSAS ALCOHOLIC
BEVERAGE CONTROL DIVISION; and
ARKANSAS MEDICAL MARIJUANA COMMISSION**

APPELLEES

**APPELLANTS’ MOTION FOR SUPERSEDEAS, REQUEST FOR
EXPEDITED REVIEW, AND MEMORANDUM OF AUTHORITIES**

Bennett Scott “Storm” Nolan, II (“Nolan”) and River Valley Production, LLC d/b/a River Valley Relief Cultivation (“River Valley”), for their motion for supersedeas, state:

1. This case involves a second appeal after this Court affirmed in part, dismissed in part, and remanded an interlocutory appeal brought on grounds of sovereign immunity. *See Arkansas Dep’t of Fin. & Admin. v. 2600 Holdings, LLC*, 2022 Ark. 140, 646 S.W.3d 99. This Court held that sovereign immunity does not preclude a writ of mandamus against the State agencies. *2600 Holdings*, 2022 Ark.

140, 646 S.W.3d 99. The opinion recognized that 2600 Holdings sought to compel by mandamus the Arkansas Medical Marijuana Commission (“MMC”) to “strip Nolan of the license that [the State] had issued to him and issue it to 2600 Holdings instead.” *2600 Holdings*, 2022 Ark. 140 at *6,646 S.W.3d at 103. The Court noted that, while Arkansas courts have jurisdiction to consider a writ of mandamus, “a decision on the merits of the writ of mandamus is outside of [the Court’s] jurisdiction” because the appeal was limited to deciding whether sovereign immunity applied. *2600 Holdings*, 2022 Ark. 140 at *6, 646 S.W.3d at 103. One of the merits issues was whether the complaint “should be dismissed pursuant to Rule 19 of the Arkansas Rules of Civil Procedure because it failed to name Storm Nolan, who was an indispensable party.” *2600 Holdings*, 2022 Ark. 140, 646 S.W.3d 99.

2. Despite this Court’s opinion, 2600 Holdings did not seek to add Nolan or River Valley on remand. Instead, on October 25, 2022, 2600 Holdings filed a motion for summary judgment. **(RP.002)**. 2600 Holdings requested that the circuit court order the state agencies to void the cultivation facility and license held by Mr. Nolan. **(RP.002)**. Two days later, the circuit court granted 2600’s request for an emergency shortening of the time to respond to the summary judgment, making the response due by October 31. **(RP.061)**. That same day, the Attorney General’s Office moved to withdraw as counsel for the state agencies **(RP.065)**, which was denied in an order signed the same day the motion was filed. **(RP.123)**.

3. On October 31, 2022, Nolan moved to intervene and requested that it be added as a party under Ark. R. Civ. P 19 so that it could respond to the motion for summary judgment that sought to strip him of his property rights. **(RP.069)**. That same day, the State responded to the motion for summary judgment explaining, in part, that “the current license holder is a necessary party to this litigation, and [2600 Holdings] has not named him as a party.” **(RP.105)**. As the ABC and DFA stated, a writ as requested by 2600 Holdings would “simply deprive a non-party of a license it has held for over two years and twice renewed.” **(RP.105)**. On November 2, 2022, the circuit court denied Nolan’s request to be made a party. **(RP.133)**. One day later, the circuit court granted 2600 summary judgment. **(RP.137)**. There were no hearings.

4. The circuit court’s order denying intervention recognized that 2600 Holdings sought to “void a cultivation facility license and permit held, respectively, by non-parties [River Valley] and Mr. Nolan[.]” **(RP.133)**. The circuit court further recognized that, “[u]ndoubtedly, resolving this case in favor of [2600 Holdings] will have an effect on Mr. Nolan’s rights.” **(RP.0135)**. And, in the order granting summary judgment, the circuit court ruled that the state agencies acted unreasonably, unlawfully, and capriciously by awarding Nolan and River Valley a license and permit. **(RP.150)**. The circuit court did not, however, address all the state agencies’ arguments and did not rule on the motion that 2600 Holdings’ complaint could not

go forward because it lacked standing and because it failed to name Nolan and River Valley as necessary and indispensable parties under Rule 19. **(RP.137-151)**.

