IN THE SUPREME COURT OF THE STATE OF NEVADA

NULEAF CLV DISPENSARY, LLC, a Nevada limited liability company,

Appellant,

vs.

THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH; ACRES MEDICAL, LLC, a Nevada limited liability company; and GB SCIENCES NEVADA, LLC, a Nevada limited liability company,

Respondents.

GB SCIENCES NEVADA, LLC, a Nevada limited liability company,

Cross-Appellant,

vs.

THE STATE OF NEVADA DEPT. OF HEALTH AND HUMAN SERVICES, DIV. OF PUBLIC AND BEHAVIORAL HEALTH; NULEAF CLV DISPENSARY, LLC, a Nevada limited liability company; and ACRES MEDICAL, LLC, a Nevada limited liability company,

Cross-Respondents.

Supreme Court No. 69909

District Court Case No. A710597

RESPONDENT/CROSS-APPELLANT GB SCIENCES NEVADA, LLC'S RESPONDING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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On Appeal from Judgment Granted by the Eighth Judicial District Court of the State of Nevada, in and for Clark County
Case No. A710597

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. GroBlox Sciences, Inc.
2. Smith & Shapiro, PLLC
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Dated this 31st day of October, 2016.

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I.

JURISDICTIONAL STATEMENT FOR CROSS-APPEAL

Cross-Appellant GB Sciences Nevada, LLC ("***GB Sciences***") cross-appeals the November 13, 2015 Minute Order and December 14, 2015 Order, which partly denied GB Science's request for a mandatory injunction against Respondent State of Nevada Department of Health and Human Services, Division of Public and Behavioral Health (the "***Division***") to reissue a medical marijuana establishment provisional registration certificate to GB Sciences, which had been revoked from Appellant/Cross-Respondent NuLeaf CLV Dispensary, LLC ("***NuLeaf***"). (Respondent Appendix Volume 1: RAPP68-69 and RAPP89-98) GB Sciences also appeals the January 26, 2016 Minute Order, and two March 3, 2016 Orders which denied GB Science's Rule 59(e) Motion and granted a motion to dismiss GB Science's Counterclaims against Respondent/Cross-Respondent Acres Medical, LLC's ("***Acres***"). (Resp. App. Vol. 2: RAPP359-62, RAPP363-66, and RAPP367-73) The underlying matter became final upon the entry of the March 3, 2016 Orders. Notice of Entry of Order for the March 3, 2016 Orders was served on March 4, 2016. (Appellant Volume 3: APP517-23 and Resp. App. Vol. 2: RAPP362-73) This Court has jurisdiction to hear this Cross-Appeal in accordance with NRAP 3A(b)(1).

The Order also constituted a denial of a mandatory injunction against the Division to issue the revoked certificate to GB Sciences. (Resp. App. Vol. 1: RAPP68-69 and RAPP89-98) Thus, this Court also has jurisdiction to hear this Cross-Appeal in accordance with NRAP 3A(b)(3).

II.

ROUTING STATEMENT FOR CROSS-APPEAL

This case is presumptively retained by the Supreme Court because it (1) arises from the District Court's interpretations of NRS Chapter 453A and NAC 453A (NRAP 17(a)(8)), (2) raises questions of first impression involving Nevada law (NRAP 17(a)(13)), and (3) involves medical marijuana establishments which are of public importance (NRAP 17(a)(14)). This case is not presumptively assigned to the Court of Appeals under NRAP 17(b).

III.

ISSUES PRESENTED FOR REVIEW

A. NULEAF'S APPEAL:

As set forth in NuLeaf's Opening Brief, the two issues on appeal are:

1. **Substituted Judgment.** Did the District Court err in finding the Division acted inappropriately by issuing a Provisional Certificate to NuLeaf?

2. **Improper Remedy.** Did the District Court err in directing the Division to re-issue the Provisional Certificate to Acres?

B. GB SCIENCES' CROSS-APPEAL:

GB Sciences agrees with the District Court's ruling as it relates to NuLeaf. However, GB Sciences is appealing the District Court's ruling as it relates to Acres. The following are the issues presented for review:

1. **Res Judicata Effect of the Acres Order.** In awarding NuLeaf's Provisional Registration Certificate ("***PRC***") to Acres, the District Court took judicial notice of the November 3, 2014 Order (the "***Acres Order***") in Acres Medical, LLC v. Dept. of Health and Human Services, Case Number A-15-719637-W (the "***Acres Lawsuit***"), and found that, notwithstanding the fact that GB Sciences was not a party to the Acres Lawsuit, the Acres Order was binding upon GB Sciences. Did the District Court err when it determined that the Acres Order was binding upon GB Sciences?

2. **Was Summary Judgment Appropriately Granted in Favor of Acres.** Did the District Court err in granting summary judgment in favor of Acres and against GB Sciences, when: (i) Acres was not a party to the underlying lawsuit until the hearing on GB Sciences' Motion for Summary Judgment; (ii) Acres' did not file its complaint in intervention until after GB Sciences' Motion for Summary Judgment had been fully briefed and argued; (iii) Acres had never filed a motion for summary judgment for the Court's consideration; and (iv) GB

Sciences was never provided any opportunity to address any of Acres' claims or arguments?

3. **Dismissal of GB Sciences' Counterclaims Against Acres.** Did the District Court err in dismissing GB Sciences' counterclaims against Acres?

IV.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a case involving the State of Nevada's issuance of registration certificates to Medical Marijuana Establishments ("***MMEs***"), under Nevada Revised Statutes Chapter 453A.

B. COURSE OF PROCEEDINGS

1. The Complaint.

On December 2, 2014, GB Sciences filed a Complaint, seeking declaratory judgment, injunctive relief, a petition for judicial review, and a petition for writ of mandamus. (Resp. App. Vol. 1: RAPP1-25) Acres was not a party to this lawsuit. Id. On December 5, 2014, GB Sciences filed a First Amended Complaint, seeking the same relief requested in the original Complaint. (App. Vol. 1: APP1-29) On February 2, 2015, the Division filed its Answer. (App. Vol. 1: APP154-57) On October 5, 2015, NuLeaf filed an Answer to the First Amended Complaint. (App. Vol. 2: APP364-76)

2. GB Sciences' Motion for Summary Judgment and NuLeaf's Countermotion for Summary Judgment.

On September 18, 2015, GB Sciences filed a Motion for Summary Judgment (the "***MSJ***"). (App. Vol. 1: APP160-76 and App. Vol. 2: APP177-347) Acres was not a party at that time. On September 28, 2015, the Division filed its

