IN THE SUPREME COURT OF THE STATE OF NEVADA

NULEAF DISPENSARY, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants, vs. THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH; ACRES MEDICAL, LLC, AND GB SCIENCES, LLC, Respondents.	Case No.: 69909 Dist. Ct Case No.: A-14-710597-C

ANSWERING BRIEF OF RESPONDENT ACRES MEDICAL, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Respondent **Acres Medical, LLC** states that it is a Nevada Limited Liability Company, of which no publicly traded company owns 10% or more of the membership interests.

The following law firms have represented **Acres Medical, LLC** in this litigation:

Greenberg Traurig, LLP.

Dated this 31st day of October, 2016.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

STATUTES

REGULATIONS

Respondent Acres Medical, LLC, submits its Answer Brief to the Opening Brief of Appellant Nuleaf.

INTRODUCTION

The facts underlying this appeal concern errors committed by a state agency during the application process for licensure and registration of medical marijuana facilities. Because of these errors, Respondent/Cross Respondent Acres Medical, LLC ("Acres") had not received one of twelve available provisional registration certificates, even though Acres's application was entitled to a score that would have placed it within the top 12 applicants for such provisional certifications in the absence of such errors. One such error, which involved the score Acres received, was corrected in a separate suit filed in the Eighth Judicial District Court, the decision from which was not appealed, and therefore, is not before this Court. The other error, corrected by the decision below, involved the state agency including ineligible applications within the ranking process for such applications.

One such ineligible application was that of Appellant NuLeaf CLV Dispensary, LLC ("Nuleaf"); another was that of a party dismissed from this action below. Another Applicant, Respondent/Cross Appellant GB Sciences, LLC ("GB Sciences"), had received a score that due to the scoring error involving Acres, and the inclusion of the ineligible applications, placed it in the 13th rank. GB Sciences

filed suit requesting the District Court to order the state agency to correct its error by removing the ineligible applicants from the ranking.

Acres intervened in the action, asserting that its own score, having been corrected, ranked it higher than GB Sciences. Accordingly, when the District Court determined that the state agency had indeed, improperly included Nuleaf in the ranking process, the District Court ordered Nuleaf's certificate revoked, and that the agency issue the provisional certificate to next highest-ranking applicant, which was Acres.

As shown below, the District Court properly determined that state agency had improperly issued a certificate to Nuleaf, whose application had not contained the requisite certifications, and who had, moreover, been denied a required special use permit by the City of Las Vegas. Because Nuleaf's application should not have been ranked, the District Court properly ordered the agency to revoke that certificate, and properly ordered that a certificate be issued to Acres, the applicant whose ranking was next highest on the list.

ROUTING STATEMENT

This matter does not fall within any of the categories listed in NRAP 17(a)(1) as requiring retention by the Nevada Supreme Court, and accordingly, may be assigned to the Nevada Court of Appeals.

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT PROPERLY ORDERED THE DIVISION TO REVOKE AN IMPROPERLY ISSUED PROVISIONAL REGISTRATION CERTIFICATE

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II. THE DISTRICT COURT PROPERLY DIRECTED THE DIVISION TO ISSUE A CERTIFICATE TO ACRES, THE NEXT HIGHEST RANKED APPLICANT.

STATEMENT OF THE FACTS

The facts relevant to this appeal concern whether Nuleaf's application satisfied the statutory and regulatory requirements, and whether the state agency adhered to such statutes and regulations. In order to understand the relevant factual events, it is therefore necessary to first understand the statutory and regulatory requirements.

Nevada's Process for Licensure for Medical Marijuana Related Businesses.

In 2013, the Nevada Legislature enacted NRS Chapter 453A, *et seq*., addressing the medical use of marijuana. Within that statutory framework, is NRS 452A. §§320-370 address the registration of medical marijuana establishments authorized to cultivate and dispense marijuana and marijuana infused products to those persons authorized to use medical marijuana. The legislature established certain requirements for those who wished to enter the medical marijuana industry, including specific requirements that ***must be included in applications*** for

registrations. NRS 453A.322. Specifically, the Legislature provided that, where a local government has created specific zoning requirements for such establishments, the applicant must provide either proof of licensure by the local authority, or a letter from the local authority asserting that the applicant has satisfied those requirements. NRS 453A.322(3)(a)(5).

Respondent Nevada Department of Health and Human Services, Division of Public and Behavioral Health (the "Division"), was charged with the registration of medical marijuana facilities, and specifically tasked with adopting regulations to carry out the provisions of NRS 453A.320-370. NRS 453A.370. The Division created a regulatory framework for implementing and enforcing NRS Chapter 453A, *et seq,* resulting in the implementation of NAC Chapter, which sets forth the regulations for the application, review, approval, and ultimate registration of a medical marijuana establishment in accordance with the requirements of NRS Chapter 453A.