5. Nolan and River Valley attempted again to be heard, filing a post-judgment Motion To Intervene Under Rule 24 Or To Be Joined Under Rule 19 on November 17, 2022. **(RP.153-182)**. The circuit court summarily denied that motion four calendars later, without a response or hearing. **(RP.184)**. Nolan and River Valley immediately filed a timely notice of appeal. **(RP.188)**. “An order denying a motion to intervene as a matter of right is immediately appealable.” 2 Arkansas Civil Prac. & Proc. § 7:10 (5th ed.) (collecting cases). Contemporaneously with this Motion, Nolan and River Valley lodged a partial record, docketing their appeal with this Court.

6. In response to the circuit court’s summary judgment order, the MMC sent notice to Nolan and RVRC for a revocation hearing and stated that it is “taking the necessary steps to revoke the cultivation license . . . in compliance with the Court’s Order dated November 3, 2022.” **(RP.152)**. It follows that the State is not appealing the summary judgment order. A hearing is set for November 28, 2022, before the MMC on the revocation of Nolan’s and River Valley’s cultivation license. **(RP.164)**. The MMC has indicated that it will apply the circuit court’s ruling and revoke the license and permit of Nolan and River Valley. *See* Revocation Notice attached as **(RP.164)**. After that hearing on November 28, an appeal goes to the

Alcoholic Beverage Control Board, *See Oversight Of Med. Marijuana R. 24.5*, but the ABC is also under the circuit court’s order on summary judgment. **(RP.151)** (stating that “Defendants” are ordered to take steps).

7. The circuit court’s summary judgment order, which adjudicated rights of Nolan and River Valley without allowing either Nolan or River Valley to be heard is a violation of the due process. *See Arkansas Dep’t of Health v. Solomon*, 2022 Ark. 43, 6–7 (holding that person has a property interest in their license and permit that cannot be taken without Constitutional notice and opportunity to be heard).

8. “A supersedeas is a written order commanding appellee to stay proceedings on the judgment, decree or order being appealed from and is necessary to stay such proceedings.” Ark. R. App. P—8(a). Where, as here, an appeal has been docketed in this Court, jurisdiction to issue a supersedeas rests with this Court. Ark. R. App. P.—Civil 8(b); Ark. R. Civ. P. 62(d).

9. This Court holds that stays are appropriate when an appeal in an important case involves serious legal issues. *See McCambridge v. Little Rock*, 294 Ark. 126, 742 S.W.2d 114 (1987) (“We grant the stay as we have done consistently in important cases where serious legal issues are presented to this court.”). The Arkansas Court of Appeals has, at least once, looked at four factors when considering a stay request: (1) the threat of irreparable harm to the movant if the stay is not granted; (2) the balance between the harm to the movant if not stay is granted

and the respondent if a stay is granted; (3) the probability that the appellant will succeed on the merits of the appeal; and (4) any public policy issues. *Arkansas Elec. Consumers v. Arkansas Pub. Serv. Comm'n*, 31 Ark. App. 217-A, 217-D, 791 S.W.2d 719, 720 (1990); *but see Rogers v. Rogers*, 80 Ark. App. 430, 441, 97 S.W.3d 429, 436 (Ark. Ct. App. 2003) (“there is no requirement that a likelihood of success on appeal be shown before a stay of an order may be granted”). Regardless of the standard, all factors weigh in favor of a stay in this case.

a. Irreparable Harm. There is a presumption of irreparable harm from a showing of a constitutional deprivation “even when the violation persists for ‘minimal periods’ of time.” *A.H. v. French*, 985 F.3d 165, 176, 184 (2d Cir. 2021). The presumption arises regardless of when during the litigation that deprivation occurs. *Antonyuk v. Hochul*, No. 122CV0986GTSCFH, 2022 WL 5239895, at *22 (N.D.N.Y. Oct. 6, 2022). Here, there has been an order on summary judgment ostensibly stripping Nolan and River Valley of their property rights without notice or an opportunity to be heard and in violation due process right. Further, the revocation of their permits and license is irreparable harm in that it would force Nolan and River Valley to destroy almost \$7 million in inventory and shut down business and cease existence. *See Oversight Of Med. Marijuana R. 4.4; D.A.R.E. N.J. Inc. v. D.A.R.E. Am., Inc.*, 2012 WL 12911043, at *5 (C.D. Cal. Nov. 16, 2012) (terminating business enterprise qualifies as irreparable injury); *Imperial Pac. Int’l*

