STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Petitioner,

Case No. 19-4144PL

vs.

JUSTIN C.K. DAVIS, M.D.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH"), in Gainesville, Florida, on January 23, 2020.

APPEARANCES

For Petitioner: Kristen Summers, Esquire
Corynn Alberto, Esquire
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For Respondent: Mark S. Thomas, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint; and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Department of Health ("the Department") issued a three-count Administrative Complaint on May 8, 2019, alleging that Justin C.K. Davis, M.D. ("Dr. Davis") violated the following statutes: (1) section 458.331(1)(uu), Florida Statutes, (2017)[1] via section 381.986(4)(a), Florida Statutes, by failing to satisfy certain requirements prior to qualifying an undercover investigator from the Department to receive medical marijuana; (2) section 458.331(k) by employing a trick or scheme related to the practice of medicine; and (3) section 381.986(3)(b), by having a direct or indirect economic interest in a medical marijuana treatment center ("MMTC").

Dr. Davis responded by requesting a formal administrative hearing, and the Department referred this matter to DOAH on August 5, 2019.

After granting two continuances, the undersigned convened the final hearing on January 23, 2020.

The Department presented the testimony of K.B., Benjamin Atkins, James Love, and Thomas Oldenborg. Petitioner's Exhibits 1 through 3, 5 through 9, and 11 through 15 were accepted into evidence.

Dr. Davis testified on his own behalf, and presented additional testimony from Mr. Atkins. Respondent's Exhibits 1 through 3 were accepted into evidence.

Joint Exhibits 1 through 3 were also accepted into evidence.

[1] Unless stated otherwise, all statutory references shall be to the 2017 version of the Florida Statutes.

The two-volume final hearing Transcript was filed on March 4, 2020. However, the record was not complete until the filing of Jeffrey Danzinger, M.D.'s deposition in lieu of live testimony on March 11, 2020. That deposition was designated and accepted into evidence as Petitioner's Exhibit 16.

The parties filed timely Proposed Recommended Orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing and the entire record in this proceeding, the following Findings of Fact are made:

The Parties

1. The Department is the state agency responsible for regulating the practice of medicine in Florida, pursuant to chapters 456 and 458, Florida Statutes. The Department also oversees Florida's medical marijuana program via the Office of Medical Marijuana Use, formerly known as the Office of Compassionate Use. Art. X, § 29, Fla. Const.; § 381.986, Fla. Stat.

2. Section 381.986 provides that a "qualified patient" can receive medical marijuana from a medical marijuana treatment center.[2] A qualified patient must have at least one of the statutorily-designated qualifying medical conditions and obtain a certification from a qualified physician. § 381.986(2) and (4), Fla. Stat.

3. Section 381.986(2)(f) identifies "post-traumatic stress disorder" ("PTSD") as a qualifying medical condition.

4. A qualified physician must hold an active, unrestricted license as an allopathic physician under chapter 458 or as an osteopathic physician under

[2] A marijuana treatment center holds a license issued by the Department to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices. § 381.986(8)(a), Fla. Stat.

chapter 459, Florida Statutes. § 381.986(1)(m), Fla. Stat. A qualified physician must also "successfully complete a 2-hour course and subsequent examination offered by the Florida Medical Association or the Florida Osteopathic Medical Association, which encompasses the requirements of [section 381.986] and any rules adopted hereunder."

5. A qualified physician may not have a "direct or indirect economic interest" in a medical marijuana treatment center. § 381.986(3)(b), Fla. Stat.

6. Dr. Davis is a qualified physician and a board-certified family practitioner who has been licensed to practice medicine in Florida since 2003. His practice focuses on holistic medicine and alternative treatments including medical marijuana. Dr. Davis is based in Gainesville, Florida, and practices via a corporation he founded in 2016 called "Florida Marijuana Doctors, Inc." or "FMD Green."

7. Dr. Davis has treated hundreds of patients with PTSD and has prescribed medical marijuana to treat PTSD.

The Ties Between Dr. Davis and Trulieve

8. Trulieve is a medical marijuana treatment center that operates 43 of the 213 medical marijuana dispensaries in Florida. As measured by sales, Trulieve holds 50 percent of the medical marijuana market in Florida. In 2017, Trulieve's Florida market share was approximately 80 percent.

9. Trulieve opened a medical marijuana dispensary ("the Lady Lake dispensary") in the Ocala/Lady Lake area in 2017 by leasing 2,243 square feet for $40,374 a year in a building located in the Oakland Hills Professional Center at 13940 Highway 441 in The Villages.

10. In 2017, there were not enough qualified physicians to handle the number of Florida residents seeking medical marijuana prescriptions.[3] In an

[3] Benjamin Atkins was involved with ensuring Trulieve's dispensaries were compliant with state law, and he was involved with opening the Lady Lake dispensary. He described the shortage of qualified physicians as "disastrous." When Trulieve opened the Lady Lake dispensary, he was unaware of there being any qualified physicians practicing in that area. Mr. Atkins further testified that "[t]here's approximately 45,000 licensed physicians in Florida, and when [the medical marijuana program] first started there were maybe five

effort to alleviate that problem, Trulieve contacted qualified physicians and reached agreements for them to work one day a week or one day a month inside buildings with Trulieve dispensaries where there was a shortage of qualified physicians.[4]

11. Trulieve subleased office space to Dr. Davis and at least three other qualified physicians at the Lady Lake dispensary for $100 a month.[5] Upon entering the Lady Lake dispensary one would immediately be in a lobby or waiting room with a Trulieve sign identifying the dispensary on one side and office space behind a door on the opposite side.[6]

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physicians that were qualified and willing to see patients. . . . So I would call it a crisis. If you [had] that situation with something like pediatrics, the news would have been talking about what a crisis it is."

