**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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***Supreme Court Case No. 69909***
**District Court Case No. A-14-710597-C**



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NULEAF CLV DISPENSARY, LLC, A NEVADA LIMITED LIABILITY COMPANY

*Appellant,*

v.

THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH; ACRES MEDICAL, LLC; AND GB SCIENCES, LLC, A NEVADA LIMITED LIABILITY COMPANY,

*Respondents.*

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# APPELLANT'S REPLY

Appeal from the Eighth Judicial District Court, Clark County
The Honorable Eric Johnson, Department XX
District Court Case No. A-14-710597-C

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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) that must be disclosed. These representations are made in order that Justices of this Court may evaluate possible disqualification or recusal.

Appellant, Nuleaf CLV Dispensary, LLC, is a Nevada limited liability company which is neither owned nor affiliated with any publicly traded corporation. The law firm whose partners or associates have or are expected to appear for Nuleaf CLV Dispensary, LLC are PISANELLI BICE PLLC.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

## I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The District Court's application of NRS Chapter 453A failed to accord the "great deference" due the Department of Health and Human Services (the "Division") to best reconcile competing public policy objectives as well as conflicting statutory mandates. The District Court further infringed on the Division's authority when it granted a mandatory injunction, directing the Division to revoke Nuleaf's license and instead issuing it to a party that had just filed a last-minute and untimely motion to intervene.

Respondent/Cross Appellant GB Sciences' ("GB) and Acre Medical LLC's ("Acres") double down on the untenable assertion that since Nuleaf CLV Dispensary LLC ("Nuleaf") did not have all its local land use and building approvals, it was ineligible to even apply let alone receive a provisional certificate from the Division. But of course, their argument ignores that no applicant could or possessed all such local approvals – as though that is what NRS 453A.322 somehow required – including themselves. Thus, if the Division's handling of Nuleaf's application violated NRS 453A.322, as they allege, then so too did GB and Acres who seek to be substituted in at Nuleaf's position, despite the Division's determination that they were some of the least qualified for such a privileged license.

Of course, the Division recognized this reality which is why it appropriately graded all applicants and proceeded to award provisional certificates, giving each of the successful applicants time to satisfy all local requirements, including land use and building approvals. The District Court's contrary ruling is itself contradictory: it simultaneously holds that the statute is mandatory as to the requirements for Nuleaf to have its application processed, but simultaneously discretionary as to the requirements for others. And, that is precisely why the District Court's ruling – one that substitutes the court's preferred policy choices in reconciling competing policy objectives with that of the Division – should not stand.

## II. ARGUMENT

### A. The Proper Standard of Review is De Novo.

Cognizant of the District Court's error, GB attempts to change the standard of review, on the mistaken belief that doing so will allow the District Court's erroneous decision to stand. GB's citations to other jurisdictions is unavailing. This Court has consistently determined that a district court order's summary judgment ruling is reviewed de novo. *Cable v. State ex rel. its Employers Ins. Co. of Nevada*, 122 Nev. 120, 124, 127 P.3d 528, 531 (2006). Likewise, this Court reviews a district court's interpretation of a statute is de novo. *Cable v. State ex rel. its Employers Ins. Co. of Nevada*, 122 Nev. 120, 124, 127 P.3d 528, 531 (2006).

Of course, under NRS Chapter 453A, the Division is authorized to regulate the distribution of medical marijuana. "Because [the Division] is charged with administering [NRS Chapter 453A, the Division] has the implied power to construe the statute." *United States v. State Eng'r*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001). Thus, "great deference should be given to the [administrative] agency's interpretation when it is within the language of the statute." *Pyramid Lake Paiute Tribe of Indians v. Washoe Cty.*, 112 Nev. 743, 748, 918 P.2d 697, 700 (1996) (quoting *State v. State Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). Furthermore, the Division's "decision shall be presumed correct, and the party challenging the decision has the burden of proving error." *United States v. State Eng'r*, 117 Nev. at 589, 27 P.3d at 53.