(*CNMI*), *LLC v. Commonwealth Casino Comm’n*, No. 1:22-CV-00007, 2022 WL 4448918, at *10 (D. N. Mar. I. Sept. 26, 2022) (revocation of casino license is irreparable harm).

b. Balance Of Harm. There is no harm in keeping the status quo of Nolan and River Valley continuing to operate under the MMC permit and license as they have for the last two-and-a-half years. To the contrary, if the circuit court’s order is not stayed, Nolan and River Valley will have to shut down a business after investing millions of dollars on a permit and license issued to them by the State of Arkansas. Dozens of hard-working Arkansans will lose their jobs on a holiday eve. And, as Nolan is one of eight cultivators licensed in Arkansas, about 12.5% of the medical marijuana available to the citizens of Arkansas will vanish, leaving a supply void for those suffering people that rely on the medication. The balance of the harm weighs in favor of a stay.

c. Probability Of Success On Appeal. The Fifth and Fourteenth Amendments to the United States Constitution and article 2, section 21 of the Arkansas Constitution provide that no person shall be deprived of property without due process of law. Nolan and River Valley have a property interest in their license and permit that “may not be taken from [them] ... at the whim of the government without due process.” *Arkansas Dep’t of Health v. Solomon*, 2022 Ark. 43, 7 (citing *Chandler v. Martin ex rel. State*, 2014 Ark. 219, at 9, 433 S.W.3d 884, 891). “Due

process requires, at a minimum, that a person be given notice and a reasonable opportunity for a hearing before he or she is deprived of property by state action.” *Arkansas Dep’t of Health v. Solomon*, 2022 Ark. 43, 6–7 (citing *Chandler v. Martin ex rel. State*, 2014 Ark. 219, at 9, 433 S.W.3d 884, 891). The circuit court entered an order that ostensibly deprives Nolan and River Valley of their property rights even though neither had notice and both have been denied the opportunity to be heard. Nolan and River Valley are likely to prevail with their constitutional right to have an opportunity to defend their property rights against state action.

d. Public Policy. The public has an interest in preserving the supply of its medicine, including marijuana. *See* Ark. Cons. Amend 98. The public has an interest in preserving due process of law. Public policy weighs in favor of a stay.

10. “At base, the question is whether the balance of the equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm’n*, 31 Ark. App. 217A, 217–D, 791 S.W.2d 719, 720 (1990) (citations omitted). Here, at the base, the balance of equity favors a stay where significant constitutional rights are at play, irreparable and significant harm will result from not issuing a stay, and there is no harm in granting a stay and preserving the status quo.

SUPERSEDEAS BOND

11. This Court has “consistently recognized the purpose of a supersedeas

bond to be securing the payment of a judgment following affirmance on appeal.” *Jewell v. Fletcher*, 2010 Ark. 195, 18, 377 S.W.3d 176, 188. “The phrase ‘as the court requires’ in Rule 8 clearly gives the court discretion to determine when and to what extent a supersedeas bond must be secured.” *Baily v. Delta Trust & Bank*, 359 Ark. 424, 439, 198 S.W.3d 506, 518 (2004).

12. Nolan and River Valley appeal from the denial of their motion to intervene or request to be added as a party. There is no judgment against either Nolan or River Valley that could result in costs or damages being affirmed against them on appeal. Accordingly, no bond is required. *See Beverly Enterprises-Arkansas, Inc. v. Cir. Ct. of Indep. Cnty.*, 367 Ark. 13, 238 S.W.3d 108 (2006) (holding that a circuit court erred by requiring a supersedeas bond on appeal from class certification order because there was no judgment for damages on which to stay execution).