[4] With regard to how Trulieve contacted Dr. Davis about working in the Ocala/Lady Lake region, Mr. Atkins offered the following testimony:

> A: And then we would reach out to physicians we were aware of in other parts, and to be honest with you, some were very cold and uncaring and just focused on getting patients to make money, but then there were people like Dr. Davis who were compassionate and caring. And I remember at one time he drove all the way to Miami to see a child who nobody would see. There was just a lot of demand like that. So we would say to somebody like Dr. Davis, "Hey, you know, would you be able to work in the area of The Villages to see people," and the compassionate physician would agree to one day a month or one day a week, go to different areas of the state that were underserved even though it wasn't easy.
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> Q: Did you seek out Dr. Davis to have him come to The Villages area then?
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> A: I don't remember exactly who sought who. What I can tell you is he was always regarded as somebody that was compassionate and, you know, passionate about helping people and was willing to in special circumstances travel around and see people and do stuff like that. I honestly don't remember who said first, "Hey, would you come to The Villages," or if he said, "I'm willing to come to The Villages," or what.

[5] Similar arrangements existed at other Trulieve dispensaries.

[6] Trulieve did not solicit nonqualified physicians or other businesses to sublease space. However, if a nonqualified physician had inquired about subleasing space in the facility,

12. Lester Perling, a compliance attorney with Broad and Cassell, wrote the sublease, and Trulieve utilized the same sublease for all of the qualified physicians at the Lady Lake dispensary.

13. Mr. Perling did not advise Trulieve what to charge for the subleases, but he did advise Trulieve that it had to be at or above the market price. Benjamin Atkins was responsible for the subleases between Trulieve and any qualifying physicians working at the Lady Lake dispensary. Mr. Atkins testified convincingly that $500 a month was the fair market price for such space. His testimony was substantiated by that of Department witness Thomas Oldenborg as discussed below. Trulieve's leasing plan was to enter subleases with up to five qualified physicians, and charge each $100 a month to use the space one day a week, thus earning Trulieve $500 a month in rental income, i.e., the fair market value for the space. Dr. Davis's one-fifth share of the $500 monthly fair market value rental rate for his one fifth share of the monthly occupancy was commercially reasonable. The evidence firmly established that the leasing arrangement was not a trick or scheme related to the practice of medicine. Furthermore, the evidence firmly established that Dr. Davis's rental of office space at a commercially reasonable rate from Trulieve did not create a direct or indirect economic interest between Dr. Davis and Trulieve.[7]

Mr. Atkins testified that "we would probably lease to a variety of people so long as they were willing to abide by the lease and it was safe."

[7] Mr. Atkins's calculations about how much revenue Trulieve realized from the sublease appear to be erroneous in that he believed Trulieve was receiving $100 per week from each sublease rather than $100 a month. Nonetheless, his testimony clearly established the underlying fact that "if somebody came and said I'll give you $500 a month or something for that space, that was probably well within market." The subsequent inflation of that figure based on a miscalculation of the lease term does not lessen the weight of his testimony that the total market value was $500 a month, and constitutes competent, substantial evidence that Trulieve was not offering the leases for a below market price.

When questioned again about Trulieve's methodology, Mr. Atkins reiterated his earlier testimony:

14. While the sublease that Trulieve utilized for Dr. Davis and the other qualified physicians had provisions pertaining to late fees, common area maintenance, and a security deposit, the spaces for the associated amounts were left blank. As a result, Trulieve did not: (a) charge Dr. Davis for making late rental payments; (b) pass along the costs of common area maintenance; or (c) require a security deposit.

15. Trulieve was not concerned with a late fee because it would have been an inconsequential amount. As for a common area maintenance charge, Trulieve deemed that to be immaterial given its belief that it was subleasing the physician suite for an amount far in excess of the fair market price.[8]

> So we would take the space and say, okay, what would the space be leased out for in the fair market, and that space I recall was like $500 or something like that. So then to make sure you're charging above market, say you have 30 days that you could lease in an average year – or in a year, 30 days per month, taking 355 and dividing it by 12, that you would essentially be charging different people to rent, and so charging $100 a month for the four days is like six times market.

[8] When asked if Trulieve acted intentionally by omitting those incidental charges, Mr. Atkins testified as follows:

> A: I don't want to say it was intentional or unintentional or misremember. I can just tell you from my state of mind sitting here today that when your rent from somebody is $100 a month, because you're looking for 30 different people to pay that 100 or whatever, whatever the math is, you know, to charge a late fee of, you know, $8 or something would not have been something I would have been concerned with.
>
> ***
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> Q: Mr. Atkins, in your experience dealing with the Trulieve dispensary subleases to qualified physicians, could you offer the Court what some typical or reasonable rates would be for late charges in any of those subleases?
>
> A: Yeah, my opinion is if it was $100 a month, a late charge would be like $5 or $6 or something.
>
> Q: Same question as to the past due on the common area maintenance, the CAM. From your experience with the

16. As for other arrangements, qualified physicians were responsible for bringing their own equipment to the Lady Lake dispensary.