### B. The District Court Improperly Denied Deference to the Division and Substituted its Judgment.

GB's and Acres' responses fail to address the issue at the heart of the appeal. The District Court's interpretation of NRS Chapter 453A is contradictory and fails to accord proper deference to the Division. Even pretending that the District Court's interpretation was itself not contradictory, its substitution of judgment for that of the Division's was improper. *Brocas v. Mirage Hotel & Casino*, 109 Nev. 579, 582, 854 P.2d 862, 865 (1993) ("It is well recognized that this court, in reviewing an administrative agency decision, will not substitute its judgment of the

evidence for that of the administrative agency.").

The need to heed deference is heightened here, where the statute does not offer a resolution to every potential pitfall in the registration and regulatory process, including the diversion that occurred here due to the last-minute maneuvering of a local government. In the case of such local governmental delay, the Division is tasked with best resolving any regulatory contradictions so as to best achieve public policy.

In *State v. Rosenthal*, the district court declared licensing provisions of the Nevada Gaming Control Act unconstitutional for lack of standards. 93 Nev. 36, 39, 559 P.2d 830, 832 (1977). This Court reversed, reasoning that, if the standards set out by the Legislature were inadequate, where application of a privileged license was at issue, the implementing agency legitimately served to cure the defect. *Id*. On the other hand, this Court concluded that the statute was indeed adequate because the Gaming Commission's reasonable action was required in light of the public interest. And "[i]t is entirely appropriate to lodge such wide discretion in the controlling administrative agency when a privileged enterprise is the subject of the legislative scheme." *Id*.

Akin to *Rosenthal*, here, the Division governs the privileged medical marijuana industry and must be given the leeway to address legislative gaps using its broad discretion. *See* NRS 453A.370 (empowering the Division to "[a]ddress

such other matters as may assist in implementing the program of dispensation contemplated by NRS 453A.320 to 453A.370, inclusive"); NRS 453A.320 ("Any medical marijuana establishment registration certificate issued pursuant to NRS 453A.322 . . . ***is a revocable privilege*** and the holder of such a certificate or card, as applicable, does not acquire thereby any vested right.").

The legislature specifically gave the Division the authority to interpret and implement NRS Chapter 453A, and its interpretation therefore entitled to wide discretion. Rather than heading that discretion, the District Court improperly substituted its own judgment as to how best reconciled the competing terms and policies identified in NRS 453A.320.

### *1. The Division's Application Is Reasonable and Not Contrary to the Plain Language.*

Only in such circumstances where an administrative agency's interpretation is unreasonable under the circumstances or contrary to law should its interpretation and application be denied its usual deference. *State Indus. Ins. Sys. v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996) (providing that an agency's interpretation must be given deference so long as such interpretations are reasonable); *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995) (stating that an agency's implementation of a statute cannot contradict the statute). Here, the Division's issuance of provisional registration certificates without consideration of the City's 11th-hour letter was both reasonable and consistent with

the plain language of the statute.

First, the Division's interpretation cannot conflict with plain language that does not exist. The statute does not provide prescription in case a local government entity fails to provide all local approvals in time for the application deadline. *See generally* NRS 453A.322. Although the City's letter attempts to partially approve and deny certain applicants, the City's own letter confirms its inadequacy on its face. As it states, the City had not yet instituted all the requisite ordinances. *See* NRS 453A.322(3)(a)(5) (requiring a local government letter to certify compliance with local zoning restrictions and satisfy all applicable building requirements at the time of submission). In particular, the City offers:

> During proceedings, it was noted that current definitions in the land use code restrict production and cultivation facilities from being located within a structure which houses any other type of use. Therefore, you will note on the attached lists for production and cultivation that several applications were tabled by the Council until such time as the Council can deliberate on a change in our land use code to allow the co-location of such facilities. Please do not consider a "table" item as an approval or denial.

(App. Vol. II, APP00316.) Confirming that the City would approve other applicants at a later date, the City most certainly saw its approval/denial process as extending beyond the Division's issuance of provisional certificates. And the Division saw it the same way, necessarily. If the statute were interpreted the way GB and Acres misconstrue it, the "tabled applicants" also did not receive a letter of compliance, and therefore could not have received a provisional certificate, as a

simple function of the City's last-minute inconsistencies.

