IN THE SUPREME COURT OF THE STATE OF NEVADA

NULEAF 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; Respondent ACRES MEDICAL, LLC, Respondent/ Cross Respondent AND GB SCIENCES, LLC, Respondent/ Cross Appellant	Case No.: 69909 Dist. Ct Case No.: A-14-710597-C

ANSWERING BRIEF OF CROSS RESPONDENT ACRES MEDICAL, LLC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, Respondent/Cross 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 21st day of December 2016.

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Respondent/Cross Respondent Acres Medical, LLC, ("Acres") submits its Answer Brief to the Opening Brief of Cross Appellant GB Sciences, LLC.

INTRODUCTION

This cross appeal arises from the disappointment experienced by the Cross-Appellant, GB Sciences, LLC, ("GB Sciences") when the corrections of errors committed in processing and ranking applications for medical marijuana licenses by Respondent State of Nevada Department of Health and Human Services, Division of Public and Behavioral Health (the "Division") did not result in its receipt of a provisional certificate for licensing. As noted in Acres's Answering Brief to the Opening Brief filed by Appellant Nuleaf Dispensary, LLC ("Nuleaf"), Acres had not received one of twelve available provisional registration certificates for the City of Las Vegas ("City"), even though Acres's application had been entitled to a score that would have placed it within the top 12 applicants for such provisional certifications had the agency not committed the errors.

Appellant Nuleaf's appeal challenges the District Court's conclusion that the state agency's inclusion of ineligible applications in the ranking process required that the ineligible applicants be removed from the ranking, resulting in a movement up in rank of eligible applicants. Cross Appellant GB Sciences, LLP ("GB Sciences") argued below, and argues in this Court, that the next eligible applicant in rank should be awarded the provisional registration certificate that had been

awarded to Nuleaf. The District Court granted the relief requested by GB Sciences, and ordered that the state agency award the certificate to the entity that had received the next highest ranking. However, that entity was Acres, not GB Sciences.

GB Sciences's mistaken belief that it was the next highest ranked entity was the result of the other error committed by the state agency – the omission of a portion of Acres's score in the final tally. This error had been corrected in the final order entered in separate litigation brought by Acres. That order directed the agency to include the omitted portion from Acres's score, as a result of which, Acres' became the 13th ranked applicant, having achieved a higher score than GB Sciences. Significantly, GB Sciences was aware of Acres's litigation, which named all publicly disclosed applicants whose rank would be displaced by the mandamus relief requested by Acres, and pleaded the existence of Roe Entities whose names were unknown. Despite this knowledge, GB Sciences, whose score had not been publicly disclosed, did not seek to intervene in Acres's writ proceedings. Nor did GB Sciences object to Acres's intervention in this action.

Evidence presented to the Court established that Acres, not BG Sciences, was the next highest ranked applicant once the ineligible applications were deleted from the ranks. GB Sciences failed to plead any cause of action against Acres that

would, or could, alter the rank awarded by the state agency. Accordingly, the District Court properly ordered the state agency to award the certificate to Acres.

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, it may be assigned to the Nevada Court of Appeals.

STATEMENT OF THE ISSUES

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

II. THE DISTRICT COURT PROPERLY DISMISSED GB SCIENCES'S COUNTERCLAIMS.

STATEMENT OF THE FACTS

In its Answer Brief to Appellant Nuleaf's Opening Brief, Acres described the facts relevant to that appeal. Such facts are repeated herein only to the extent necessary for understanding the factual events relevant to GB Science's cross appeal.

Nevada's Licensure Process for Medical Marijuana Related Businesses Requires Ranking of Applicants.

Under NRS Chapter 452A.320-370, the legislature mandated that applicants for licenses include specific information in their applications. NRS 453A.322.

Where the requisite information has been provided, the Division then has the responsibility of assessing the information provided and evaluating it against specific criteria. Because the number of medical marijuana dispensaries that may be located in specific areas is limited (*see* NRS 453A.324(1)(a)), the Division is required to rank applicants in accordance with specific criteria.

The Ranking of Relevant Applicants.