13. In the alternative, should this Court believe that a supersedeas bond is appropriate, Nolan and River Valley stand ready to post such a bond as they have already posted a \$500,000.00 performance bond in connection with the permit. *See Bond Rider attached as Exhibit 1.*

REQUEST FOR EXPEDITED CONSIDERATION

14. Given the impending proceedings before the MMC (November 28, 2022) and the ABC (December 21, 2022), Nolan and River Valley request that this

Court expedite consideration of this motion. *See Edwards v. Campbell*, 2010 Ark. 386, 1 (granting expedited consideration when a matter is time-sensitive).

MEMORANDUM OF AUTHORITIES

- Ark. R. Civ. P 19
- Ark. R. Civ. P. 62
- Ark. R. App. P—Civil 8
- 2 Arkansas Civil Prac. & Proc. § 7:10 (5th ed.)
- *A.H. v. French*, 985 F.3d 165 (2d Cir. 2021).
- *Antonyuk v. Hochul*, No. 122CV0986GTSCFH, 2022 WL 5239895 (N.D.N.Y. Oct. 6, 2022).
- *Arkansas Dep't of Fin. & Admin. v. 2600 Holdings, LLC*, 2022 Ark. 140, 646 S.W.3d 99.
- *Arkansas Dep't of Health v. Solomon*, 2022 Ark. 43.
- *Arkansas Elec. Consumers v. Arkansas Pub. Serv. Comm'n*, 31 Ark. App. 217-A, 217-D, 791 S.W.2d 719 (1990)
- *Baily v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004).
- *Beverly Enterprises-Arkansas, Inc. v. Cir. Ct. of Indep. Cnty.*, 367 Ark. 13, 238 S.W.3d 108 (2006)
- *Chandler v. Martin ex rel. State*, 2014 Ark. 219, 433 S.W.3d 884.
- *D.A.R.E. N.J. Inc. v. D.A.R.E. Am., Inc.*, 2012 WL 12911043 (C.D. Cal. Nov. 16, 2012)
- *Edwards v. Campbell*, 2010 Ark. 386, 1
- *Imperial Pac. Int'l (CNMI), LLC v. Commonwealth Casino Comm'n*, No. 1:22-CV-00007, 2022 WL 4448918 (D. N. Mar. I. Sept. 26, 2022)
- *Jewell v. Fletcher*, 2010 Ark. 195, 377 S.W.3d 176.
- *McCambridge v. Little Rock*, 294 Ark. 126, 742 S.W.2d 114 (1987)
- *Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (Ark. Ct. App. 2003)

Respectfully submitted,

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*Attorneys for Appellants Bennett Scott "Storm"
Nolan II and River Valley Production, LLC
d/b/a River Valley Relief Cultivation*

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of November 2022, I electronically filed the foregoing with the Clerk of the Court using the AOC eFlex electronic filing system, which shall send notification of such filing to all counsel of record.

/s/ Joseph R. Falasco _____
Joseph R. Falasco

Arkansas Medical Marijuana Commission
1515 W. 7th Street, Suite 503

Little Rock AR 72201

Hudson Insurance Company
1035 Greenwood Blvd, Suite 265
Lake Mary, FL 32746
Telephone (888) 400-5505

Bond Rider

To be attached to and form part of:

Bond Number: 10109454
issued to: River Valley Relief Cultivation, LLC
in favor of: Arkansas Medical Marijuana Commission
described as: Cultivation Performance Bond

Effective date of Rider: January 28, 2021

It is understood and agreed that the bond is changed or revised as described below:

Address changed:
 Name changed:
 Bond term changed: Name Change
 Other change: From: River Valley Relief Cultivation, LLC
To: River Valley Production, LLC DBA River Valley Relief Cultivation

Said bond shall be subject to all its terms, conditions and limitations, except as herein expressly modified.

In witness whereof, Hudson Insurance Company has caused its corporate seal to be hereunto affixed this 28th day of January 2021.