17. Also, Trulieve had a policy prohibiting employees from directing patients to a particular physician. If a patient inquired about where he or she could locate a qualifying physician, a Trulieve employee was supposed to direct that patient to a state-run website or the "find-a-doctor" tool on Trulieve's website. Qualifying physicians who subleased space from Trulieve did not receive preferential status on Trulieve's website.

18. Between January 1, 2016, and January 25, 2018, Dr. Davis prescribed 4,941,075 milligrams of medical marijuana. Trulieve filled 76.71% of that amount. Given Trulieve's dominant position in the Florida market for medical marijuana, that number is not surprising.

The Department's Critique of the Sublease

19. The Department presented the testimony of Thomas Oldenborg, a commercial real estate broker whose territory includes the Lady Lake area. Mr. Oldenborg deals with investment properties and lease analysis.

20. Mr. Oldenborg noted that the main lease between Trulieve and the landlord of the Oakland Hills Professional Center does not allow for subletting.

21. Mr. Oldenborg opined that $100 a month was not a reasonable rate for the sublease between Dr. Davis and Trulieve. He testified that it would be difficult to find parties interested in leasing a 500 square foot space for one day a week. Leases with such terms are not typically advertised to the

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> Trulieve subleases to qualifying physicians, what would the CAM passthrough be?
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> A: I mean, if you're charging six times market rent, I wouldn't charge the CAM. I would only charge a CAM if I was overcharging.

general public. Instead, such leases are usually done privately between parties that have a preexisting relationship.[9]

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[9] Mr. Oldenborg's full opinion was as follows:

> Q: Mr. Oldenborg, given your review of this lease and your knowledge of commercial real estate in the area, is the $100 per month rental rate a reasonable rate?
>
> A: No.
>
> Q: Why not?
>
> A: Because there would be, in my opinion, no possible way to facilitate the lease or the transaction as in there is no way to advertise that type of deal on a normal commercial real estate platform or any available commercial real estate platform.
>
> Q: Would you mind elaborating on that?
>
> A: Sure. Normally if somebody is to sublease a space it has to be pretty clear on what it is and put out to the general public. This, again in my opinion, seems that the two parties would almost have to have a personal relationship or something to come across this deal. Somebody would have to approach somebody in person and have this conversation.
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> ***
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> Q: Have you ever, in your time, seen a lease advertised on one of these lease platforms with restrictions on days of use?
>
> A: No, sir.
>
> Q: Have you ever seen time restrictions, as in specific hours?
>
> A: No, sir.
>
> Q: Are you aware of whether that can even be advertised on these platforms?
>
> A: I do not believe it can, which is the predication of my answer. I don't know how they would list it. There's really no availability to do so, in my knowledge.
>
> Q: If a client came in – if a client came in asking for a lease for one day per week for, say, three hours a day, would you be able to facilitate a search to find something of that sort?
>
> A: No.

22. However, contrary to his initial opinion, when questioned about other parameters of the sublease between Dr. Davis and Trulieve, Mr. Oldenborg's testimony indicated that the sublease was priced at fair market value:

> Q: In your experience and your knowledge of the area, what is the going rate for a single office or executive suite sublease of a comparable size, say 500 square feet in this region?
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> A: You're normally looking at – for an executive suite, you're normally looking at a ten-by-ten office with access to a conference room and you're looking at roughly $500 a month to a thousand dollars a month, [depending] on what area of The Villages you're in, but you're not getting very much square footage.
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> ***
>
> Q: Could you estimate about how much square footage that $500 a month lease would purchase?
>
> A: It would come with a single office, which would be roughly a hundred square feet and then you would have access to a conference room, which is usually an appointment basis.
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> ***
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> Q: In your experience would you say that [the current lease space of Dr. Davis] is consistent with approximately 500 square feet of office space?
>
> A: Yes, sir.

23. Mr. Oldenborg was then led through a series of calculations from which he ultimately agreed that the cost to Trulieve of the office space used by Dr. Davis was, based on all of the agreed upon assumptions, $107 per

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> Q: So you would not be able to find a lease offered on the open market similar to this sublease?
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> A: No, sir.

month. He further testified that a payment by Dr. Davis to Trulieve of $100 a month is "[f]air market value, just not typical for that type of lease setup or sublease." However, the qualification to his testimony that the lease was fair market value was reduced to near zero by the following:

> Q: And describe for me any experience that you've had with part-time leasing arrangements with physicians?
>
> A: Very little.
>
> Q: Okay. Can you recall any of those instances where you've done any kind of a part-time lease?
>
> A: No.

24. Given that Dr. Davis only had access to the space in question for one day a week rather than five days a week, Mr. Oldenborg's testimony established that Trulieve charged a fair price for the sublease.