Response. (App. Vol. 2: APP348-63) On October 5, 2015, NuLeaf filed its Opposition and Countermotion for Summary Judgment (the "***Counter MSJ***"). (App. Vol. 2: APP377-419) On October 14, 2015, GB Sciences filed its Reply to the Response by the Division. (Resp. App. Vol. 1: RAPP26-31) On October 15, 2015, GB Sciences filed its Reply to the Opposition to the MSJ and Opposition to the Counter MSJ. (Resp. App. Vol. 1: RAPP32-56) On November 3, 2015, NuLeaf filed a Reply to GB Science's Opposition to the Counter MSJ. (App. Vol. 3: APP446-57)

3. Acres' Motion to Intervene.

On October 19, 2015, after the MSJ and Counter MSJ had been essentially fully briefed[1], Acres filed its motion to intervene (the "***Motion to Intervene***"). (App. Vol. 3: APP430-45) Thus, none of the parties addressed in their MSJ briefs how Acres' proposed involvement affected the pending motions. On November 3, 2015, NuLeaf filed its Opposition to the Motion to Intervene. (Resp. App. Vol. 1: RAPP57-62) On November 6, 2015, Acres filed its Reply to NuLeaf's Opposition. (Resp. App. Vol. 1: RAPP63-67)

[1] The only brief which had not been filed was Nuleaf's Reply in Support of its Countermotion for Summary Judgment, which was filed on November 3, 2015. However, Nuleaf raised no arguments relating to Acres in that brief, nor would it have been appropriate due to the fact that Acres was not yet a party and due to the limitations of what can be included in reply briefs.

4. The MSJ Hearing.

On November 9, 2015, a hearing was held on the MSJ, the Counter MSJ, and the Motion to Intervene. (App. Vol. 3: APP524-86 and Resp. App. Vol. 1: RAPP68-69) At the hearing, the Motion to Intervene was granted. However, the District Court took the MSJ and Counter MSJ under advisement. (App. Vol. 3: APP524-86 (APP575:19-24)) Importantly, none of the parties made any arguments to the District Court relating to Acres involvement in the case, nor Acres entitlement (if any) to a MME dispensary provisional registration certificate (a "***PRC***"). (App. Vol. 3: APP524-86)

5. Acres Complaint in Intervention and GB Sciences' Counterclaim.

On November 17, 2015, *after* the hearing on the MSJ and Counter MSJ, Acres filed a Complaint in Intervention in this case (the "***Acres Complaint***"). (App. Vol. 3: APP458-84) In the Acres Complaint, Acres asserted *for the first time* claims against GB Sciences and sought an Order from the District Court that it was in a senior position for entitlement to a PRC *vis-a-vis* GB Sciences. (App. Vol. 3: APP458-84) On December 3, 2015, GB Sciences filed its Answer and Counterclaim ("***GB Sciences' Counterclaim***"). (Resp. App. Vol. 1: RAPP70-88) In GB Sciences' Counterclaim, it sought a declaration that the Acres Order was not binding upon GB Sciences and that due to equitable and other doctrines, GB Sciences should be awarded the now available PRC. (Resp.

App. Vol. 1: RAPP70-88 (RAPP83-84)) On December 22, 2015, the Division filed its Answer to the Acres Complaint. (Resp. App. Vol. 1: RAPP99-102)

6. The District Court's MSJ Order.

On December 14, 2015, the District Court entered an Order (the "***MSJ Order***"), wherein the District Court granted the MSJ, in part, ordering the Division to revoke NuLeaf's PRC. (Resp. App. Vol. 1: RAPP89-98)

In the MSJ Order; however, the District Court awarded the PRC to Acres instead of GB Sciences. Id. In reaching this result, the District Court took judicial notice of the October 8, 2015, Order in the Acres Lawsuit, and based thereupon concluded that Acres should have been the thirteenth ranked applicant. Id. at RAPP94. Based upon this judicial notice/finding, the District Court ordered the Division to issue the now available PRC to Acres. Id. at RAPP96-97.

7. GB Science's Motion to Alter or Amend Judgment and Acres' Motion to Dismiss Counterclaim.

On December 23, 2015, GB Sciences filed a Motion to Alter or Amend Judgment; or, in the Alternative Motion for Partial Reconsideration (the "***Motion to Alter***"). (Resp. App. Vol. 1: RAPP103-79) On January 11, 2016, Acres filed its Opposition. (Resp. App. Vol. 2: RAPP243-257) On January 18, 2016, GB Sciences filed its Reply to the Opposition. (Resp. App. Vol. 2: RAPP252-84)

On December 28, 2015, Acres filed a Motion to Dismiss GB Sciences' Counterclaim (the "***Acres MTD***"). (Resp. App. Vol. 1: RAPP180-88) On January 5, 2016, GB Sciences filed its First Amended Answer to Complaint in Intervention and Counterclaim. (Resp. App. Vol. 1: RAPP189-207) On January 11, 2016, GB Sciences filed its Opposition to the Acres MTD. (Resp. App. Vol. 2: RAPP208-42) On January 19, 2016, Acres filed its Reply. (Resp. App. Vol. 2: RAPP285-95) On January 25, 2016, Acres filed a Motion to Dismiss GB Sciences' First Amended Counterclaim (the "***Second Acres MTD***"). (Resp. App. Vol. 2: RAPP296-300) On January 26, 2016, a hearing was conducted on the Motion to Alter and the Acres MTD (and Second Acres MTD). (Resp. App. Vol. 2: RAPP301-02 and RAPP303-58) The District Court denied the Motion to Alter but granted the Acres MTD (and the Second Acres MTD). Id.

8. The District Court's March 3, 2016 Orders.

On March 3, 2016, the District Court entered an Order denying the Motion to Alter. (Resp. App. Vol. 2: RAPP363-66) On the same date, the District Court entered an Order granting the Acres MTD and Second Acres MTD. (Resp. App. Vol. 2: RAPP359-62) On March 4, 2016, Acres served notices of entry of order for the two orders. (App. Vol. 3: APP517-23, Resp. App. Vol. 2: RAPP367-73)

C. DISPOSITION BELOW

The disposition below has been set forth in full in the preceding two sections, III(A) and (B).

V.

STATEMENT OF FACTS

A. GENERAL BACKGROUND.

In 2013, SB 374, which was codified into NRS Chapter 453A, was passed by the Nevada State Legislature, which provided for the registration of medical marijuana establishments ("***MMEs***").

Under NRS § 453A.320 et seq., the Division, in partnership with the local jurisdiction, plays a role in the ultimate licensing of MMEs. The Division is responsible for processing and ranking applications for MMEs, focusing on public health and public safety, while the local jurisdiction maintains the right to determine issues such as site plans, zoning, safety, and proximity to schools, public facilities, or other businesses.

