

Supplier for store names, buildouts and store formats, uniforms and merchandising, IT tech support and in-store technology, human resources services such as training and recruitment, general oversight and business consulting.”⁴

2. Right of First Refusal (“ROFR”) Option. Elev8 must present TILT with an offer on the same terms as any bona fide offer tendered to Elev8 to purchase an interest constituting a change in control. The agreement recognizes that the ROFR Option may only be exercised if the Massachusetts state marijuana laws and regulations are amended to remove existing ownership limits.⁵
3. Right of First Refusal (“ROFR”) Debt/Equity Financing. In addition to the ROFR Option for purchase of equity, the ROFR agreement contains provisions prohibiting Elev8 from seeking any debt or equity financing to support opening a new retail store without first presenting TILT the opportunity to provide financing on substantially the same terms. Although the ROFR on debt and financing appears in the ROFR agreement, it is expressly distinguished from the “ROFR Option” for equity purchase and effective upon execution.
4. Loan prepayment. Elev8 must annually prepay 70% of any excess cash flow to TILT in repayment of a one million dollar loan at eight percent interest. TILT’s obligations under the loan are conditioned on the Supply Agreement and ROFR Agreement remaining in full force and effect.⁶
5. Mortgage and Security Agreement. TILT’s loan was secured against Elev8’s assets and real estate through a mortgage and security agreement.⁷

On July 25, 2019, TILT attended an Investigative Conference and informed Commission staff that TILT intended to terminate its management agreement arrangements with affiliated licensees, including Elev8, dissolve defunct subsidiaries and negotiate traditional loan financing arrangement with those affiliate licensees. On August 16, 2019, counsel for TILT memorialized their planned actions as discussed at the Investigative Conference.⁸

On October 5, 2019, Elev8 amended its application to include an executed Termination, Settlement and Release Agreement and executed loan agreement (“restructured agreements”).⁹

⁴ Exhibit D (TILT and Elev8 Supply Agreement, dated December 18, 2019).

⁵ Exhibit E (Right of First Refusal Agreement (Elev8), dated January 11, 2019).

⁶ Exhibit F (Loan and Security Agreement, dated January 11, 2019). See Section 4.1(i): *Conditions Precedent to Loans* (“The obligation of Lender to make advances hereunder is subject to the satisfaction of, or waiver of, immediately prior to or concurrently with the making of such Loan of each of the following conditions precedent . . . Each of the Supply Agreement and ROFR Agreement shall have been duly executed by the parties thereto and is in full force and effect and no breach by the Borrower or its stockholders shall have occurred under such agreement); and Section 9.7: *Sale of Assets, Consolidation, Merger, Dissolution, Other Prohibited Activities* (“Borrower shall not, directly or indirectly, without Lender’s consent . . . terminate or breach the Supply Agreement or ROFR Agreement.”).

⁷ Exhibit G (Mortgage and Security Agreement, dated January 11, 2019) and Exhibit H (Secured Promissory Note dated January 11, 2019)

⁸ Exhibit H (“CAC Updates” email from Adam Fine, dated August 16, 2019).

⁹ Exhibit I (Loan Agreement by and among Elev8 Cannabis LLC and SH Finance Company, dated September 23, 2019); and Exhibit K (Termination Release and Settlement Agreement, dated September 23, 2019).



On October 28, 2019, Elev8 recorded a discharge and release of the mortgage and security agreement interest.¹⁰

The restructured agreements release all obligations pertaining to supply, rights of first refusal, cash flow sweep loan repayment and any secured interest in Elev8's real estate interests.

2. Investigation Outcome

The MOU Agreements between TILT and Elev8 established an interest that subject to disclosure on Elev8's initial application for licensure. However, Elev8 has since terminated the MOU Agreements and properly disclosed newly-executed traditional loan arrangements.

Prior to termination of the MOU Agreements, TILT exercised decision-making authority over management and operational decisions. TILT controlled at least 70% of the inventory Elev8 could offer and established a per-item revenue sharing arrangement. TILT held a Right of First Refusal over any offering Elev8 sought for debt or equity financing. Elev8 could not freely choose to cancel or renegotiate these arrangements because TILT's provision of capital under the loan agreement was expressly contingent on Elev8's agreement and adherence to the supply and right of first refusal agreement. Further default on the loan could impact Elev8's real property which was subject to a mortgage and security agreement in connection with the TILT loan.

Based on review of the restructured agreements, there is no evidence that TILT currently holds a controlling interest in Elev8. TILT and Elev8 have complied with all requests for information put forward by Commission staff and has promptly amended its application with new capital information. Accordingly, the ownership and control investigation pertaining to Elev8 is deemed closed.

3. Licensing Recommendation

An application for licensure may be denied based on the submission of misleading, incorrect, false or fraudulent information to the Commission. 935 CMR 500.400(2). The newly promulgated regulations revise this provision to further clarify the standard as submission of information that "was deceptive, misleading, false or fraudulent, or that tends to deceive or create a misleading impression, whether directly, or by omission or ambiguity." Enforcement does not find that the investigation results support a finding that Elev8 submitted misleading, incorrect, false or fraudulent information to the Commission.

First, failure to disclose TILT's interest is moot given the termination, settlement and release of the contractual agreements.

Second, any past failure to disclose an interest on the application was not intentional or bad-faith. At the time Elev8 submitted its application and responded to the Commission's RFI, it had an obligation to disclose close associates and other persons or entities having direct or indirect

¹⁰ Exhibit K (Discharge of Mortgage, Absolute Assignment of Rents and Leases, Security Agreement and Fixture Filing, recorded in Worcester Registry of Deeds at Book 61309 and Page 393 on October 28, 2019).



authority over Elev8's management, policies, security operations or cultivation operations. 935 CMR 500.101(1)(a). During this time, TILT submitted applications for its wholly-owned subsidiary Commonwealth Alternative Care which lack disclosure of an interest in Elev8 or any other control affiliates. TILT held contractual interests similar to the Elev8 agreements with multiple other control affiliates (i.e. Herbology Group, Verdant, Ermont). None of the other control affiliates disclosed any interest held by TILT on their respective agreements. There is no TILT expressly directed control affiliates to omit reference to their controlling interest as to not negatively affect their wholly-owned subsidiary's licensing efforts. Regardless of express direction, TILT provided management and operational assistance to its control affiliates. Elev8 could have reasonably looked to TILT's application disclosures as implicit guidance on how to proceed with their own application.

There is insufficient evidence to support a finding that Elev8 acted in a deceiving manner warranting staff recommendation to deny licensure pursuant to 935 CMR 500.400(2).

4. Conclusion

Elev8 has provided all requested and required documentation to demonstrate termination of contractual arrangements with TILT that would otherwise have established direct or indirect control. The Director of Investigations has determined that no further investigative steps are necessary or appropriate at this time. The Director of Licensing has reviewed the investigative material in consultation with Enforcement Counsel and does not find any grounds warranting staff recommendation to deny licensure. Accordingly, this memorandum recommends that the Chief of Investigations and Enforcement deem this investigation closed.