Findings as to Whether Dr. Davis Engaged in a Trick or Scheme Related to the Practice of Medicine or Had a Direct or Indirect Economic Interest in Trulieve

25. Trulieve sought out qualified physicians to sublease unused space in Trulieve dispensaries. However, there is no evidence that the arrangement between Dr. Davis and Trulieve was an attempt to defraud Florida residents seeking medical marijuana or an attempt to "game the system" by circumventing any statutory requirements. There is no persuasive evidence indicating that Dr. Davis referred patients to Trulieve or that Trulieve referred prospective patients to Dr. Davis. As a result, the evidence does not clearly and convincingly demonstrate that Dr. Davis employed a trick or scheme related to the practice of medicine.

26. Dr. Davis had no ownership stake in Trulieve. Thus, the evidence does not clearly and convincingly demonstrate that Dr. Davis had a direct or indirect economic interest in Trulieve.

K.B.'s Appointment with Dr. Davis

27. K.B. retired in 2015 after 35 years in law enforcement. After a year, she returned to the workforce and was employed as an investigator in the Department's unlicensed activity section from August of 2017 through November of 2017. Her duties included undercover operations.

28. K.B. used the alias of K.G. ("K.G.") during her undercover operations. Her "K.G." alias was a white female who had been in the military and had received treatment for PTSD.

29. K.B. began an undercover investigation of Dr. Davis with the intent to get him to qualify her to receive medical marijuana for the treatment of PTSD.

30. K.B. initially visited the Lady Lake dispensary on August 2, 2017, in order to gather information about the business. She walked through the front door of the Lady Lake dispensary and saw a Trulieve sign to her right. She saw no signs referring to Dr. Davis.

31. K.B. met a security guard named Jason who wrote some information about Dr. Davis on a Post-It note and essentially referred to Dr. Davis as Trulieve's "in-house doctor." However, the security guard said that K.B. was not required to utilize Dr. Davis and mentioned other doctors in the area who could qualify her for medical marijuana.

32. After her conversation with the security guard, K.B. returned to her office and ultimately went on-line in order to schedule an appointment with Dr. Davis for November 1, 2017. She used a prepaid card to pay the $300 appointment fee.

33. She also faxed "K.G.'s" fictitious medical records to Dr. Davis's office. Those fictitious medical records purported to memorialize treatment rendered to "K.G." at Camp Pendleton in December of 2007, January 2008, and December 2008. Those records indicated that "K.G." had witnessed a traumatic event while in the military and was experiencing difficulty

sleeping and hallucinations. She also supposedly reported that she had become irritable, angry, and had withdrawn from friends and family.

34. Dr. Davis received those records, reviewed them, and incorporated them into the medical records that he created for "K.G." He also reviewed "K.G.'s" controlled substance history via E-Force, a database for controlled substances.

35. K.B. arrived at the Lady Lake dispensary and waited in the lobby until Dr. Davis brought her back into his office. The appointment began with typical doctor-patient banter before turning to the reason for "K.G.'s" appointment, PTSD.[10]

36. Rather than relying on the fabricated medical records that K.B. had faxed to his office, Dr. Davis attempted to ensure that "K.G." still suffered from PTSD. Accordingly, he had K.B. describe "K.G.'s" purported symptoms. In doing so, K.B. described experiencing nightmares and/or flashbacks for a long period of time and probably alluded to them being related to "K.G.'s" military service. K.B. also mentioned experiencing generalized anxiety and headaches.[11]

37. In addition to discussing PTSD and medical marijuana, Dr. Davis measured K.B.'s blood pressure, heart rate, temperature, respiration rate, height, weight, and body mass index. He noticed that her blood pressure was

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[10] The Department's expert witness, Dr. Jeffrey Danziger, testified that PTSD "involves the development of certain characteristic symptoms following exposure to one or more extreme traumatic events. And the traumatic event must involve exposure to actual or threatened death, serious injury, or sexual violence. The person must directly experience the trauma, witness it occurring to others or learn that it occurred to a close family member or close friend. Or the exception is people exposed to – with repeated exposure to trauma such as first responders or police officers."

[11] Dr. Davis testified that K.B. "indicated a lot of symptoms. She had extreme nightmares, anxiety, insomnia, and social isolation, some depression, although she made it very clear to me that she wasn't suicidal. I remember making it clear. She – and I said, 'social isolation,' she said she was gaining weight, she said she was having a lot of – she said flashbacks and having a lot of recurring thoughts about death or death of her friend. I think she may have said some other things but those were sort of the salient points and certainly were enough to corroborate her past medical history and her current symptoms."

moderately high and checked her lower extremities for edema. While her blood pressure was not high enough to cause him to prescribe a hypertension drug, Dr. Davis did recommend that she see a primary care physician about her elevated blood pressure. Dr. Davis also checked K.B.'s bodily strength and conducted a gait analysis.

38. K.B. described her demeanor during the appointment as "somewhat brief and evasive" and acknowledged that she was intentionally attempting to give Dr. Davis as few details as possible about her purported symptoms. For example, K.B. deflected Dr. Davis's questions about the nature of the nightmares and/or flashbacks by saying they were too painful to discuss.[12]

39. K.B. acknowledged during her testimony that there was no difference between the symptoms she described to him and the symptoms documented in "K.G.'s" fabricated medical records. Also, K.B. did not recall giving Dr. Davis any information that would suggest "K.G." did not have PTSD.