In relation to NRS § 453A.322[2], Senator Tick Segerblom called a meeting of the Advisory Commission on the Administration of Justice's Subcommittee on

[2] NuLeaf takes exception to GB Sciences' reference to these Minutes, arguing that they do not compose the "legislative history" of SB 374 because the meeting took place ***after*** passage of the bill. Nonetheless, they are still instructive and persuasive as to the thought process and intent behind the legislation of the parties from both the Division and the Nevada State Senate who were instrumental in its passage.

the Medical Use of Marijuana. (App. Vol. 2: APP183-206) During that meeting, Senator Segerblom addressed the question of what happened if one of the applicants who was highly ranked by the State failed to qualify at the local level. Id. Mr. Westom made it very clear that it was the intent of the legislature that if an application was denied at the local level, the State also denied it and would let them know "who was the next ranked entity." (App. Vol. 2: APP189)

B. THE DIVISION'S APPLICATION PROCESS.

The Division issued its own application packet. (App. Vol. 2: APP256-300) While the Division was allowed to *accept* all applications submitted, under NRS § 453A.322, the Division could only issue a PRC if the applicant's application included six (6) specific items and if the applicant otherwise met the other requirements established by NRS Chapter 453A.

One of the six (6) items required by law before the Division could issue a PRC is found in NRS § 453A.322(3)(a)(5), which states:

> 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.

NRS § 453A.322 (emphasis added). Thus, before the Division could issue a PRC, the applicant must obtain either proof of licensure or a letter from the local jurisdiction ("***Local Approval***").

C. THE CITY'S APPLICATION PROCESS.

In accordance with its own responsibilities, the City of Las Vegas (the "***City***") enacted Ordinance No. 6321 and 6324 to establish zoning regulations, licensing regulations, and standards for MME locations and issued an MME business license application form. (App. Vol. 2: APP208-52) Further, the City enacted Las Vegas Municipal Code 6.95.080(D) which provided:

> Upon approval of a medical marijuana compliance permit, **the Director shall prepare a notice to the State regulating authority pursuant to NRS 453A.322.3(a)(5)**, outlining that the proposed location has been found in conformance with land use and zoning restrictions and that the applicant is eligible to be considered for a medical marijuana establishment business license....

LVMC 6.95.080(D). (App. Vol. 1: APP160-76) As evidenced by LVMC 6.95.080(D), the City specifically created a process to notify the Division as mandated by and in compliance with NRS § 453A.322(3)(a)(5).

D. NULEAF'S APPLICATION.

NuLeaf was one of the forty-nine (49) applicants for one of the twelve (12) registration certificates allotted to the City. (App. Vol. 2: APP305) While NuLeaf submitted its City application, on October 28-29, 2014, the Las Vegas City Council denied NuLeaf's special use and compliance permit, along with nine (9) other applicants. (App. Vol. 1: APP165)

As mandated by LVMC 6.95.080(D) and with the specific intention of complying with NRS § 453A.322(3)(a)(5), on or about October 30, 2014, the City

sent a letter to the Division notifying the Division that NuLeaf had failed to obtain Local Approval. (App. Vol. 1: APP307-14 (APP311) and APP316-21) Notwithstanding the City's notification, the Division inappropriately issued a PRC to NuLeaf. (App. Vol. 1: APP166)

E. GB SCIENCES' APPLICATION.

Meanwhile, unlike NuLeaf, on October 28-29, 2014, the City of Las Vegas approved GB Science's applications for special use permits and compliance permits and GB Science's was included in the City's Notice to the Division as being approved. (App. Vol. 2: APP323-27)

On or about November 3, 2014, GB Sciences was notified by the Division that it was not issued a PRC because it was not ranked in the top 12 by the Division. (App. Vol. 2: APP329-30 and APP332-7) Rather, GB Sciences was ranked No. 13 by the Division, just one position outside the twelve PRCs allocated to the City of Las Vegas. (App. Vol. 2: APP329-30)

If the Division had complied with NRS § 453A.322(3)(a) and disqualified NuLeaf due to NuLeaf's failure to obtain the letter required by NRS § 453A.322(3)(a)(5), GB Sciences would have been ranked 12th in the Division's ranking and would, therefore, have received one of the twelve allotted PRCs. (App. Vol. 2: APP329-30 and APP332-37)

F. ACRES' SEPARATE LAWSUIT.

On or about June 9, 2015, Acres filed the Acres Lawsuit. (Resp. App. Vol. 2: RAPP252-84 (RAPP264-84)) Acres had apparently received a low score on its MME Application from the Division, had been ranked as low as 35th or 36th, and was seeking a new score. (App. Vol. 2: APP332-37) (Resp. App. Vol. 2: RAPP252-84) (RAPP264-84))

However, Acres did not name GB Sciences as a defendant in the Acres Lawsuit, even though Acres sought to leapfrog over GB Sciences in rank. (App. Vol. 1: APP329-30) On or about October 8, 2015, after an essentially uncontested hearing, the District Court in the Acres Lawsuit entered an Order, granting Acres' petition for writ of mandamus and ordering the Division to re-score Acres' MME application and re-rank it number 13 among the applicants for an MME PRC allocated to the City. (Resp. App. Vol. 1: RAPP103-179 (RAPP156-59))

VI.

SUMMARY OF THE ARGUMENT

The District Court did not err in revoking NuLeaf's PRC because the District Court had the authority to interpret and apply NRS § 453A as it related to NuLeaf and correctly did so in light of the fact that NuLeaf did not comply with NRS § 453A.322(3)(a)(5) prior to the issuance of the PRC. Further, the District

Court had full authority to put the parties in the position they should have been in if the law had been followed. Finally, the "not later than" language of NRS § 453A.322 does not bar the District Court from acting.

However, the District Court erred in awarding NuLeaf's revoked PRC to Acres, and in so doing violated GB Sciences' due process rights, when the District Court improperly took judicial notice of the Acres Order and incorrectly applied res judicata effect thereto, and when it granted a non-existent, unbriefed and unargued motion for summary judgment in favor of Acres. Further, the District Court erred in dismissing GB Sciences' counterclaims against Acres, notwithstanding the fact that the counterclaims were properly pled.

VII.

LEGAL ARGUMENT - APPEAL

A. STANDARD OF REVIEW.

There are two standards of review applicable to the underlying appeal in chief.

1. De Novo Review.

Statutory interpretation is a question of law which this court will review *de novo*. City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). The District Court's interpretation of NRS Chapter 453A, and its application to the facts in this case are subject to *de novo* review.

2. Abuse of Discretion.

Although not declared by the Nevada Supreme Court, other courts hold that equitable determinations are reviewed by the appellate court under the abuse of discretion standard. *See* A. C. Aukerman Company v. R. I. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992)(*reviewing* laches and equitable estoppel); Dickson, Carlson & Campillo v. Pole, 99 Cal. Rptr. 2d 278 (Ct. App., 2nd Dist. 2000) (unclean hands). Assuming this standard applies in Nevada, the District Court's issuance of a mandatory injunction which stripped NuLeaf of its PRC and awarded it to Acres is subject to this standard of review.

