IN THE CIRCUIT COURT OF CLINTON COUNTY
STATE OF MISSOURI

MISSOURI VETERINARY MEDICAL BOARD 3605 Missouri Boulevard P.O. Box 1335 Jefferson City, MO 65102	*Petitioner,*	
vs.		
BROOKE RENE GRAY 6227 SE Perren Road Holt, Missouri 64048		Case No. 10CN-CV00842
and		
B & B EQUINE DENTISTRY 6227 SE Perren Road Holt, Missouri 64048	*Defendants.*	

DEFENDANTS' SUR-REPLY TO PETITIONER'S REPLY TO DEFENDANTS' RESPONS TO PETITIONER'S MOTION IN LIMINE

As a Sur-Reply to Petitioner's Reply to Defendants' Response to Petitioner's Motion in Limine, Defendants offer the following suggestions:

I. Introduction

In direct contradiction to section 340.276, Petitioner is attempting to enforce a criminal law by seeking a civil injunction against the Defendants. Petitioner's Motion in Limine asks the Court to impose harsh sanctions on a citizen who, accused of criminal behavior, threatened with criminal prosecution, and brought unwillingly before this Court, has chosen to remain silent rather than to offer information that would waive her

Fifth Amendment privilege. Defendants have responded that they should not be deprived of the constitutional safeguards provided by criminal procedure simply because the government agency chose to pursue a civil action in lieu of a criminal prosecution. Especially in light of the clear, continuing threat of criminal prosecution, this Court should rule that Defendants must be afforded the protections of criminal procedure.

The instant case is factually distinct from any precedents cited by Petitioner. The Missouri Veterinary Medial Board is a *government agency* tasked with the enforcement of a *criminal statute*.[1] It has previously stated its opinion that Brooke Gray has violated that statute and has threatened her with *criminal prosecution*. (Def. Ex. A). Despite the Board's strategic decision to file this case as a civil suit, it can only prevail in this case if it proves that Defendants committed *criminal acts*. As Petitioner's Reply makes clear, it desperately wants this case to proceed as an ordinary civil case (as opposed to "the burdensome paths of criminal prosecution") for several reasons, including: (1) Petitioner would only need to prove its allegations of criminal activity to a preponderance of the evidence; (2) Petitioner would not have to make its case to a jury of Defendants' peers; (3) Petitioner would need not overcome Defendants' presumption of innocence; (4) Petitioner could use discovery for a fishing expedition to dredge up information that could potentially incriminate Defendants *and others*;[2] (5) Petitioner could demand that

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[1] Section 340.294 renders *every part* of the Veterinary Practice Act a criminal law because it makes a violation of "any provision of sections 340.200 to 340.330" a class A misdemeanor.

[2] Fully two-thirds of Petitioner's discovery requests aim at potentially incriminatory information. If this case is treated as a normal civil action, if Defendants responded to even the most innocuous discovery requests they would entirely waive their Fifth

Defendants' ability to present evidence be crippled simply because Defendants asserted their Fifth Amendment rights against self-incrimination; and (6) Petitioner would not need to overcome the rule of lenity in dealing with the statutes at issue.[3] Certainly, treating this case as though it were a mere civil action would be very, very convenient for the Petitioner. But this is *precisely* why Missouri courts have for more than 130 years refused to enjoin criminal activity unless the party requesting the injunction first demonstrated that the activity to be enjoined threatened its private property rights or constituted a true public nuisance.

Constitutional government exists to secure citizens' natural rights to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry; "when government does not confer this security, it fails in its chief design." Mo. Const. Art. I, § 2. While it may be "inconvenient" or "cumbersome" for government agencies to respect the constitutional rights of citizens accused of criminal activity, the people themselves established these safeguards against unjust or unconstitutional laws. If a conflict arises between legislative or bureaucratic convenience and constitutional rights, it is the laws and regulations that must give way, not the Constitution.

Amendment privilege and could be *compelled* to produce potentially incriminating information – all of which could then be turned over to prosecuting authorities. *State ex rel. Pulliam v. Swink*, 514 S.W.2d 559, 560 (Mo. banc 1974).

[3] Ironically, Petitioner suggests that a civil proceeding is "less threatening" than a criminal proceeding.

II. For More than a Century Missouri Courts Have Held that They Cannot Enjoin Criminal Acts in the Absence of Evidence of Threats to Private Property Rights or the Presence of a Public Nuisance.

In *State ex rel. Cir. Atty. v. Uhrig*, 14 Mo.App. 413 (1883), the Court of Appeals rejected a government attorney's effort to enjoin the unlicensed operation of a dram-shop. The court did not even question that such unlicensed operation constituted a public nuisance, but it still refused to issue the injunction because if the injunction were disobeyed, "a single judge... would hear evidence and try the facts whether the defendants had committed such isolated criminal acts—facts which, with the exceptions already stated, the law has always required to be contested before a jury." *Id.* at 417. While this Court has already determined that Defendants are not entitled to have a jury hear this case,[4] the central point of this passage from *Uhrig* is that courts should not permit citizens accused of criminal acts to be deprived of their liberty or livelihood without being afforded the benefit of constitutional protections.