The Legislature limited the number of medical marijuana dispensaries that could be located in a county with a population over 700,000 to 40. NRS 453A.324(1)(a). In addition, for counties with a population exceeding 100,000, the Legislature provided that no more than 25% of such county's total registrations could be within a single local government jurisdiction. NRS 453A.324(1)(a). The Legislature further provided that, where a local government issues business

licenses, any registration certificate issued to a facility will be provisional until such time as the facility establishes that it is in compliance with the local government's ordinances or rules, and has been issued a business license. NRS 453A.326(3). Pursuant to these limitations, up to twelve registration certificates could be issued for dispensaries to be located within the City of Las Vegas ("City"). In May and June of 2014, the City had enacted Ordinance No. 6321 and 6324 to establish zoning regulations, licensing regulations, and standards for MME locations. **II APP 208-251.**

The Parties' Applications to the City

Acres, Nuleaf, and GB Sciences were each among those who applied to the City for the zoning and business license approval required under the City's newly enacted ordinances. **III APP 465 ¶ 50.** The City made determinations on such applications in October 2014. **II APP 316-319.** Acres and GB Sciences each received approval from the City**. II APP 319.** Nuleaf's application for a special use permit was denied. **II APP 320.**

On October 30, 2014, the Division received a letter from the City in which the City advised the Division of those applicants who had been approved by the City and those, including Nuleaf, who had been denied**. II APP 311-320.** As relevant here, that letter advised:

> Las Vegas Municipal Code 6.95.080(d)-Medical Marijuana Establishments, requires notification to the State regulating authority

> if an applicant for a medical marijuana establishment has been found in conformance with land use restrictions and if the application to the City is eligible to be considered for a medical marijuana establishment business license. On October 28 and 29, 2014, the Las Vegas City council deliberated on applications presented to the City for dispensaries, cultivation and production facilities. The attached list for each type of establishment is the result of Council actions on each application.
>
> Please note that any application that resulted in a denial has also been denied land use for the proposed location and their application was found not to be in accordance with the City Code is is not eligible for a business license for the proposed establishment. Those applications that are noted as approved, received land use and could be considered for a business license at such future time as they might receive a provisional certificate from your agency and have complied with all regulations and requirements of a privileged business license applications.

II APP 316. Thus, by virtue of such letter, the applications of Acres and GB Sciences complied with the requirement of NRS 453A.322(3)(a)(5) that proof of compliance with zoning requirements be included**.** In contrast, because its application to the City had been denied, Nuleaf's application did not contain the requirement proof of compliance. However, as the Division subsequently acknowledged, while it had received the City's notification that Nuleaf had been denied zoning approval, it did not consider that notification, and issued rankings that included Nuleaf. **III APP 534:5-540:25**.

The Parties' Applications to the Division.

Acres, Nuleaf, and GB Sciences were each among those who applied to the Division for registration for a facility in the City. **III APP 465 ¶ 50.** The ranking

as originally released by the Division showed that Nuleaf was ranked third with a rank of 189.71, **II APP 335;** GB Sciences as thirteenth, with a rank of 166.86**, II APP 330,** and Acres as 26th, with a score of 126. **III APP 426-428**. However, Nuleaf's inclusion as a ranked applicant was a result of the Division's admitted failure to consider the City's letter.

Additionally, a score of 126 was the result of another error by the Division. In calculating Acres combined score on each of the categories considered by the Division, one category had been mistaken omitted. ***Id.*** On October 10, 2015, Judge Elyssa Cadish, Department VI, Eighth Judicial Judicial District, granted Acres's Petition for Mandamus, Case No. A-15-719637-W, and issued an order directing the Division to to assign the correct score of 167.3 to Acres, and to assign Acres its correct rank based on that score, thirteenth. **III APP 426.** No appeal was taken of that ruling, which is therefore final.

Proceedings Below

While Acres was proceeding to have its scoring error corrected in Department VI, GB Sciences, believing it was the next in line for one of the twelve registrations available for the City, was challenging the rankings granted to two applicants[1], including, as relevant here, Nuleaf**. I APP 1.** Acres sought leave to

[1] GB Sciences had also challenged the ranking granted to Desert Aire Wellness, LLC, which had been ranked tenth, with a score of 172.33, because this entity had withdrawn its application for City approval prior to the ranking, and therefore, at

intervene in this action in October 2015, which request was granted in November 2015. **I APP 430-445, 485-486; III APP 517.** GB Sciences had not opposed Acres's intervention.