B. THE DISTRICT COURT DID NOT ERR IN REVOKING NULEAF'S PRC.

1. The District Court had the Authority to interpret and Apply NRS § 453A.

Statutory interpretation is a question of law. City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). It is the District Court's responsibility to determine the law. *See* Baron v. District Court, 95 Nev. 646, 648, 600 P.2d 1192, 1193-94 (1979). Therefore, the District Court had the authority to interpret NRS Chapter 453A.

NuLeaf essentially argues that the District Court should have abdicated its responsibility to determine the law, by giving unfettered deference to the Division

with respect to all aspects of interpretation and implementation of NRS Chapter 453A. *See* Opening Brief at 19-25.

However, courts will not defer to the secretary of a division of the State of Nevada where the secretary's interpretation is unreasonable and conflicts with legislative intent. Nev. State Democratic Party v. Nev. Republication Party, 256 P.3d 1, 10 (Nev. 2011); State, Div. of Ins. v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).

Further, contrary to NuLeaf's contentions, the plain language of NRS Chapter 453A shows that the law was designed to be implemented as a balanced partnership between the Division and the local authorities.[3]

This is evident in the clear language of the provision at issue, NRS § 453A.322(3)(a)(5), as well as the remainder of NRS Chapter 453A (physical address considerations (NRS § 453A.322(3)(a)(2)); registration certificate

[3] Nuleaf claims that the local authorities tried to usurp the authority of the Division to rank the MME applicants through the local approval process and favor certain applicants over others; however, Nuleaf only makes this argument because its own application could not pass local muster. It is not borne out by the facts in the record below.

Nuleaf references a separate district court case involving unincorporated Clark County, but does not reveal that Judge Delaney denied a preliminary injunction because the applicants who did not yet have special use permits but received PRCs from the Division, nonetheless, ***had received letters from various cities as well as staff recommendations for approval from Clark County before the PRCs were issued***. (App. Vol. 2: APP399-403 (APP402)) NuLeaf did not receive such a letter in this case. Rather, NuLeaf's applications for permits had been denied under strong protest by many persons. (App. Vol. 2: APP316-20) NuLeaf's arguments also ignore the many sections of NRS Chapter 453A (cited herein) which show that the law expected MME applicants for such a highly regulated activity to be able to

provisional until license issued by local authority (NRS § 453A.326); location considered (NRS § 453A.328(5)); local inspections and record maintenance (NRS § 453A.330); revocation of PRC if failure to pay fee to local authority (NRS § 453A.340(4)); applicant must comply with local ordinances and rules of zoning and use (NRS § 453A.350(1)(b)); applicant can move locations if approved by local authorities (NRS § 453A.350(2)); applicant cannot supersede local fire safety rules (NRS § 453A.352(2))); etc.

Contrary to the suggestions of NuLeaf, the law was not intended to favor simply the applicant with the biggest sway in Carson City; but, rather, to objectively consider the impact of a proposed MME on the local community, and the District Court is entitled to make its own determination on the law, regardless of the Division's interpretation or application of it.

2. The District Court Correctly Interpreted and Applied NRS § 453A.322(3)(a)(5).

The District Court must interpret a statute in a reasonable manner, that is, "[t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results." Desert Valley Water Co. v. State, Engineer, 104 Nev. 718, 720, 766 P.2d 886, 886-87 (1988). In reviewing a statute, it "should be given [its] plain meaning and must

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pass over both hurdles: the Division's ranking system and the City's Local Approval.

be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." Mangarella v. State, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (internal quotation omitted). When the language of a statute is unambiguous, courts are not permitted to look beyond the statute itself when determining its meaning. Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995).

When "the [L]egislature has failed to address a matter or . . . addressed it with imperfect clarity, [it becomes the responsibility of this court] to discern the law." Baron, 95 Nev. at 648, 600 P.2d at 1193-94. Similarly, when a statute is susceptible to more than one reasonable but inconsistent interpretation, the statute is ambiguous, and this court will resort to statutory interpretation in order to discern the intent of the Legislature. Gallagher v. City of Las Vegas, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998).

In this case, the applicable statutory provisions were clear and the District Court properly applied them in revoking NuLeaf's PRC.

Nonetheless, NuLeaf argues in its Opening Brief that under the District Court's ruling, no entity could ever satisfy the law. *See* Opening Brief at 25-28. NuLeaf reaches this conclusion by relying upon two false premises: that the District Court concluded that an MME applicant could not obtain the PRC unless

the applicant ***(1) had already obtained a business license and (2) had already satisfied all applicable building requirements.***

However, this is not what the law states nor what the District Court concluded. Rather, the law simply states, and the District Court concluded:

> (5) If the city, town or county in which the ***proposed*** medical marijuana establishment ***will be located*** has enacted zoning restrictions, **[1]** ***proof of licensure*** with the applicable local governmental authority ***or*** **[2]** ***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 . . .

N.R.S. § 453A.322(3)(a)(5)(emphasis added). The only requirement of the law in this subsection is that ***either*** an applicant obtain the necessary business license, ***or*** that it obtain a letter from the local authority ***certifying*** two things: (1) the proposed MME is in compliance with the restrictions, and (2) the *proposed* MME satisfies all applicable building requirements. The letter need only certify those two items. In this case, the City did have a mechanism to help applicants satisfy this requirement before the 90-day deadline, that was LVMC 6.95.080(D) and the letter sent on October 30, 2014 in compliance with LVMC 6.95.080(D) and NRS §453A.322(3)(a(5). (App. Vol. 2: APP316-21)

Contrary to the arguments of NuLeaf, an applicant is not required to have ***already satisfied all applicable building requirements*** within the 90 day period before issuance of a PRC to satisfy NRS § 453A.322(3)(a)(5). This is obvious in the fact that the Subsection refers to a "proposed" MME and to the local city,

town or county where the MME "will be located." The applicant need only either obtain the business license, or receive the letter sent pursuant to LVMC 6.95.080(D). Ultimately satisfying all building requirements, like many other aspects of the MME business could come later. *See* NRS § 453A.326(3). If the MME's plans never materialized, then revocation of the PRC was always within the Division's discretion, pursuant to NAC 453A.324.

In fact, if the District Court had interpreted the statute in the manner that NuLeaf suggests, then no one could ever be issued a PRC as it would require the Division to either deny all applications or completely ignore NRS § 453A.322(3)(a)(5). Clearly this absurd result is not what was intended by the Legislature and the District Court properly accepted the City's October 30, 2014 Letter, which was drafted specifically to comply with NRS § 453A.322(3)(a)(5), as sufficient compliance. This was a reasonable interpretation and application of the statute and gives the full faith and meaning to the statute and the legislature's intent behind it.