The *Uhrig* court's concerns were echoed in *Missouri Veterinary Medical Ass'n v. Glisan*, 230 S.W.2d 169, (Mo. App. 1950), the case that Petitioner admits most closely resembles the instant case. As Petitioner correctly pointed out, the *Glisan* court ruled that "the alleged unlawful veterinary work of the defendant cannot be enjoined simply

[4] In light of the discovery of *Uhrig*, which is the only Missouri precedent of which we are aware whose facts present a government party attempting to enforce a criminal law by means of a civil action for injunction, Defendants urge the Court to reconsider its determination that they should not be permitted a jury trial. Of particular importance to this issue is the case's notation that the government should not be permitted to choose pursue enforcement of a criminal law via a court of equity and that "the right of trial by jury has always been enjoyed in England and America" in similar cases. *Id.* at 417. As such, it appears that the instant case *is*, in fact, the kind of case in which a jury trial should be guaranteed. *Uhrig* may be old, but its reasoning is consistent with Missouri courts' articulation of equitable principles from that date all the way to the present and it appears never to have been questioned or overturned. This court should honor Defendants' demand for a jury trial.

because it is unlawful," and that the unlicensed practice of veterinary medicine "is not of itself a public nuisance." *Id.* at 172. Not only did *Glisan* reiterate the Missouri courts' general rule declining to enjoin criminal acts, it explained *why* this was the rule: "The reason that such relief is beyond the scope of equitable jurisdiction is that the acts complained of are already enjoined by law with a prescribed punishment for their commission and for further reason that to proceed in equity against an offender *might deprive him of the protection afforded by criminal law and procedure*." *Id.* at 171. Indeed, the concerns expressed by Missouri courts in *Uhrig*, *Glisan*, and numerous other cases have come to fruition in the instant case as a government agency is threatening to deprive a citizen of her liberties without affording her "the protection afforded by criminal law and procedure."

III. Petitioner's Suggested Application of Section 340.276 Ignores the Plain Language of the Statute.

Defendants reiterate the fact that Petitioner has not complied with the statute it cites as authority for this action. Petitioner has urged this Court to disregard the criminal aspects of the statute it is enforcing because Petitioner has chosen to pursue an injunctive remedy in lieu of criminal prosecution. Petitioner suggests that in adopting section 340.276 the General Assembly sought to provide "*an alternative* to the cumbersome paths of criminal prosecution". (Pet. Reply at 7) (emphasis added). This interpretation flatly contradicts the plain language of the statute itself, which specifies that injunction actions authorized by the statute "shall be *in addition to* and *not in lieu of* any penalty or other discipline provided for by sections 340.200 to 340.330". § 340.276.2, RSMo.

(emphasis added). The statute notes that an action for an injunction "may" be brought concurrently with "other actions," suggesting that while those "other actions" could also potentially precede the action for injunction, the injunction action itself *cannot* be brought "in lieu of" or independent of the "other actions" prescribed by the statute.

IV. The Requested Injunction Cannot be Considered Equitable in Nature.

The notion of equitable jurisdiction cannot be separated from its very specific historical context. In the English legal tradition from whence American courts emerged, courts of law and courts of equity were separate institutions with very different functions. The former, which were known for a rigid application of legal doctrines, were empowered to assess and award damages for injuries that one party had inflicted on another; the latter, frequently characterized by judicial flexibility and discretion, were empowered to issue injunctive relief that would either prevent one party from acting in a way reasonably likely to injure someone else or require a party to undertake an action necessary to accomplish justice. Following in this jurisprudential tradition, Missouri maintained separate courts of law and equity until the middle of the 19th Century, at which point the state adopted a unified court system that assumed responsibility for both legal and equitable proceedings.

Despite the merger of law and equity, Missouri courts have recognized that they are bound by certain traditional principles when called upon to exercise equitable jurisdiction. In fact, it is these traditional principles that *define* equity, and they are frequently articulated when one party seeks an injunction against another. Injunction is an "extraordinary and harsh remedy" and generally courts using their equitable powers

may *only* provide injunctive relief if the party seeking that relief first proves: (1) that the party has no adequate remedy at law; and (2) that irreparable harm will result if the injunction is not granted. *See City of Kansas City v. New York-Kansas Bldg. Assoc., L.P.*, 96 S.W.3d 846, 855 (Mo. App. W.D. 2002). Courts deciding whether to issue an injunction must evaluate the utility of the action to be enjoined and measure it against the gravity of the harm likely to result in the absence of the injunction. *See McCombs v. Joplin 66 Fairgrounds, Inc.*, 925 S.W.2d 946, 950-51 (Mo.App S.D. 1996). This exercise in judicial discretion is the "balancing of equities" that distinguishes equitable jurisdiction from the mechanical application of the law.