Acres and GB Sciences were each among those who applied to the Division for registration for a facility in the City of Las Vegas. **III APP 465 ¶ 50.** The ranking as originally released by the Division placed GB Sciences as 13th, with a total score of 166.86**, II APP 330,** and Acres as 26th, with a total score of 126. **III APP 426-428**. However, the total score reported for Acres had omitted one portion of the scoring criteria, resulting than a report of a lower rank than Acres had actually earned. **III APP 443, ¶¶ 5-9.**

<u>Acres Obtains Mandamus Relief Against the Division</u>

Acres learned of its scores and the scoring error in January 2015.After nonjudicial efforts to obtain a correction failed, Acres filed an action for declaratory, injunctive, or mandamus relief in Acres Medical, LLC v. [the Division], Eighth Judicial District Court, Case No. A-15—719637-W ("Acres Case"), which case was assigned to Department VI where the Honorable Elyssa Cadish presides**. II R. APP 222-232.** Acres's pleading sought alternative relief,

including declaratory relief, judicial review, and mandamus review. Because of the requirements for seeking declaratory relief and judicial review, Acres named, as real parties in interest**,** all of the applicants whose ranking might have been impacted by the grant of relief to Acres. ***Id*****. at 222-226, ¶¶ 17-25.** Acres specifically named whose identities whose ranks had been publicly released by the Division, but not all applicants who had originally been ranked above Acres were identified by the Division. **III APP 433, ¶ 6.** The unidentified applicants were included as Roe entities. **II R. APP 226 ¶ 25.** GB Sciences was one of the unidentified applicants. **III APP 433, ¶ 6.** GB Science was, however, aware of the Acres Case. ***Id.***

Following a hearing on September 29, 2015, Judge Cadish determined that Acres had applied to the Division for an Application for a medical marijuana dispensary licenses for the City of Las Vegas, along with several other applications for various medical marijuana facilities. The Division was required to rank applications based upon certain criteria, among which was "Organizational Structure." Acres had submitted the same information on every application for that criterion. When Acres received its scores for the applications from the Division in January 2015, it discovered that the score of the City of Las Vegas Application for Organizational Structure was 0, even though the score Acres had received for other applications for that criterion, based on the exact same information, had been 41.3.

When the 41.3 points that had been inadvertently omitted from Acres total score for the City of Las Vegas application were added, Acres earned a total score of 167.3, placing it as the 13th ranked candidate for licenses in the City of Las Vegas. **III APP 442-443.** Counsel for GB Sciences was present at that September 29th hearing. **III APP 433, ¶ 6.** Judge Cadish granted a Writ of Mandamus directing the Division to correct Acres's score and to place it in its proper rank. **III APP 442-443.** GB Sciences never sought to intervene in the the Acres Case. There was no appeal of the decision in the Acres Case.

Proceedings in the Present Litigation

While Acres was litigating the scoring error which was ultimately corrected in Department VI, GB Sciences, inaccurately believing that it had achieved the next highest score for the City of Las Vegas licenses, was challenging the rankings granted to ineligible applicants, including Nuleaf and another defendant, Desert Aire Wellness, LLC ("Desert Aire"). **I APP 1.** GB Science's First Amended Complaint and in Addition, or in the Alternative, First Amended Petition for Judicial Review and Writ of Mandamus, as relevant here, named the Division, Nuleaf, and Desert Aire as defendants. ***Id.*** GB Science later stipulated to the dismissal without prejudice of Desert Aire. **I APP 158-159.**

In the fall of 2015, GB Sciences filed a motion for summary judgment. **I APP 160.** Nuleaf opposed and countermoved for summary judgment. **II APP 377.**

On October 19, 2015, Acres sought leave to intervene in this action. **I APP 430-445.** Acres attached Judge Cadish's Order as an exhibit to its Motion to Intervene. ***Id.***[1]

GB Science did not oppose Acres's Motion to Intervene. **III APP 527:13-14; 530:8.** Nuleaf, however, objected on the basis that the introduction of a new party could delay the proceedings, which had progressed to the summary judgment stage, and that Acres had waited too long to seek intervention, since it had waited until the Mandamus Order had concluded before intervening. **III APP. 530:19-531:6, 532:21-533:10**. Acres replied that until the issuance of the Writ of Mandamus, it would not have been able to show standing to challenge the Nuleaf application, and it had sought intervention within a week of the issuance of the Writ. **III APP 5:23-7:23.** The District Court inquired as to whether there would be a delay, or whether Acres would rely on the briefing performed by GB Science;