40. Dr. Davis and K.B. did not go into great detail about any PTSD treatment that "K.G." had received between 2008 and the time of the appointment with Dr. Davis, and K.B. did not recall any discussion about taking any medications that might interact negatively with medical marijuana. However, K.B. did tell Dr. Davis that Xanax and Zoloft had not been helpful and were discontinued. She also told Dr. Davis that "K.G." had previously used medical marijuana and that the treatment had been effective.[13]

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[12] While Dr. Davis estimated that the appointment lasted 24 to 30 minutes, K.B. estimated that it lasted 15 minutes. Nevertheless, K.B. testified that she did not feel rushed during the appointment and did not feel that Dr. Davis should have afforded her more time. "I can say this: From the discussion that we had and from the exam that he gave and the discussion we had about the product and he asked me if I had any additional questions, so – and I believe I said I did not at that time, so I think we were done having that discussion." Also, in response to a question asking if the appointment would have taken longer if she had not been intentionally evasive, K.B. testified that, "I'll say that Dr. Davis was willing to answer any questions I had if I had chosen to be longer-winded. So I don't feel like I was rushed and I don't feel like I was kept in there longer than I needed to be. I'd say it was fair."

[13] With regard to K.B.'s description of "K.G.'s" medical marijuana use, Dr. Davis testified that, "For her symptoms, she had used it previously and it was very effective for her in

41. The fabricated medical records and what was relayed to him during the appointment convinced Dr. Davis that medical marijuana was appropriate for "K.G."[14]

42. At that point, Dr. Davis discussed the risks and benefits associated with medical marijuana, the different types of medical marijuana, and the different delivery methods. Dr. Davis mentioned that one type of medical marijuana would be better to use at nighttime and another would be better for daytime use if she lacked energy. He instructed her to begin with very small doses and gave her a preprinted log to keep track of the amount she was taking.

43. K.B. acknowledged during her testimony that Dr. Davis told her that she did not have to acquire medical marijuana at Trulieve and that she could acquire the product wherever she chose.[15]

44. K.B. also acknowledged that Dr. Davis never referred to himself as Trulieve's "in-house doctor," and that he never indicated that he had any

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relieving her symptoms. She also related to me that she had tried not only the – I think she had indicated not only the other medications that were specifically listed on here, but had tried multiple medications and treatments and had not had a lot of success or had had side effects, but that she had used marijuana in the past with excellent results."

[14] Dr. Davis remarked that, "This was a pretty classic textbook case of post traumatic stress, as it was designed to be. She was a very good agent."

[15] Dr. Davis testified that patients frequently ask him to recommend a dispensary. However he does not do so because "that's not my job. I have no interest in any dispensary. I actually have very good relationships with all the dispensaries, and my business is to educate people about – make sure that they're qualified and then educate them about the safe use of marijuana and what products might be appropriate for them, et cetera, it's not which dispensary. And it's also a very individualized thing. You know, people like different dispensaries for different reasons, they have different products, and the system is actually designed specifically to encourage people to be allowed to go to different dispensaries, and that's very different than narcotics where it's very frowned upon. If you go to – if you get an Adderall prescription and then you go to another pharmacy, it's very frowned upon, whereas this system is specifically set up to be transparent and allow people to go to any dispensary that they wish, and I encourage that."

relationship with Trulieve. Also, Dr. Davis corrected K.B. when she referred to Trulieve as "your dispensary."[16]

Findings Regarding the Sufficiency of Dr. Davis's Assessment of "K.G."

45. Dr. Davis's medical records for "K.G." list her problems as PTSD stemming "from traumas she witnessed in the military," anxiety, flashbacks, and extreme nightmares. His medical records note that "K.G." "[s]ays that the worst for her has been nightmares. She is looking for something that can help her. She has tried numerous medications in the past and they have not worked and she hates the side effects." Dr. Davis also noted that "K.G." "has tried [medical marijuana] in the past and it worked very well for her."

46. Dr. Jeffrey Danziger has been a Florida-licensed psychiatrist since November of 1986, and he has treated patients suffering from PTSD.

47. Dr. Danziger based his testimony about the diagnosis of PTSD on the Diagnostic and Statistical Manual, Fifth Edition, the DSM-5. In addition to suffering a severe trauma, Dr. Danziger explained that someone suffering from PTSD must have "at least four categories of symptoms:"

> The first category is the presence of intrusion symptoms associated with the traumatic event, which can incur – involve recurrent and intrusive distressing memories, recurrent distressing dreams in which the content or nature of the dream are related to the trauma, dissociative reactions and/or if one is exposed to stimuli that symbolize or resemble the traumatic event they develop intense or prolonged psychological distress or marked physical reactions.
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> The second broad category is persistent avoidance of stimuli associated with the trauma, which can be efforts to avoid distressing memories, thoughts or feelings, or avoidance or efforts to avoid external

[16] When asked if she had any reason to believe that Trulieve and Dr. Davis were referring patients to one another, K.B. testified that, "I'm just basically saying that in my presence, no one did any direct referral from one – from the doctor to the business or from the business to the doctor. While the – while the employee of Trulieve did say that Dr. Davis was the in-house doctor, he did not state [that] I had to get product if I saw Dr. Davis at Trulieve."