Finally, NuLeaf's arguments regarding the regulations adopted by the Division are irrelevant as the Division lacks the authority to modify the statute, but instead must adopt regulations in compliance with the statute. Thus, to the extent any regulations conflict with any of the requirements of NRS § 453.322, those regulations are invalid.

a. NuLeaf Failed to Comply with NRS § 453A.322(3)(a)(5) prior to the issuance of the PRC.

Nevada Revised Statutes § 453A.322(3) makes it clear that the Division was authorized to issue a PRC if, and only if, the applicant ***had complied*** with NRS § 453A.322(3)(a)(5). Specifically, NRS § 453A.322(3) states in pertinent part:

> 3. ... ***not later than 90 days after receiving an application***..., 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***:
>
> * * *
>
> (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 . . .

NRS § 453A.322(3) (emphasis added). In other words, ***before*** the Division could issue a PRC, the applicant must have received and submitted the zoning approval (i.e. license or letter) (the "***Local Approval***") to the Division.

There is no uncertainty in this language. The words "***if***" "has submitted... ***all*** of the following" leave no ambiguity as to whether or not the requirements set forth in NRS § 453A.322(3)(a)(5) are discretionary or mandatory. They are mandatory. Because NuLeaf, along with fifteen (15) other applicants, were denied

the Local Approval by the City on October 30, 2014, and the City advised the Division of that fact with its October 30, 2014 letter, the plain language of the statute prohibited the Division from issuing a PRC to NuLeaf. (App. Vol. 2: APP316-21)

b. The District Court had the Authority to Undue an Action Wrongfully Done and to put the Parties in the Position They Should Have Been if had the Law Been Followed.

As stated earlier, an abuse of discretion standard of review applies to the District Court's issuance of a mandatory injunction. *See* A. C. Aukerman Company v. R. I. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992); Dickson, Carlson & Campillo v. Pole, 99 Cal. Rptr. 2d 278 (Ct. App., 2nd Dist. 2000).

The Nevada Supreme Court has specifically held that district courts have the authority to issue mandatory injunctions "to restore the status quo, to undo wrongful conditions." Leonard v. Stoebling, 102 Nev. 543, 550-51, 728 P.2d 1358 (1986); Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa, 88 Nev. 1, 492 P.2d 123 (1972). In fact, one of the stated purposes of mandatory injunctions is to "compelling the undoing of acts that had been illegally done." City of Reno v. Matley, 79 Nev. 49, 378 P.2d 256 (1963).

In this case, there can be no dispute that NRS § 453A.322(3)(a)(5) required the Division to only issue PRCs to those entities who had actually obtained the

required Local Approval at the time of issuance of the PRC. NuLeaf did not have such Local Approval and in fact had been denied, and the Division had been notified of that fact, yet the Division issued a PRC to NuLeaf, in direct violation of NRS § 453A.322(3)(a)(5). (App. Vol. 1: APP166)

Where an applicant is ineligible for a PRC, such as NuLeaf, the PRC should be revoked and granted to the "next in line". (App. Vol. 1: APP160-76) (APP189)) This was GB Sciences (ranked #13 by the Division, for one of the 12 PRCs allocated to the City of Las Vegas). (App. Vol. 2: APP329-30) Thus, the District Court correctly ordered that NuLeaf's PRC should be revoked.

Nonetheless, in its Opening Brief, NuLeaf argues that "when GB Sciences sued the Division and NuLeaf in the action it failed to assert or seek writ relief," and that NuLeaf had noted that failure to assert the remedy. *See* Opening Brief at 14, fn. 2, and at 17. However, NuLeaf never actually made that argument below, and the Nevada Supreme Court will "decline to address an issue raised for the first time on appeal." Mainor v. Nault, 120 Nev. 750, 770 n. 42, 101 P.3d 308, 321 n. 42 (2004).[4] Further, that contention is false as GB Sciences did assert a petition for writ of mandamus in its Complaint and First Amended Complaint, and NuLeaf responded to GB Sciences' writ petition when it filed its Answer.

[4] Nuleaf cites to APP00377-91 in the record, but the document referenced (Nuleaf's CounterMSJ) does not actually make that argument.

(Resp. App. Vol. 1:RAPP1-25, App. Vol. 1: APP1-29, and App. Vol. 2: APP364-76) Moreover, a mandatory injunction is an appropriate remedy, even where government entities are involved. *See also* Mirin v. Ace Cab Company, Inc., 85 Nev. 690, 462 P.2d 523 (1970) (order granting mandatory injunction against public service commission, reversed for other reasons).

Finally, NuLeaf also argues that by the Division's own stated policies, a revoked PRC cannot be reissued beyond the 90-day period for issuance of PRCs in calendar year 2014 (i.e. November 3, 2014). *See* Opening Brief at 24. However, that argument cannot help NuLeaf avoid the revocation of its PRC. Rather, it only goes to the Division's ability to reissue the PRC.

Regardless of whatever internal policies the Division may now seek to adopt to deal with failing applicants, the statute, as written does not prohibit a District Court from ordering the Division to reissue a wrongfully issued PRC to the proper recipient after the 90-day period has expired. Further, the internal policies of the Division do not overrule the equitable principles recognized in the State of Nevada whereby the District Court may "undo . . . acts that had been illegally done." *See* Matley, *supra.*[5]

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[5] *Accord* Brock v. Pierce County, 476 U.S. 253, 260, 106 S. Ct. 1834 (1986) (holding that the mere use of the word "shall" in legislation did not remove a secretary's power to act where language instructed that secretary "shall act not later than" 120 days after receiving [a] complaint. . . . [t]his Court has frequently articulated the great principle of public policy, applicable to all governments alike,

c. NuLeaf's "not later than" Argument runs Contrary to Established Legal Principles.

NuLeaf further argues that the "not later than 90 days" language in N.R.S. § 453A.322(3) prohibits the Division and the Court from rectifying their clear error after expiration of the original 90 day period. However, the "not later than" language can be rightfully understood as a spur to the Division to issue the PRCs in a timely manner, but not a prohibition on the Division from curing clear errors.

NRS 453A.322(3)'s "not later than" is clearly a command by the Nevada legislature to spur the Division to act quickly. However, this language does not deprive the Division of the authority to take necessary action to fulfill the statute's purpose beyond that time.

The two-fold purpose behind the passage of S.B. 374 (codified later as NRS 453A) could not be more clear. The first motivation: answer a Constitutional mandate to provide medical marijuana patients with access to medical marijuana. (Resp. App. Vol. 1: RAPP54) The second motivation: provide for the safe, speedy establishment of MMEs - in fact Chairman Segerblom stated the purpose of the bill was to make sure that MME's were up and running within 1 year. (Resp. App. Vol. 1: RAPP56)

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which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided . . .).