[1] Acres's Complaint in Intervention for Declarative and Injunctive Relief, and/or Petition for Writ of Mandamus or Prohibition, formally filed on November 17, 2015, asserted claims for declaratory and injunctive relief directed at the Division and the City of Las Vegas. **III APP 458.** Acres requested declarations regarding: (1) the impropriety of Division's consideration of Nuleaf's application and the issuance of a provisional or actual certificates to Nuleaf; (2) the failure to issue Acres a provisional certificate; (3) the Division's obligation to issue Acres the provisional certificate based on Acres's score and ranking; and (4) the City of Las Vegas's inability to reconsidering its denial of Nuleaf's zoning application. **III APP 471-473, ¶¶ 93-103.** Acres also requested injunctive relief in the form of the prohibition of issuance of certificates to Nuleaf, an order to the Division to identify Acres as the next highest ranked after the deletion from the ranks of Nuleaf, and to issue a provisional certificate to Acres. **III APP 474-475 ¶ 113.**

Acres asserted it did not require time for its own briefing, and thus, no delay in the proceedings would result. **III App 533 11-22.** On November 9, 2015, the District Court orally granted the Motion. **III APP 533:23-534:2,** ***see also*** **III APP 484-486.**

As noted, the proceedings were at the summary judgment stage, GB Sciences having 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 had opposed and counter moved for summary judgment. **II APP 377-419.** The hearing of the motion and counter motion was held on November 9, 2015. **III APP 524-586.** At that hearing, counsel for the Division stated that the status quo at that time [prior to the deletion of the Nuleaf application] was that Acres, not GB Sciences, was ranked 13th among the applicants. **III APP 534:8-11.**

The District Court's Summary Judgment Ruling

On December 14, 2015, the District Court entered an order partially granting GB Science's Motion for Summary Judgment, to the extent it requested that the Division rescind the issuance of a certificate to Nuleaf. **III APP 487-499.**

Having found that the District Court order issued by Judge Cadish had determined that Acres was the next ranking applicant, the Court ordered the

Division to issue the certificate to Acres. ***Id.*** GB Sciences filed a Motion to Reconsider or Alter or Amend Judgment on December 23, 2015, directed at the District Court's order that the Division award the certificate to Acres. **I R. APP. 103.** Acres opposed this motion. **II R. APP 208**.

The hearing on the reconsideration motion was held on January 26, 2016. At that hearing, the District Court explained its decision to direct that the certificate be awarded to Acres:

> THE COURT: Okay. I -- let me just tell you sort of where I'm looking at, and I looked at this in the context that I made -- the key finding of mine was that Nuleaf shouldn't have received the certificate in view of it having not obtained the letter required by statute from the City of Las Vegas, and, at that point, I looked to see who was No. 13 -- my feeling was to look to see who was No. 13 on the list who should have got it, and my understanding was pursuant to -- it wasn't that I was adopting and applying Judge Cadish's order. It was that, pursuant to her order -- and, Ms. Anderson, I assume, pursuant to her order – I don't think it was appealed -- you adjusted -- Nevada Department of Health and Human Services adjusted everything and Acres was No. 13. Right?
>
> **MS. ANDERSON:** Correct, Your Honor.[2]
>
> **THE COURT:** Okay. So I had contemplated, when I was doing it, just saying Nuleaf shouldn't get and whoever was No. 13 should -- should get, but I knew who was No. 13 because I had seen Judge Cadish's order. So I thought, Well, I'm just going to cut through the -- cut through the water here and -- and -- and deal with it.
> So that's sort of where I'm coming -- I don't I'll be honest, I don't see that as having any real impact upon your due process rights, but I'll give you a chance to -- to discuss that.

[2] Ms. Anderson was counsel for the Division. II R. APP. 306:2021.