With regard to the City ordinances that were established at the time the applications were due to the Division, the City had not yet begun reviewing nor approving any of them. As a result, none of the applicants received city approval in time for the application submission deadline. *See* App. Vol. III, APP00534 (confirming that the Division interprets the statute as requiring licensure or a letter of compliance prior to the application deadline and that no applicant met this deadline).

And, GB's attempt at ducking this problem – suggesting that the City's deadline to submit a compliance notice by letter was not until the Division's 90-day review window closed – is absurd. GB's proposed interpretation of the statute's procedural mandate is unworkable, illogical, and inconsistent with legislative intent. If the Legislature set out to allow the local government to submit compliance letters – incomplete ones at that – at any time within the 90-day consideration period, then the City could, as it did here, always bombard the Division with compliance letter(s) the day before the 90-day deadline.

The Division would then be required to process the City's results and send out its issuance letters within one business day. Constraining the Division to a 1-day turnaround is absurd, one in which the Legislature should not be presumed to have intended. *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)

("Statutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results.").

In light of the circumstances surrounding the statute's implementation, the Division's approach in how to best achieve the statutory objectives was reasonable. Despite the City's untimeliness, the Division issued provisional registration certificates to the most qualified applicants, subject to local government approval. The Division's letters to provisional certificate recipients instructed that the provisional certificates could be revoked if local government approval was not thereafter achieved. (App. Vol. I, APP00069-70.) Thus, NRS 453A.322(3)(a)(5), requiring local government approval, did not lose its meaning, and any perceived procedural misstep was meaningless. *See Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275, 1278 (2011) (providing that "[s]ubstantial compliance may be sufficient 'to avoid harsh, unfair or absurd consequences'" and that in determining whether it is the appropriate standard to the rejection of strict compliance, courts ask whether the statute can be adequately served without technical compliance with the statutory language.)

Furthermore, GB and Acres confirmed their lack of legal substance when they cannot reconcile their position with the actual terms of NRS 453A.322(3)(a)(5). After all, that section not only references zoning/land use

approvals, but also requires the letter to state that the applicant has satisfied "***all applicable building requirements.***" NRS 453A.322(3)(a)(5) (emphasis added). As the Division itself recognized, no applicant could have satisfied these requirements at the time of its deadline to select the winners of the provisional certificates. (App. Vol. II, APP00350.) And, the City's letter – on which GB and Acres hang their case – is tellingly silent on this point. Thus, all they can argue is that the "all building requirements" aspect of this section is somehow not mandatory for consideration of ***their applications*** but the land use approval aspect – contained in the exact same sentence – was magically mandatory for consideration of ***Nuleaf's application***. (GB's Ans. at 15-16; Acre's Ans. at 16-17.)

Respectfully, the District Court's embrace of this contradictory and nonsensical interpretation is just the type of improper judicial intervention in the administrative decision process that the law forbids. The Division correctly resolved these competing regulatory requirements and implemented the statute in a reasonable approach so as to achieve legislative objective of safe and efficient provision of medical marijuana.

The legal gymnastics undertaken by GB and Acres in attempting to defend the District Court's interference in the Division's reasonable approach speaks volumes. They must resort to claiming that the statute is simultaneously permissive – as applied to their obligations – but simultaneously a mandatory

prerequisite when it comes to Nuleaf's application. The law is not so absurd.

### *2. The Division's Application of the Statute Is Most Consistent with Public Policy Concerns.*

Where there is an absence of clear statutory intent, policy concerns should fill the void. *Rivero v. Rivero*, 125 Nev. 410, 426, 216 P.3d 213, 225 (2009). "The purpose for registering medical marijuana establishments . . . is to protect the public health and safety and the general welfare of the people of this State." NRS 453A.320. Based on this statutory mandate, the Division worked with experts to create an objective scoring and ranking system "focused on public health and public safety as it relates to the use of marijuana for medical purposes . . . ." (App. Vol. II, APP00411-12.) Nuleaf was ranked third overall of the City of Las Vegas' applicants. (*Id*. at APP00332.) Thus, the Division considered Nuleaf a top applicant in meeting the public health and safety goals of NRS Chapter 453A.