Further, NuLeaf's argument is inconsistent with a significant body of case law analyzing similar allegedly prohibitory language. In fact, on several occasions the Supreme Court of the United States has analyzed similar "deadline" language and found that the use of the words "shall" and/or "not later than", coupled with a date or time frame, did not bar a government official from exercising his or her granted authority to fulfill the purpose of the legislation. Barnhart v. Peabody Coal Co., 537 U.S. 149, 152, 123 S. Ct 748, 752, 154 L. Ed, 2d 653, 661 (2003) (finding that benefit assignments by Commissioner of Social Security Administration were valid when assigned after October 1, 1993 despite language requiring that benefits be assigned by October 1 , 1993); United States v. James Daniel Good Real Prop., 510 U.S, 43, 63-64, 114 S. Ct 492, 506, 126 l. Ed. 2d 490, 509-510 (1993) (holding that courts may not dismiss a forfeiture action for failure to comply with internal timing requirements set forth in legislation); United States v. Montalvo-Murillo, 495 U.S. 711, 717-718, 110 S. Ct 2072, 2077, 109 L. Ed. 2d 720, 730 (1990) (holding that defendant was not entitled to release despite a delay in a hearing where legislation required that hearing "shall be held immediately" upon defendant's first appearance, but hearing was not held immediately); Brock v. Pierce County, 476 U.S. 253, 265, 106 S. Ct. 1834, 1841, 90 L. Ed. 2d 248, 258-259 (1986) (holding "that the mere use of the word 'shall'" in legislation did not remove Secretary's power to act

where language instructed that Secretary "shall act" "not later than 120 days after receiving [a] complaint") (emphasis added); French v. Edwards, 80 U.S. 506, 514, 20 L, Ed. 702, 704 (1872) (reasoning that there is no presumption or rule that for every mandatory duty imposed upon a government there must exist some corollary punitive sanction for departures or omissions, even if negligent).

If the Nevada State legislature had intended the 90-day period as an absolute deadline rather than a spur, it could have clearly identified a penalty with language like "in no event shall the Division issue a registration certificate later than . . ." or "the Division shall have no authority to issue a registration certificate beyond . . ." However, no such limiting language was drafted into N.R.S. § 453A.322(3). As such, NuLeaf's argument that the "not later than" language in NRS § 453A.322(3) prohibits the District Court's ruling is unsubstantiated and should be disregarded.

VIII.

LEGAL ARGUMENT - CROSS-APPEAL

A. STANDARD OF REVIEW.

Statutory interpretation is an question of law which this court review *de novo*. City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). The District Court's interpretation of NRS Chapter 453A, and its application to

the facts in this case are subject to *de novo* review. *See also* Seino v. Employers Ins. Co. of Nevada, 121 Nev. 146, 149, 111 P.3d 1107, 1110 (2005).

As stated earlier, equitable determinations are matters committed to the sound discretion of the trial judge and the trial judge's decision is reviewed by the appellate court under the abuse of discretion standard. *See* A. C. Aukerman Company v. R. I. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992) (*reviewing* laches and equitable estoppel). However, a District Court's discretion to grant an equitable defense is not unlimited. The court must consider the material facts affecting the equities between the parties; the failure to do so is an abuse of discretion. *See* Dorman v. DWLC Corp., 42 Cal. Rptr. 2d 459 (Ct. App. 1995). A decision based on bare "equity" unsupported by established precedent and lacking evidentiary support does not disclose the proper exercise of discretion. Dickson, Carlson & Campillo v. Pole, 99 Cal. Rptr. 2d 278 (Ct. App., 2nd Dist. 2000).

Notwithstanding the foregoing, the Nevada Supreme Court will review an appeal from an order granting a motion for summary judgment *de novo*. Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); Sustainable Growth Initiative Committee v. Jumpers, LLC, 122 Nev. 53, 128 P.3d 452, 458 (2006).

In this case, the equitable determinations of the District Court were made in the context of competing motions for summary judgment. Therefore, all such determinations should be reviewed by the Nevada Supreme Court, *de novo*.

B. THE DISTRICT COURT ERRED IN AWARDING NULEAF'S REVOKED PRC TO ACRES.

1. The District Court Violated GB Science's Due Process Rights.

The Nevada Supreme Court will review *de novo* whether an error is of constitutional dimension. Jackson v. State, 291 P.3d 1274, 1277, 128 Nev. Adv. Op. 55 (Dec. 6, 2012).

Section 8, Subsection 5, of Article I of the Nevada State Constitution provides that: "No person shall be deprived of life, liberty, or property, without due process of law." Nev. Art. I, § 8. The Nevada Supreme Court has made it clear that the Nevada Constitution imposes a "mandate of due process of law that no person be deprived of personal or property rights by a judgment ***without notice and an opportunity to be heard***." Paradise Palms Community Ass'n v. Paradise Homes, 89 Nev. 27, 30, 505 P.2d 596, 598 (Nev., 1973) (emphasis added); *See also* Anastassatos v. Anastassatos, 112 Nev. 317, 319, 913 P.2d 652, 653 (Nev., 1996) (notice and an opportunity to be heard are the twin hallmarks of due process.).

The case of Nicoladze v. First Nat. Bank of Nevada, 94 Nev. 377, 580 P.2d 1391 (1978) is instructive. In Nicoladze, First National Bank of Nevada

("***FNBN***") obtained a judgment against Lawler Cattle Company. Id., at 377. *After* the Judgment had been obtained, FNBN filed a motion to add George G. Nicoladze as a party on the theory that he was the alter ego of the Lawler Cattle Company. Id. "Without conducting a hearing on the matter or making any findings, the district court granted the motion." Id. at 377-378. In reversing the district court's ruling, the Nevada Supreme Court held that "***Fundamental due process requires that a person against whom a claim is asserted in a judicial proceeding have an opportunity to be heard and present his defenses.***" Id. a 378 (emphasis added).

In this case, GB Sciences filed the MSJ as well as its Replies to the Division and NuLeaf's Oppositions, all before Acres even filed its Motion to Intervene. (App. Vol. 3: APP430-57) Nothing in the MSJ, in the Division's Opposition[6], in NuLeaf's Opposition and Counter MSJ (*see* Page 5, footnote 1, above), and in GB Sciences' Reply briefs addressed Acres and/or Acres claim that it should be put ahead of GB Sciences on the list of MME Dispensary applicants allocated to the City of Las Vegas. (App. Vol. 1: APP160-347; App. Vol. 2: APP348-63 and APP377-419; Resp. App. Vol. 1: RAPP26-56) In fact, prior to December 14, 2015, when the District Court entered the MSJ Order, there

[6] The Division did mention Acres in a footnote in its Opposition, but that is the only reference and none of its arguments were directed towards or addressed Acres. (App. Vol. 2: APP348-63) (APP351))

was simply no notice to any party that the District Court would be deciding the issue of priority between Acres and GB Sciences to receive the revoked PRC.