II R. APP. 308:10-309:11. As can be seen, the Division again acknowledged that Acres was the next highest applicant. Additionally, at the hearing, counsel for GB Sciences acknowledged that he had become aware of the Acres suit upon his own entry in this matter as counsel for GB Sciences, prior to Acres's intervention in this matter, but he chose not to intervene in that litigation. ***Id.*** **at 310:8- 3:11:7; 318:8-320:20.** Indeed, counsel for GB Sciences was present at the hearing in the Acres matter where Judge Cadish ruled that the writ of Mandamus would issue, but he failed to speak up at that time. ***Id.*** **at 323:2-17.** The District Court noted that Acres had not needed to intervene in the present litigation, because the Court's order would have been that the certificate must be awarded to the next highest-ranking applicant, which, as the Division confirmed, was Acres. ***Id.*** **at 315:9-16,333:8-20.** The Division again confirmed that, in that instance, the certificate would be awarded to Acres. ***Id.*** **at 329:10-20.**

Proceedings Specific to GB Science's Challenges to Acres's Rank

GB Science filed its Answer and Counterclaim to Acres's complaint on December 3, 2016. GB Science did not challenge the authenticity of the Mandamus Order that had been attached to Acres's Complaint, but instead, it pleaded that "the Order speaks for itself." **I R. APP. 73 ¶ 17.** The first 50 allegations of the Counterclaim were essentially a slightly differently organized reiteration of the allegations contained in GB Science's Amended Complaint

against Division, Nuleaf, and Desert Aire Wellness, LLC. **I R. APP. 77-82.** The factual allegations that actually involved Acres consisted of the following:

> 51. On or about June 9, 2015, Counterdefendant Acres filed an action against the Division with the Eighth Judicial District Court, being Case No. A-15-719637-W, to have its MME Application with the Division re-scored based upon a purported math error (the "*Acres Case*").
>
> 52. Counterdefendant did not include Counterclaimant as a party to the Acres Case.
>
> 53. On or about October 8, 2015, the Court in the Acres Case granted Counterdefendant's Petition for Writ of Mandamus, compelling the Division to re-score Counterdefendant' s application for a Provisional Certificate by adding 41.3 to the score, thus raising the score to 167.3 and making Counterdefendant's application rank number 13 for the 12 Registration Certificates allotted to the City of Las Vegas (the "*Order*").
>
> 54. On or about November 9, 2015, the Court granted Counterdefendant's motion to intervene in this case.
>
> 55. On or about November 13, 2015, the Court entered a minute order in this case revoking Nuleaf's Provisional Certificate, but granting it to Counterdefendant, applying the re-coring set forth in the Order and moving Counterdefendant to #12 in rank with the removal of Nuleaf, even though Counterclaimant was never a party to the Acres Case or able to litigate the re-scoring.
>
> 56. On or about November 17, 2015, Acres Medical filed its Complaint in Intervention, seeking to impose the effect of the Order upon Counterclaimant and jump ahead of Counterclaimant in line for the 12 Registration Certificates allotted to the City of Las Vegas.

Id. at ¶¶ 51-56. Based on the above factual allegations, GB Sciences then purported to state a cause of action for declaratory relief, and a cause of action for injunctive relief.

For the declaratory relief claim, GB Sciences alleged a series of conclusory statements regarding the validity and/or effect of the Mandamus Order on *it*. GB Sciences then recited that the elements necessary for a declaratory judgment were present. The injunctive relief claims was actually asserted against the Division and the City of Las Vegas (neither of whom were counterdefendants). No injunctive relief was requested against Acres.

Acres moved to dismiss the counterclaim. **I R. APP. 180.** GB Science opposed that motion. On January 5, 2016, GB Sciences filed an Amended Answer and Counterclaim; however, it had not sought leave to file this amended pleading. **I R. APP. 189.** In the Amended Counterclaim, GB Sciences added a claim for equitable estoppel against Acres, alleging that Acres had delayed its intervention into this litigation in order to avoid the costs of litigation that GB Sciences had incurred. **I R. APP. 205, ¶¶ 76-82.** Acres supplemented its briefing on the Motion to Dismiss to include the the Amended Answer and Counterclaim as well. **II R. APP. 296.** Following a hearing on January 26, 2016, the District Court granted the Motion to Dismiss the Counterclaims. **III APP 517.**

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). Nevada Courts review an order dismissing claims under NRCP 12(b)(5) *de novo*. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

SUMMARY OF THE ARGUMENT

The judgment should be affirmed. GB Sciences concedes that the District Court properly determined that the Division should issue the certificate to the next highest ranked applicant. The score that Acres received placed it as the next highest applicant, and GB Sciences has failed to present any basis for challenging the validity of that score. GB Sciences's due process rights were not infringed, given that the ranks are based upon unchallenged scores, GB Sciences was aware of Acres's separate litigation, yet failed to intervene, and GB Science failed to object to Acres's intervention in this litigation. Nor did GB Science allege any viable claims against Acres that would warrant the relief sought by GB Sciences.