If the City is allowed to pigeonhole the Division into determining which applicants meet the statute's public policy goals, the purpose of the statute will be lost. Quite distinct from Nuleaf's high safety and health ranking, the Division ranked GB 13th in meeting its stated public policy goals. (*Id*. at APP00329-30.) GB would have the third ranked applicant replaced by the applicant ranked 13th. And in so doing, the District Court will unnecessarily subject the public to lower safety standards based on local government ordinances, rather than give deference

to the safety qualifications enunciated by the agency tasked with evaluating safety standards.

It is clear that the Legislature vested the Division with primary authority to lead the registration process, and for local government ordinances to supplement the process. "A person who wishes to operate a medical marijuana establishment must submit to ***the Division*** an application on a form prescribed by ***the Division***." NRS 453A.322(2) (Emphasis added). If the Legislature intended local governments to lead, it would have said so explicitly; It said the opposite.

Because the Division implemented a reasonable interpretation of NRS Chapter 453A that does not contradict the law and enforces public policy concerns, the Division's deference should be enforced. A strict interpretation of the statute leaves all applicants without a certificate of registration, requiring that the process begin anew. This result would be absurd in light of the financial and time commitments the law imposes for an applicant.

### C. The Procedural Posture of this Case Does Not Warrant the District Court's Extreme Remedy.

The ease in which the District Court was willing to substitute its policy choices for that of the Division is confirmed by its unprecedented remedy: entering a "mandatory injunction that ordered the Division to cancel Nuleaf's provisional certificate and award that certificate to a last-minute intervenor despite the fact that the statutory window for Division to award provisional certificates had long since

closed."[1] Although, as Acres argue, a district court has the authority to direct an agency to correct its actions, the district court acted outside its discretion by awarding a mandatory injunction. And, contrary to the assertions of GB and Acres, the District Court did not grant any writ relief to either of them. It simply entertained a motion for summary judgment on declaratory relief and then tacked on to that a mandatory injunction. (App. Vol. III, APP00495-6.) *See* NRS 34.160 (providing for writ relief to compel a government official to perform an act that the law requires).

Again, the District Court subverted the proper legal process by ordering this extraordinary relief. Nor did GB present any other claim for relief which would entitle the District Court to order the Division to revoke Nuleaf's certificate and compel the Division to issue a new certificate outside of the statutorily-created 90-day window that the legislature imposed. Respectfully, the District Court simply abandoned its judicial role and took over the Division's responsibility for a how-to-best regulate and control the distribution of a controlled substance.

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[1] Tellingly, in its cross-appeal, GB takes the District Court to task over its improper summary handling of Acres' last-minute intervention and disposal of the claims between Acres and GB. While Nuleaf is not a party to that dispute, it must note that the District Court's summary handling of that matter further evidences the ease by which it substituted its judgment for the commonly-accepted rules of law and evidence just as it did in summarily disregarding the appropriate deference due to the Division.

## III. CONCLUSION

The District Court failed to afford the Division the "great deference" owed, as specifically provided in NRS Chapter 453A and supported in caselaw. The Division's interpretation was not unreasonable or contrary to law, and thus the District Court's denial of deference was unfounded. To the contrary, it is the District Court's interpretation that is contradictory on its face. Additionally, the District Court erred in ordering the Division to revoke Nuleaf's provisional certificate, as the procedural posture in this case demonstrates such a remedy was unavailable. As the record readily confirms, the District Court had no basis for substituting its judgment for that of the Division and its judgment should be reversed. Nuleaf is the party entitled to judgment in its favor.

DATED this 3rd day of January 2017.

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## CERTIFICATE OF COMPLIANCE

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 Office Word 2007 in size 14 font in Times New Roman.

I further certify that I have read this brief and it 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 approximately 2,935 words.

Finally, I hereby certify that 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 that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 3rd day of January 2017.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of PISANELLI BICE PLLC, and that on this 3rd day of January 2017, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing **APPELLANT'S REPLY** properly addressed to the following:

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