Hudson Insurance Company

By: Chris Eley
Chris Eley, Attorney-In-Fact





10109454

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That HUDSON INSURANCE COMPANY, a corporation of the State of Delaware, with offices at 100 William Street, New York, New York, 10038, has made, constituted and appointed, and by these presents, does make, constitute and appoint

Chris Eley

of the State of AR

its true and lawful Attorney(s)-in-Fact, at New York, New York, each of them alone to have full power to act without the other or others, to make, execute and deliver on its behalf, as Surety, bonds and undertakings given for any and all purposes, also to execute and deliver on its behalf as aforesaid renewals, extensions, agreements, waivers, consents or stipulations relating to such bonds or undertakings provided, however, that no single bond or undertaking shall obligate said Company for any portion of the penal sum thereof in excess of the sum of

Five Hundred Thousand Dollars (\$500,000.00)

Such bonds and undertakings when duly executed by said Attorney(s)-in-Fact, shall be binding upon said Company as fully and to the same extent as if signed by the President of said Company under its corporate seal attested by its Secretary.

In Witness Whereof, HUDSON INSURANCE COMPANY has caused these presents to be of its Senior Vice President thereunto duly on this 6th day of February, 2020 at New York, New York.



Dina Daskalakis

Attest: Dina Daskalakis
Corporate Secretary

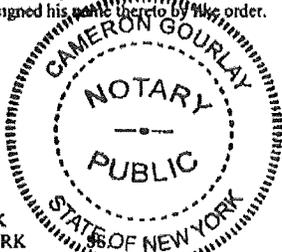
HUDSON INSURANCE COMPANY

Michael P. Cifone
By: Michael P. Cifone
Senior Vice President

STATE OF NEW YORK
COUNTY OF NEW YORK SS.

On the 6th day of February, 2020 before me personally came Michael P. Cifone to me known, who being by me duly sworn did depose and say that he is a Senior Vice President of HUDSON INSURANCE COMPANY, the corporation described herein and which executed the above instrument, that he knows the seal of said Corporation, that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by the order.

(Notarial Seal)



Cameron Gourlay
CAMERON GOURLAY
Notary Public, State of New York
No. 01GO6372305
Qualified in New York County
Commission Expires June 4, 2022

CERTIFICATION

STATE OF NEW YORK
COUNTY OF NEW YORK

The undersigned **Dina Daskalakis** hereby certifies:

That the original resolution, of which the following is a true and correct copy, was duly adopted by unanimous written consent of the Board of Directors of Hudson Insurance Company dated July 27th, 2007, and has not since been revoked, amended or modified:

"RESOLVED, that the President, the Executive Vice Presidents, the Senior Vice Presidents and the Vice Presidents shall have the authority and discretion, to appoint such agent or agents, or attorney or attorneys-in-fact, for the purpose of carrying on this Company's surety business, and to empower such agent or agents, or attorney or attorneys-in-fact, to execute and deliver, under this Company's seal or otherwise, bonds obligations, and recognizances, whether made by this Company as surety thereon or otherwise, indemnity contracts, contracts and certificates, and any and all other contracts and undertakings made in the course of this Company's surety business, and renewals, extensions, agreements, waivers, consents or stipulations regarding undertakings so made; and

FURTHER RESOLVED, that the signature of any such Officer of the Company and the Company's seal may be affixed by facsimile to any power of attorney or certification given for the execution of any bond, undertaking, recognizance, contract of indemnity or other written obligation in the nature thereof or related thereto, such signature and seal when so used whether heretofore or hereafter, being hereby adopted by the Company as the original signature of such officer and the original seal of the Company, to be valid and binding upon the Company with the same force and effect as though manually affixed."

THAT the above and foregoing is a full, true and correct copy of Power of Attorney issued by said Company, and of the whole of the original and that the said Power of Attorney is still in full force and effect and has not been revoked, and furthermore that the Resolution of the Board of Directors, set forth in the said Power of Attorney is now in force.

In witness the hand of the undersigned and the seal of said Corporation this 28th day of January, 2021.



Dina Daskalakis

By: Dina Daskalakis
Corporate Secretary