GB Sciences sought summary judgment against the Division and Nuleaf, arguing that the Division had improperly ranked Nuleaf's application when the latter had failed to show that it had complied with the City's zoning and licensing approvals**. I APP 160-II APP 347.** Nuleaf opposed and counter moved for summary judgment. **II APP 377-419.** As noted above, the Division admitted that it had not considered the City's letter when determining the rankings. **III APP 534:5-540:25.**

The District Court determined that the Division had failed to comply with NRS 453A.322(3) and its own regulations by including Nuleaf in the rankings. Therefore, the provisional registration certificate issued to Nuleaf was ordered revoked, and the Division directed to issue a certificate to the next highest ranked applicant. **III APP 487-499.** Because Acres's score of 167.3 exceeded GB Science's score of 166.86, the Division was ordered to issue the certificate to

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the time the rankings were announced, had not received such approval. **I APP 11**, **¶ 55.** GB Sciences later dismissed Desert Aire Wellness, LLC from the case. **I APP 158-159.**

Acres. ***Id.***[2]

STANDARD OF REVIEW

Nevada's Appellate Courts generally review a District Court's grant or denial of a writ petition for an abuse of discretion. *DR Partners v. Bd. of Cnty. Comm'rs,* 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). However, to the extent the decision involves a District Court's interpretation of case law and statutory language, review is *de novo*. *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 612 (2015).

SUMMARY OF THE ARGUMENT

The judgment should be affirmed. The Division's issuance of a registration certificate to Nuleaf exceeded the Division's authority, as Nuleaf failed to demonstrate its compliance with the minimum requirements to be ranked among applicants. The Division acknowledged that it failed to consider the fact that Nuleaf had been denied a special use permit, despite the fact that the Division had been provided that information prior to its announcement of the rankings. The Division's construction of the governing statutes produced a result that was

[2] Additional proceedings followed, whereby GB Sciences requested amendment of the judgment to require the certificate be provided to it. However, such issues are not relevant to Appellant Nuleaf's appeal, which is focused on the propriety of the determination of Nuleaf's ineligibility. Issues related to the propriety of the District Court's direction that the certificate be issued to Acres, rather than GB Sciences will likely be raised in GB Sciences' Cross Appeal. Accordingly, Acres will address such issues in its Answering Brief to that Cross Appeal.

expressly contrary to the statutory authority granted to it. Accordingly, the District Court properly directed the Division to correct its erroneous decision.

LEGAL ARGUMENT

The District Court's Judgment requiring the Division to issue a registration certificate to Acres should be affirmed. There were no material facts in dispute, and the legal statutes were clear in their requirements. Because Nuleaf had not and could not show that it satisfied the requirements for receipt of a registration certificate, having been denied a special use permit for its designated location, the District Court properly directed the Division to revoke the registration certificate granted to Nuleaf, and to issue a certificate to the next highest ranked applicant.

I. THE DISTRICT COURT PROPERLY ORDERED THE DIVISION TO REVOKE AN IMPROPERLY ISSUED PROVISIONAL REGISTRATION CERTIFICATE

The issue to be decided by this Court with respect to Nuleaf's appeal is quite straightforward. The statutory requirements set forth in NRS 453A.322(3) and (5) are unambiguous. Pursuant to NRS 453A.322(3), an application was required to include either proof of local licensure or "a letter from the local governmental authority certifying that the proposed medical marijuana establishment is in compliance with those restrictions and satisfies all applicable building requirements." Here, the required letter from the City of Las Vegas certified Acres's compliance with the City's restrictions, while that same letter asserted that

Nuleaf had not satisfied the City's restrictions. The Division is authorized to issue a registration certificate only to applicants who have demonstrated their compliance with all of the requirements; the Division was ***not*** authorized to issue a registration certificate to any applicant who had not satisfied the requirements that the facility comply with all local ordinances and rules. NRS 453A.322(3) and (5).

A. The Plain Language of the Relevant statutory Provision Establishes Nuleaf's Ineligibility for a Registration Certificate.