It was not until the day of the hearing on the MSJ and CounterMSJ (November 9, 2015) that Acres' Motion to Intervene was granted. (App. Vol. 3: APP524-86) By that time, the MSJ and the Counter MSJ had been fully briefed and none of the parties were prepared to argue anything relating to Acres. This is emphasized by the fact that Acres did not file its Complaint in Intervention until November 17, 2015, more than a week after the MSJ and CounterMSJ hearing had concluded. (App. Vol. 3: APP458-84)

To compound the problem, when the District Court entered the MSJ Order, it essentially granted summary judgment in favor of Acres and against GB Sciences on all of Acres claims against GB Sciences (filed less than one month prior) and all of GB Sciences counterclaims against Acres (filed just 11 days prior), all without any advance notice to any of the parties, without holding a hearing on the matter, and without providing GB Sciences with an opportunity to be heard.

This is the very scenario which the Nevada Supreme Court rejected in Nicoladze, 94 Nev. 377. Under the due process rights guaranteed by the Nevada Constitution, GB Sciences is guaranteed the opportunity to be heard in its defense

against the claims asserted by Acres and in favor of its claims asserted against Acres. The MSJ Order deprives GB Sciences of this right.

Because GB Sciences has not had any opportunity to be heard in its defense of Acres' priority claims against it and in favor of its counterclaims against Acres, the MSJ Order as it relates to Acres is clearly erroneous.

Notwithstanding the fact that the issue had not been properly raised, argued or addressed, on December 14, 2015, the District Court committed reversible error when it entered the MSJ Order wherein it found that "Acres should have been the thirteenth ranked applicant", wherein it ordered "that [GB Sciences'] Motion is DENIED to the extent [GB Sciences] seeks the re-issue of NuLeaf's registration to [GB Sciences]", and wherein it further ordered "that the Division register intervenor Acres and issue Acres a registration certificate." (App. Vol. 3: APP487-99 and Resp. App. Vol. 1: RAPP89-98)

2. The District Court Erred in Taking Judicial Notice of the Legal Ruling in the Acres Lawsuit that Acres Should be Ranked 13th.

Judicial Notice is governed by NRS Chapter 47. However, the Nevada Supreme Court has long observed the general rule that courts should ***not*** take judicial notice of their records in another and different case, even though the cases are connected. Occhiuto v. Occhiuto, 97 Nev. 143, 145, 625 P.2d 568, 596 (1981) (emphasis added) (*citing* Giannopulos v. Chachas, 50 Nev. 269, 257 P. 618 (1927)). However, the rule is not so inflexible in its application that under no

circumstances can judicial notice be invoked to take cognizance of the record in another case. Id.

According to NRS § 47.140, there are only eight matters of law which are subject to judicial notice. In this case, the District Court erred in giving judicial notice to the legal conclusion in the Acres Lawsuit that Acres should have been the thirteenth ranked applicant among applicants for the PRCs for MME Dispensaries, as NRS § 47.140 does not allow a Court to take judicial notice of the legal determinations in another case. (App. Vol. 3: APP487-99 and Resp. App. Vol. 1: RAPP89-98) First, in justifying its decision, the District Court incorrectly referenced the ability to give judicial notice under NRS § 47.150(1) to ***facts***, as opposed to ***law***. Id. Thus, the District Court incorrectly identified the legal conclusions from the Acres Lawsuit (i.e. that Acres should have been ranked 13th) as factual findings.

Second, as a legal conclusion, the Acres' court's decision that Acres should be ranked 13th, was not the proper object of judicial notice under NRS § 47.140, because it was not one of the eight enumerated categories of law set forth in NRS § 47.140.

Finally, assuming for argument sake that the Acres' court's determination that Acres should have been ranked 13th was a ***factual finding***, the District Court

was still not entitled to grant it judicial notice. Nevada Revised Statutes § 47.130 provides:

> 2. A judicially noticed fact ***must*** be:
>
> (a) Generally known within the territorial jurisdiction of the trial court; or
>
> (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,
>
> → so that the fact is ***not subject to reasonable dispute.***

NRS § 47.130 (emphasis added). In this case, whether or not Acres should be ranked 13th is the very essence of the priority dispute between Acres and GB Sciences.[7] Therefore, the District Court committed reversible error when it gave judicial notice to the ruling in the Acres Lawsuit that Acres was ranked 13th among applicants in the City of Las Vegas for an MME PRC.

3. The District Court Erred in Applying Res Judicata Effect to an Order in the Acres Lawsuit to Which GB Sciences was not a Party.

The doctrine of res judicata "precludes parties ... from relitigating a cause of action or an issue which has been finally determined by a court . . . ." University of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994); Executive Management, Ltd. v. Ticor Title Ins. Co., 114 Nev. 823, 963 P.2d 465, 473 (1998). The Nevada Supreme Court has recognized that "there are

two different species of res judicata . . . issue preclusion and claim preclusion." Tarkanian at 598, 879 P.2d at 1191. Although often used to describe both "species," in its strictest sense, the term "res judicata" refers only to claim preclusion. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396, 399 (1974).

For *res judicata* to apply, three pertinent elements must be present: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; and (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation. Tarkanian at 598, 879 P.2d at 1191. According to the Nevada Supreme Court, this test is applied in the issue preclusion context. *See* Executive Management, 114 Nev. 823, 963 P.2d at 474.

In this case, the District Court awarded NuLeaf's revoked PRC to Acres when it determined that Acres was ranked 13th among the applicants for one of the 12 MME Dispensary PRCs allocated to the City. However, as stated earlier, in the MSJ Order the Court took "judicial notice that pursuant to District Court order dated October 8, 2015, in the [Acres Lawsuit], Acres should have been the thirteenth ranked applicant on November 3, 2014." (Resp. App. Vol. 1:

[7] This is abundantly clear from Paragraphs 51-55 and 58-63 of GB Sciences' answer and counterclaim to Acres Complaint in Intervention. (Resp. App. Vol. 1: RAPP70-88 (RAPP83-84))

RAPP89-98 (RAPP94)) Based upon this judicial notice/finding, the District Court ordered the Division to issue the now available PRC to Acres. (Resp. App. Vol. 1: RAPP89-98 (RAPP97))

This determination, however, was not the result of an evidentiary hearing or vigorous argument (which was not even before the District Court during the MSJ hearing). Rather, it was solely as a result of giving judicial notice to the Order entered in the Acres Lawsuit that re-scored Acres' MME application from 126 to 167.3 and giving it a rank of 13th position.