Petitioner's position suggests that "equity" means whatever the legislature says it means, and that courts are not permitted to question the legislature. In other words, hundreds of years' worth of jurisprudence focusing on the essentiality of a threat of irreparable harm to a judge's use of equitable consideration means nothing if, as Petitioner suggests, the General Assembly one day decides that a court should issue an injunction without considering whether the act to be enjoined presents any significant threat of harm. *Even if this position were correct*,[5] the legislature may not negate constitutional safeguards for the criminally accused by authorizing the issuance of an injunction based solely on legislative policy rather than on a traditional balancing of equities. To be clear, Defendants do not deny that the General Assembly might under

[5] Defendants maintain that, to the contrary, defining and applying equitable jurisdiction is a quintessentially judicial responsibility and that any legislative attempt to redefine the boundaries of equity would be an impermissible violation of the Distribution of Powers as articulated in Article II, section 1, of the Missouri Constitution.

appropriate circumstances lawfully create such a statutory remedy – but the remedy must be considered a legislative creation, not a true function of the court's equitable powers.[6]

V. Section 340.374 Reflects the General Assembly's Intent that Those Accused of Violating the Veterinary Practice Act Enjoy the Benefit of Criminal Procedure.

As has been made clear, Defendants are at risk of being denied the safeguards of criminal procedure simply because Petitioner has, in violation of section 340.276, opted to pursue an injunction in lieu of the criminal penalties provided for in section 340.294. Defendants are arguing that even though Petitioner has chosen the form of a civil action, the circumstances of the case demand that this Court rely on criminal procedure for the duration of this litigation in order to prevent the constitutional dangers warned of in *Uhrig* and *Glisan*.

Ironically, a proper understanding of section 340.276 confirms that the legislature intended for those accused of violating the Veterinary Practice Act to be protected from those dangers. Section 340.276 mandates that an injunction action can only be brought "in addition to and not in lieu of" the other penalties provided for in sections 340.200 to 340.330. If obeyed by the Veterinary Medical Board, this provision would guarantee that any time the Board attempted to prove that a citizen had violated the criminal aspects of the Veterinary Practice Act, that citizen would have the protections of criminal procedure. Section 340.276 makes clear that the Board cannot seek an injunction

[6] This could be a crucial distinction as pertains to a defendants' right to a jury trial. The Missouri Supreme Court has held that "an action that is equitable in nature , *as viewed in historical perspective and with respect to the equitable remedy sought*, does not come with in the jury trial guarantee." *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. 2003).

independent of a criminal proceeding, so a proper reading of the statute suggests that an injunction action could only properly be filed *at the same time as* or *after* the initiation of a criminal proceeding. This interpretation of the law makes perfect sense if one assumes that the General Assembly had read *Glisan*, and was therefore aware that Missouri's courts were concerned about the possibility that citizens might be improperly denied their constitutional rights.

VI. Even if This Court Does Not Grant Defendants the Protections of Criminal Procedure, Circumstances Do Not Warrant Crippling Defendants' Ability to Put On Evidence at Trial.

Defendants have invoked their Fifth Amendment privilege because at this time they feel Petitioner has left them no alternative. Defendants have no intention of offering self-incriminatory evidence at any point in this litigation – but they have also made clear that they would be perfectly willing to provide a range of non-incriminatory information if not for the fact that doing so would result in the complete waiver of their privilege.

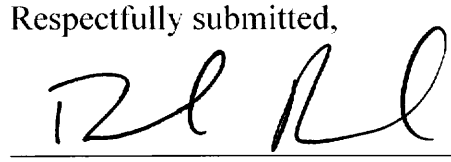
Petitioner complains that it is being prejudiced by Defendants' invocation of the privilege, but has in fact admitted that it already possesses most of the information is claims to seek in discovery. (Pet. Reply at 9), and it has not indicated any reason that the Court must decide this matter *now*, three months before this case is scheduled for trial. Petitioner's arguments on this point imply that it cannot trust the Court to determine the value or prejudicial impact of any evidence that might be offered and to exclude any evidence that it determines to be unfairly prejudicial. If Petitioner were really interested in obtaining non-incriminatory information, rather than punishing Defendants for

guarding themselves against the prosecution that Petitioner itself has threatened, it would seek a middle ground, such as some agreement or guarantee that providing non-incriminatory information *would not* waive Defendants' Fifth Amendment privilege. In the absence of any such effort by the Petitioner to offer a reasonable compromise that would provide it with the non-incriminatory information in which it claims to be interested, this Court should withhold judgment concerning evidence that Defendants might decide to offer until such time as the Court can make a fully informed decision that is more likely to be fair to both parties.

VII. Conclusion

For these reasons, Defendants respectfully request that the Court overrule Petitioner's Motion in Limine, setting this matter for a jury trial and preserving until a more appropriate moment the Court's judgment on the question of what evidence Defendants may present.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served by email, on February 25, 2011, addressed to:

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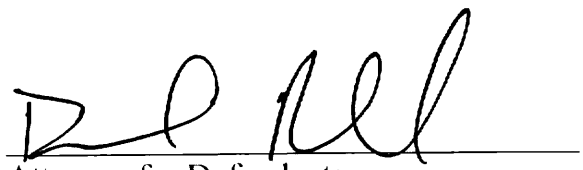

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