The plain language of the relevant statute shows that Nuleaf was not eligible to receive a registration certificate, provisional or otherwise, from the Division. The relevant statute provides as follows:

> **NRS 453A.322 Registration of establishments: Requirements; expiration and renewal.**
>
> 1. Each medical marijuana establishment must register with the Division.
>
> 2. A person who wishes to operate a medical marijuana establishment must submit to the Division an application on a form prescribed by the Division.
>
> 3. Except as otherwise provided in NRS 453A.324, 453A.326, 453A.328 and 453A.340, not later than 90 days after receiving an application to operate a medical marijuana establishment, the Division shall register the medical marijuana establishment and issue a medical marijuana establishment registration certificate and a random 20-digit alphanumeric identification number *if*:
>
> (a) The person who wishes to operate the proposed medical marijuana establishment has submitted to the Division all of the following:

* * *

(2) An application, which must include:

* * *

(II) The physical address where the proposed medical marijuana establishment will be located and the physical address of any co-owned additional or otherwise associated medical marijuana establishments, the locations of which may not be within 1,000 feet of a public or private school that provides formal education traditionally associated with preschool or kindergarten through grade 12 and that existed on the date on which the application for the proposed medical marijuana establishment was submitted to the Division, or within 300 feet of a community facility that existed on the date on which the application for the proposed medical marijuana establishment was submitted to the Division;

* * *

(5) ***If the city, town or county in which the proposed medical marijuana establishment will be located has enacted zoning restrictions, proof of licensure with the applicable local governmental authority or a letter from the applicable local governmental authority certifying that the proposed medical marijuana establishment is in compliance with those restrictions and satisfies all applicable building requirements***; and

* * *

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5. Except as otherwise provided in subsection 6, ***if an application for registration as a medical marijuana establishment satisfies the requirements of this section and the establishment is not disqualified from being registered as a medical marijuana establishment pursuant to this section or other applicable law, the Division shall issue to the establishment a medical marijuana establishment registration certificate.*** A medical marijuana

> establishment registration certificate expires 1 year after the date of issuance and may be renewed upon:
>
> * * *

NRS 453A.322 (emphasis added).

As can be seen, the statute grants the Division the authority to issue a certificate to an applicant *only* if there is proof that the applicant's proposed location complies with the local government's zoning requirements. Here, it is undisputed that the Division had no proof before that Nuleaf had satisfied the zoning requirements for medical marijuana facilities imposed by the City of Las Vegas. To the contrary, the Division had been provided proof that Nuleaf had been denied a requested special use permit for its proposed location. Accordingly, there can be no dispute that Nuleaf was ineligible to receive a certificate.

Nuleaf contends that this Court should give deference to the Division's "interpretation" that NRS 453A.322 did not really mean that an applicant must show that it is in compliance with a local government's zoning restrictions. However, while Nevada courts may defer to the agency's interpretation of a statute that the agency is charged with enforcing, this Court has stated that it will not defer to an agency's interpretation when the regulation "conflicts with existing statutory provisions or exceeds the statutory authority of the agency." *Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n*, 126 Nev. 74, 83, 225 P.3d 1265, 1271 (2010). Instead, when "the language of a statute is plain and unambiguous

and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself. *Holiday Ret. Corp. v. State, DIR*, 128 Nev. Adv. Op. 13, 274 P.3d 759, 761 (2012) (internal quotations and citations omitted). An agency cannot rewrite a statute; only the legislature has that authority. *Id.*

Here, the Division's "interpretation" that it could issue a registration certificate to an applicant whose zoning application to the local authority had been denied is expressly contrary to the plain language of the statute. Accordingly, that interpretation is entitled to no deference by this court. The Division's issuance of a registration certificate to an applicant who had not only *not* shown compliance with the City's zoning requirements, ***but had actually been denied approval for its projected location***, plainly exceeded the scope of authority granted to the Division under the statutory scheme.

B. The Entirety of the Statutory Scheme Shows that the Legislature Intended that Local Governmental Authorities would Control the Location of Medical Marijuana Establishments within their Jurisdictions.

Nuleaf makes a pretense of indignation over what it describes as local governments' attempts to the "control" the Division's selection process. *See* Opening Brief, p. 8. However, this attitude ignores the clear mandate of the legislature that local governments who wanted such authority *would have the final say as to the specific locations of medical marijuana establishments within their*

boundaries, subject only to certain exclusions imposed by statute relating to minimum distances from schools and community facilities. There can be no other reasonable interpretation of NRS 453A.322(3)(a)(5)'s express requirement that evidence of zoning approval be available at the time of the application, if the local authority had enacted zoning regulations.