> reminders, people, places, conversations, objects or situations that remind them of the trauma.
>
> The third category is that of negative alternations in cognition and mood associated with the trauma, which begins or worsens after the trauma occurred.
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> And there's several – there's seven factors, somebody must have two or more of them. Persistent or exaggerated negative beliefs about oneself or the world; trouble remembering a key event to the trauma; inappropriate guilt; distorted cognitions that lead them to inappropriately blame themselves or others; a persistently negative emotional state such as fear, horror, anger or guilt; markedly diminished interest in activities; feelings of detachment or estrangement from others; or, the inability to experience positive emotions. You need to have at least two of those seven.
>
> The fourth broad category is marked alternations in arousal and reactivity associated with the trauma. And people suffering from PTSD need to have two of the following six. Irritability and angry outbursts, reckless or self-destructive behavior, hypervigilance, an exaggerated startle response, problems with concentration or sleep disturbance.
>
> And a few other qualifiers are that this constellation of symptoms in response to a sufficiently severe qualifying trauma must last at least one month. That the syndrome causes significant distress or impairment in functioning, either social, occupational or other important areas. And the disturbance is not due to the effects of a drug or other medical condition.
>
> So these are the basis criteria for PTSD as defined in our Diagnostic and Statistical Manual, Fifth Edition.

48. Based solely on a review of the medical records that Dr. Davis maintained for "K.G.", Dr. Danziger offered the following critique:

We know that, looking at the military records, that Criterion A [was] probably met. Criterion A means exposure to actual or threatened death or serious injury. So, if those records from 2007, what they reflected, that would be a sufficient stressor.

Now what the patient talked about was, there's references on the problem list to anxiety, flashbacks and nightmares. Now flashbacks and nightmares are intrusion symptoms, which are B. But there [were] no questions asked as to how often, how frequent, how distressing, tell me about the flashbacks which involve a literal – involve a sense that the incident is literally recurring.

So, but Criterion A was probably in the old notes and if she did talk about extreme nightmares and was reluctant to discuss them, all right. I'd give him Criterion B.

But what we're not seeing is, was there any investigation as to avoidance of stimuli, negative alternations in cognition and mood or marked alternations in arousal and activity.

So there's some information as to a qualifying stressor contained in the old records and some information, albeit brief, about nightmares. But other important facets of PTSD were not addressed.

Further, there's a reference there to she's been tried on numerous medications. Well, what medications? It'd be reasonable to ask what medications were you tried on that failed.

And then secondly, in treating PTSD, there are various specific psychotherapies [that are] very useful in the treatment of PTSD. And that would include cognitive processing therapy, cognitive exposure therapy and EMDR, the eye movement resonance treatment.

> So there was, in other words, there was no inquiry into what medicines have you been on that failed and then have you had any counseling or psychotherapy.

49. Because PTSD spontaneously resolves for up to half of those suffering from it, Dr. Danziger was adamant that Dr. Davis could not base his diagnosis solely on "K.G.'s" old medical records:

> The records from a decade earlier reflect Criterion A, which refers to a sufficient stressor. That's there. And Criterion B. She says she's having nightmares, she didn't want to talk about it further. Okay. I'll give him Criterion B. I'll give Dr. Davis that and if someone didn't want to talk about it, you don't want to force it. But there's no reference to C, D, and E, which is the avoidance behavior, negative alterations and marked alterations in arousal and reactivity. And no documentation as to, well, what treatments were tried, what medicines were you on, did they do individual therapy, group therapy, how did you respond. That's what's missing. So what's missing in terms of PTSD assessment is the full dimension of PTSD, is it still present and what treatment did you or did you not receive before making his decision on how to treat.

50. Despite the supposed shortcomings in Dr. Davis's diagnosis of "K.G.", Dr. Danziger declined to say that Dr. Davis's diagnosis was erroneous:

> I would answer that by saying she had possible PTSD, but the examination was not complete enough to definitively make the diagnosis and proceed with treatment. So, possible PTSD, but insufficient data to verify that was the right diagnosis.

51. Dr. Danziger also qualified his testimony by stating he was not comfortable opining about the standard of care in different specialties and, as a psychiatrist, he is not a qualified physician under section 381.986:

> Q: Is there any difference in what you would anticipate for an initial patient visit or an

> encounter to make a determination of posttraumatic stress between a psychiatrist and a non-psychiatrist?
>
> A: There likely would be. My colleagues in primary care treat hypertension, diabetes, asthma, arthritis, heart failure, a host of medical conditions that I don't treat.
>
> Some may – some of my colleagues in primary care and internal medicine are very comfortable treating psychiatric conditions and only referring those who are the most severe or refractory to treatment, and others refer just about everything. So it depends on the practitioner.
>
> I want to be careful opining what's an appropriate standard on a different specialty than mine.

52. Dr. Davis had "K.G.'s" fabricated medical records at his disposal, and those records indicated that she had been diagnosed and treated for PTSD. In addition, Dr. Davis's own exam indicated that "K.G." had several symptoms indicating she was still suffering from PTSD.