However, GB Sciences was not a party to the Acres Lawsuit and as such, the Order in the Acres Lawsuit should not have precluded GB Sciences from raising any of its arguments as to why Acres should not be placed ahead of GB Sciences.

Therefore, the District Court committed reversible error when it improperly applied *res judicata* effect to the ruling in the Acres Lawsuit.

4. The District Court Erred in Awarding the PRC to Acres, *sua sponte*, as a Result of a Summary Judgment Hearing, When Acres had not Filed any Written Motion for Summary Judgment or even a Complaint in Intervention.

The Nevada Rules of Civil Procedure require a party seeking summary judgment to file a written motion. *See* N.R.C.P. 56(a) and (b). Such a written motion must "set[] forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular"

evidence that supports the party's claim. N.R.C.P. 56(c). Summary judgment motions are to be in writing and conform to N.R.C.P. 56(c)'s requirements.

The Nevada Supreme Court has only recognized two exceptions. The first exception is for oral motions that do not prejudice the nonmoving party. Exber, Inc. v. Sletten Const. Co., 92 Nev. 721, 733, 558 P.2d 517, 524 (1976).

The second exception occurs when a district court *sua sponte* grants summary judgment if it provides adequate procedural protection, including a minimum notice of 10 days to the losing party to defend its claim. Soebbing v. Carpet Barn, Inc., 109 Nev. 78, 83, 847 P.2d 731, 735 (1993). Before the district court grants summary judgment *sua sponte*, the nonmoving party must have an opportunity to present an argument and submit evidence to the court. Sierra Nev. Stagelines, Inc. v. Rossi, 111 Nev. 360, 363-64, 892 P.2d 592, 594 (1995).

The Nevada Supreme Court has very recently reiterated that "[w]e have previously held that '[a]lthough district courts have the inherent power to enter summary judgment sua sponte pursuant to [NRCP] 56, that power is contingent upon giving the losing party notice that it must defend its claim.'" Renown Regional Medical Center v. Second Jud. Dist. Ct., 335 P.3d 199, 202, 130 Nev. Adv. Op. 80 (Oct. 2, 2014) (*quoting* Soebbing v. Carpet Barn, Inc., 109 Nev. 78, 83, 847 P.2d 731, 735 (1993). The Court in Renown Regional further stated that "we have called it 'troubling' when a district court grants summary judgment sua

sponte without having taken evidence in the form of affidavits or other documents." Sierra Nev. Stagelines, Inc. v. Rossi, 111 Nev. 360, 364, 892 P.2d 592, 594–95 (1995). A district court must not elevate "promptness and efficiency" over fairness and due process by entering summary judgment before claims are properly before it for decision. Id. at 364, 892 P.2d at 595. The Nevada Supreme Court went on to state that it intended to "take this opportunity to reiterate that the defending party must be given notice and an opportunity to defend itself before a court may grant summary judgment sua sponte." *See* Soebbing, 109 Nev. at 83, 847 P.2d at 735; *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence.").

In the instant case, the District Court erred by granting summary judgment in favor of Acres when Acres had not previously filed any written motion for summary judgment. In fact, Acres had not even filed its Complaint in Intervention when the MSJ and CounterMSJ were heard and taken under advisement. (App. Vol. 3: APP458-84 and APP524-86) Unlike Exber, GB Sciences was prejudiced when it was not given an opportunity to respond to a written motion for summary judgment by Acres (because Acres never filed one).

In further violation of the legally mandated principles in Soebbing, the District Court granted summary judgment in favor of Acres, *sua sponte* without providing "adequate procedural protection" to GB Sciences, including "a minimum notice of 10 days" to GB Sciences.

5. The District Court Erred in Dismissing GB Science's Counterclaims Against Acres.

This Court reviews an order granting a motion to dismiss *de novo*. Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). The Nevada Supreme Court has repeatedly warned:

> a complaint will not be dismissed for failure to state a claim unless it appears **beyond a doubt** that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.

Simpson v. Mars, Inc., 113 Nev. 188, 190, 929 P.2d 966 (1997) (emphasis added). When considering a motion to dismiss, the district court ***must accept all factual allegations contained in the complaint as true***. Lubin v. Kunin, 117 Nev. 107, 110, 17 P.3d 422, 425 (2001)(emphasis added).

The Nevada Supreme Court has further stated:

> When considering a motion to dismiss made pursuant to NRCP 12(b)(5), a district court **must** construe the complaint **liberally** and **draw every fair inference in favor of the plaintiff**. A complaint should not be dismissed unless it appears to a certainty that the plaintiff could prove no set of facts that would entitle him or her to relief. Moreover, when a complaint can be amended to state claim for relief, leave to amend, rather than dismissal, is the preferred remedy. Leave to amend should be freely given when justice requires, and a request to amend should not be denied simply because it was made in open court rather than by formal motion.

Cohen v. Mirage Resort, Inc., 119 Nev. Adv. Rep. 1, 62 P.3d 720, 734 (February 7, 2003)(emphasis added); *See also* Hampe v. Foote, 118 Nev. 05, 47 P.3d 438 (2002).

According to N.R.C.P. 8:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) ***a short and plain statement of the claim*** showing that the pleader is entitled to relief . . . .
>
> (f) Construction of Pleadings. All pleadings shall be so ***construed as to do substantial justice.***

N.R.C.P. 8 (in pertinent part)(emphasis added).

In this case, there was really no question as to whether GB Sciences properly alleged a Counterclaim against Acres. (Resp. App. Vol. 1: RAPP189-207) However, in light of the District Court's ruling on the MSJ and Acres' improper injection into the debate between NuLeaf and GB Sciences over who should receive the PRC at issue, the District Court also granted Acres' Motion to Dismiss. (Resp. App. Vol. 2: RAPP359-62)

For the reasons set forth above, the dismissal was in error.

IX.

CONCLUSION

For the foregoing reasons, the Nevada Supreme Court should affirm the District Court's decision to revoke the MME Provisional Registration Certificate from NuLeaf, but reverse the District Court's award of the same MME

Provisional Registration Certificate to Acres and remand the matter for further proceedings to determine which applicant should be awarded the revoked provisional registration certificate.

Dated this 31st day of October, 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Wordperfect in 14 point font Times New Roman type style; or

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2. I further certify that this brief complies with the page- or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is either:

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[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[X] Does not exceed 40 pages.

3. 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 N.R.A.P. 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.

Dated this 31st day of October, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 31st day of October, 2016, I served a copy of this **RESPONDENT/CROSS-APPELLANT GB SCIENCES NEVADA, LLC'S RESPONDING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL** upon all counsel of record:

□ By personally serving it upon him/her; or

■ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

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