Nuleaf seeks to circumvent this requirement of local approval by citing the Division's regulations that allow an applicant to move its facility locations to another site within 5 miles of the original location. *See* NAC 453A.326(2). However, Nuleaf's reliance on this regulatory provision is disingenuous. While *that* provision does indeed, permit a change in location upon showing of both justification for the move and appropriate local authority approvals, Nuleaf fails to acknowledge that any such change must be from "its original *approved* location." NAC 453A.326(2) (emphasis added). Nor does Nuleaf acknowledge the provision of NAC 453A.326(3), which states:

> 3. A medical marijuana establishment may change the location of the medical marijuana establishment to a new location ***if the local government in which the medical marijuana establishment is located enacts zoning restrictions which prohibit the location of the medical marijuana establishment after the Division has issued a medical marijuana establishment registration certificate to the medical marijuana establishment.***

NAC 453A.326(3). This language clearly demonstrates the assumption that a site proposed by an applicant had been, ***at the time of the application and Division***

approval, approved by the local authority; it therefore protects a certificate holder who, as a result of *subsequent* local zoning decisions, must move locations. Nothing in this regulation, nor the statutory scheme as a whole, indicates that the Division's approval process is intended to provide opportunities to an applicant to submit an application with an unapproved "place holder" location, on the speculative chance that approval will be obtained in the future within 5 miles of the place holder. Yet that is essentially, what Nuleaf asks this Court to approve.

Furthermore, the Division's own selection process must consider the *actual* location proposed by the applicant, as the selection criteria includes considerations specifically relevant to location, including the convenience of the location to those who have need of medical marijuana, the likely impact of the establishment on the community where located, and the adequacy of the proposed size of the facility site. NRS 453A.328(5)-(7). None of these considerations *could* factor into the Division's selection process, if an applicant were not required to submit a locally approved location in the application. Statutory interpretation must employ common sense, and "statutes must be given a reasonable construction with a view to promoting rather than defeating the legislative policy behind them." *State, Dep't of Motor Vehicles & Pub. Safety v. Brown*, 104 Nev. 524, 526, 762 P.2d 882, 883 (1988). Nuleaf's proposed construction defeats the statute's clear intent that an

applicant's actual intended location for its facility be vetted by both the local authority and the Division prior to the issuance of a registration certificate.

Contrary to Nuleaf's contentions, there is no contradiction between NRS 453A.322(3)(a)(5)'s requirement for proof of satisfaction of locally enacted zoning and building requirements, and NRS 453A.326's imposition of a "provisional" certificate pending "compliance with all applicable local governmental ordinances or rules." In context, the purpose and intent of each provision is clear. Section 322's requirements relate to zoning regulations specific to medical marijuana facilities that the local governmental jurisdictions might have enacted, while Section 326 refers to the local authority's generally applicable business license requirements. Applying this plain and obvious interpretation gives meaning to both provisions, as this Court has traditionally encouraged. *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009) ("This court generally avoids statutory interpretation that renders language meaningless or superfluous.").

Because the District Court properly ruled that the Division had exceeded the scope of its authority in issuing a registration certificate to an ineligible applicant, the Judgment should be affirmed.

II. THE DISTRICT COURT PROPERLY DIRECTED THE DIVISION TO ISSUE A CERTIFICATE TO ACRES, THE NEXT HIGHEST RANKED APPLICANT.

Nuleaf contends that the District Court had no authority to direct the Division to take action, i.e., impose a mandatory injunction. This contention is without merit. A District Court Has authority to direct a state agency to correct its own illegal actions, and to direct the agency to take action. *City of Reno v. Matley,* 79 Nev. 49, 378 P.2d 256 (1963). This is true whether the District Court's actions are deemed to be the issuance of a mandatory injunction, a decision under judicial review, or a writ of mandamus – all of which relief was requested in GB Science's Amended Complaint, I APP 1-29. Similarly, Acres's Complaint in Intervention asserted actions for declaratory/injunctive relief, as well as for a writ of mandamus. III APP 458-484. Accordingly, even if Nuleaf's contention that the requested relief could be granted only through an extraordinary writ is moot were accurate, that point is moot, as such extra ordinary relief had been requested below.

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CONCLUSION

The Judgment should be affirmed as the District Court properly determined that the Division had unlawfully issued a registration certificate to an ineligible applicant, and properly directed the Division to issue a certificate to the next highest ranked applicant.

Respectfully submitted this 31st day of October, 2016.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in Times New Roman 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3,913 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) (1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 31st day of October, 2016.

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GREENBERG TRAURIG, LLP

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CERTIFICATE OF SERVICE

This is to certify that on October 31 2016, a true and correct copy of the foregoing ***ANSWERING BRIEF OF RESPONDENT ACRES MEDICAL, LLC*** was served via this Court's e-filing system, on counsel of record for all parties to the action.

/s/ Andrea Lee Rosehill
An employee of Greenberg Traurig, LLP