53. Section 381.986(4)(a) requires a qualified physician to conduct "a full assessment of the medical history of the patient," and Dr. Davis did not gather a significant amount of information about "K.G.'s" struggles with PTSD during the years between the last fictitious appointment in 2008 and her appointment with Dr. Davis in 2017. However, the Department has not adopted a rule elaborating on what a qualified physician must do in order to conduct a "full assessment." Also, the Department has not adopted a rule requiring qualifying physicians to follow the DSM-5.

54. The evidence does not clearly and convincingly demonstrate that Dr. Davis violated section 381.986(4)(a) by failing to conduct a full assessment of "K.G."

CONCLUSIONS OF LAW

55. Pursuant to section 120.57(1), Florida Statutes, DOAH has jurisdiction over the parties and subject matter of this proceeding.

56. A proceeding, such as this one, to impose discipline upon a licensee is penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n.*, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, the Department must prove the charges against Dr. Davis by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 933-34 (Fla. 1996)(citing *Ferris v. Turlington*, 510 So. 2d 292, 294-95 (Fla. 1987)); *Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med.*, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

57. Regarding the standard of proof, the court in *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), stated that:

> clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id.

58. The Florida Supreme Court later adopted the *Slomowitz* court's description of clear and convincing evidence. *See In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal has also followed the *Slomowitz* test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

Count I – Did Dr. Davis violate section 381.986(4)(a) by Failing to Conduct a Full Assessment of "K.G."?

59. Section 458.331(1)(uu) subjects a physician to discipline for issuing a physician certification in a manner contrary to section 381.986 and the rules adopted thereunder. Section 381.986(4)(a) provides, in pertinent part, that a qualified physician may issue a physician certification only if the qualified physician "[c]onducted a physical examination while physically present in the same room as the patient and a full assessment of the medical history of the patient."

60. Dr. Davis based his decision to certify "K.G." for medical marijuana on her fabricated medical records and his own assessment. The Department alleges that Dr. Davis's assessment was incomplete because, as explained by Dr. Danziger, Dr. Davis did not collect enough information about "K.G.'s" purported symptoms and treatment during the 10 years between the date of her last fabricated medical record and her appointment with Dr. Davis. That allegation is based on the DSM-5's PTSD criteria. However, the Department fails to cite anything in its Proposed Recommended Order establishing the DSM-5 as the authority governing how qualifying physicians are to conduct patient assessment. Nor has the Department adopted a rule establishing the parameters of a "full assessment." Under such circumstances, the undersigned cannot use Dr. Davis's failure to adhere to the DSM-5 as a basis for finding that Dr. Davis violated section 381.986(4)(a). *See* § 120.57(1)(e)1., Fla. Stat. (2019) (mandating that "[a]n agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority."). The term "full assessment" is not so clear that it could not be reasonably interpreted in multiple ways. *See St. Francis Hosp., Inc. v. Dep't of HRS*, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989)(stating "[w]e recognize that an agency interpretation of a statute which simply reiterates the legislature's statutory

mandate and does not place upon the statute an interpretation that is not readily apparent from its literal reading, nor in and of itself purport to create rights, or require compliance, or to otherwise have the direct and consistent effect of the law, is not an unpromulgated rule, and actions based upon such an interpretation are permissible without requiring an agency to go through rule making."); *State v. Gear*, 339 P.3d 1034, 1038 (App. 2014)(construing Arizona's medical marijuana act and noting the Arizona Department of Health Services has utilized regulations to describe what a physician must do to complete a "full assessment" of a qualifying patient's medical history.).

61. The Department argues in its Proposed Recommended Order that Dr. Davis acted as a "rubber stamp" and gave no meaningful review to "K.G.'s" medical history and symptoms. However, K.B.'s description of her appointment with Dr. Davis undermines that argument. K.B.'s testimony indicated that Dr. Davis had a meaningful discussion about her PTSD symptoms and probably would have had a more in-depth discussion if K.B. had not been intentionally evasive. Furthermore, the preponderance of the competent substantial evidence in this case demonstrates that Dr. Davis performed a meaningful review of "K.G.'s" medical history and symptoms, meaningfully discussed "K.G.'s" PTSD symptoms with K.B., and in no way acted as a "rubber stamp" of the prescription written.

62. Finally, the weight of Dr. Danziger's testimony was diminished by his concessions that: (a) Dr. Davis did not necessarily err by diagnosing "K.G." as having PTSD; and that (b) he was hesitant to opine that Dr. Davis acted below the standard of care because they practice in different specialties. While the instant case does not involve an allegation that Dr. Davis practiced below the standard of care, the question of whether he conducted a "full assessment" of "K.G.'s" medical history is closely related to a standard of care question. In personal injury actions involving the applicable standard of care, section 766.102(5), Florida Statutes, requires, in pertinent part, that "[a] person may not give expert testimony concerning the prevailing professional

standard of care" unless that person specializes "in the same specialty as the health care provider against whom or on whose behalf the testimony is offered." Though not directly applicable to this proceeding, the "same specialty" standard is emblematic of the problem of having physicians outside of the specialty of a charged physician opining about standards that the charged physician should meet, and may be used, along with other factors, to gauge the weight to be given such testimony by the trier-of-fact.

63. The Department failed to prove by clear and convincing evidence that Dr. Davis violated section 381.986(4)(a) by failing to conduct a "full assessment" of "K.G.'s" medical history.

Count II – Did Dr. Davis violate section 458.331(1)(k) by Employing a Trick or Scheme Related to the Practice of Medicine?

64. Section 458.331(1)(k) subjects physicians to discipline for employing a trick or scheme in the practice of medicine. The Department typically alleges a violation of section 458.331(1)(k) when a respondent is accused of fraud. *See Dep't of Health v. Skidmore*, Case No. 17-4337PL (Fla. DOAH April 30, 2018; Fla. DOH July 5, 2018)(finding that respondent made false representations that she could provide lawful medical marijuana prescriptions and that respondent profited by falsely stating that the State of Florida required a patient to see her three times over a 90-day period); *Dep't of Health v. Christensen*, Case No. 11-5163PL (Fla. DOAH March 16, 2012), *rejected in part*, Case No. 11-11153 (Fla. DOH June 14, 2012)(concluding there was clear and convincing evidence that respondent knowingly authorized a doctor to submit claims for reimbursement falsely representing that respondent provided treatment to particular patients); *Dep't of Health v. Kadosa*, Case Nos. 05-0862PL and 05-0863PL (Fla. DOAH Feb. 27, 2006; Fla. DOH April 21, 2006)(concluding that the evidence established that the respondent engaged in upcoding, unbundling, and billing for procedures not performed); *Dep't of Health v. Portnow*, Case No. 99-2326 (Fla. DOAH June 28, 2000; Fla. DOH Sept. 18, 2000)(finding that respondent attempted to

secure employment with a medical practice by forging documents falsely indicating he was board certified in Internal Medicine).

65. In the instant case, there is no evidence that Dr. Davis or Trulieve did anything to defraud Florida residents seeking to be certified for medical marijuana. Trulieve sought out qualified physicians and subleased space within the Lady Lake dispensary to them. Trulieve took that action so that Florida residents in the surrounding area would have greater access to qualifying physicians. It is reasonable to infer that greater access to qualifying physicians aided Trulieve's business and that being in close proximity to a medical marijuana dispensary facilitated the acquisition of patients by Dr. Davis and Trulieve.

66. However, the greater weight of the evidence demonstrates that Dr. Davis and other qualifying physicians were not receiving a discount on those subleases. Also, there is no persuasive evidence that Dr. Davis referred qualified patients to Trulieve or that Trulieve referred prospective patients to Dr. Davis. In short, the evidence does not clearly and convincingly demonstrate that Dr. Davis's ties to Trulieve amount to a trick or scheme related to the practice of medicine.

Count III – Did Dr. Davis Violate Section 381.986(3)(b) by Having a Direct and/or Indirect Economic Interest in Trulieve?

67. Section 458.331(1)(g) subjects a physician to discipline for failing to perform any statutory or legal obligation placed upon a licensed physician. Section 381.986(3)(b) prohibits a qualifying physician from having a direct or indirect economic interest in an MMTC.

68. The Department alleges that the ties between Dr. Davis and Trulieve result in Dr. Davis having a direct or indirect economic interest in Trulieve. However, the term "economic interest" is reasonably understood to refer to an ownership interest. *See generally Cadean Commercial USA Corp. v. Tex. Alcoholic Bev. Comm'n*, 518 S.W. 3d 318, 332 (Tex. 2017)(construing a statute that prohibited a brewer from having a "direct or indirect interest" in the

business of a retailer and holding that "FEMSA, by its stock ownership in the Heineken Group, has a commercial or economic interest that provides a stake in the financial performance of an entity engaged in brewing alcoholic beverages. This interest, coupled with FEMSA's indirect ownership interest in Cadena, who would be a retailer of alcoholic beverages if the permit were granted, would violate section 102.07."); *Garcia v. Garcia,* 2018 Cal. App. Unpub. LEXIS 3520 (Cal. Aug. 8, 2018)(noting that "[e]conomic interest was defined by the Beverly-Killea Act as 'a person's right to share in the income, gains, losses, deductions, credit, or similar items of, and to receive distributions from, the limited liability company.'").

69. While Dr. Davis had ties to Trulieve as a renter of office space, those ties were not an ownership interest. Because the Florida Legislature's use of the term "economic interest" can reasonably be interpreted as merely prohibiting a qualifying physician from having an ownership interest in an MMTC, or in otherwise sharing in Trulieve's profits and losses, the undersigned cannot conclude that Dr. Davis violated section 381.986(3)(b). *See City of Miami Beach v. Galbut*, 626 So. 2d 192, 194 (Fla. 1993)(noting that "[w]hen a statute imposes a penalty, any doubt as to its meaning must be resolved in favor of strict construction so that those covered by the statute have clear notice of what conduct the statute proscribes."). Moreover, to the extent that this allegation implicates an interpretation of section 381.986(3)(b) by the Department, that interpretation is owed no deference. *See Kanter Real Estate, LLC v. Dep't of Envtl. Prot.*, 267 So. 3d 483, 487 (Fla. 1st DCA 2019)(noting that tribunals no longer defer to an agency's statutory interpretation since a recent amendment to the state constitution).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Medicine issue a Final Order dismissing the Administrative Complaint against Justin C.K. Davis, M.D.

DONE AND ENTERED this 14th day of April, 2020, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.