LEGAL ARGUMENT

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

GB Sciences has failed to establish that the District Court erred or abused its discretion in directing the Division to issue a provisional certificate to Acres. GB Sciences has failed to establish any denial of due process, as GB Sciences was aware of Acres's own litigation, it did not protest Acres's intervention into these proceedings, and it failed to allege any facts to suggest that the Acres's ranking was inaccurate. Because GB Sciences failed even to allege any factual dispute as to the respective scores of Acres and GB Sciences, and thus failed to allege facts that would support a conclusion that Acres was not ranked higher than GB Sciences, no denial of due process has occurred. Nor has GB Science shown that the District Court's consideration of the Mandamus Order was improper. Accordingly, the judgment should be affirmed.

A. GB Science's Due Process Rights Were Not Violated.

GB Science's contention that its due process rights were violated because the District Court did not direct the Division to award a provisional certificate to it is without merit. The District Court properly denied GB Science's Motion for Summary Judgment to the extent such motion sought an award of the certificate to GB Sciences, because the evidence presented to the District Court did *not* establish

that GB Science was the next highest ranking applicant once Nuleaf's application was deleted. To the contrary, the Division acknowledged at the November 9, 2015 hearing that Acres, not GB Sciences, was the next highest ranked applicant. **III APP 534:8-11.** Moreover, even in the proceedings that occurred subsequent to the District Court's ruling on the summary judgment motion, GB Sciences alleged no facts that, if presumed true, would establish that GB Sciences's application received a higher score than did Acres's application. **III APP 534:8-11.** Thus, the "property right" that GB Sciences claims was unjustly taken was a ranking it never actually possessed. GB Sciences has the rank its score earned; it has not been dispossessed of any property.

GB Science's reliance on *Nicoladze v. First National Bank of Nevada*, 94 Nev. 377, 580 P.2d 1391 (1978) is inapposite. In that case, a person who had never been named in the litigation was held liable for a judgment. Here, the summary judgment granted by the District Court required the Division to correct its errors. The order did not impose any liability on GB Sciences. Instead, GB Science simply did not receive the entirety of the relief it had requested.

However, in order for GB Sciences to receive the provisional certificate, it would have been necessary for it to establish that it was the next highest ranked applicant. In light of the Division's acknowledgement that Acres was the next highest ranked applicant, GB Sciences could not, and did not, meet that burden.

Furthermore, GB Sciences's claims that it had no opportunity to challenge Acres's ranking is belied by the record. Acres's Motion to Intervene specifically addressed the prospect of a claim of prejudice by GB Sciences, asserting:

> [E]ven if GB Sciences opposed the Motion [to Intervene], it could not claim prejudice. The only prejudice GB Sciences could claim is that Acres is ranked ahead of GB Sciences and, therefore, will receive the Provisional License GB Sciences seeks. But that is hardly a reason to preclude Acres from intervening in this action. Indeed, ***Acres has always been ranked 13th and therefore ahead of GB Sciences.***

III APP 437 (emphasis added). Acres added:

> *Acres's claim to the Provisional License that is the subject of this action is superior to GB Sciences's.* To preclude Acres from intervening in this action to protect its rights would result in irreparable prejudice because Acres is next in line to obtain a Provisional License. . . . Acres is ranked 13th and, therefore next in line for a Provisional License should one become available. The crux of GB Sciences's argument is that it is ranked 13th and next in line. *Therefore, the subject matter of this action is Acres's potential Provisional License, not GB Sciences's.*

***Id.* at 438 (emphasis added)**. GB Sciences thus had an opportunity to argue that Acres's intervention was untimely and inappropriate because Acres was not entitled to the vacant certificate, but GB Sciences chose not to oppose the intervention.

Furthermore, the District Court's summary judgment order was not a final order in this litigation. Accordingly, it was subject to modification upon subsequent proceedings. NRCP 56(d). Before the litigation below was concluded,

GB Sciences had an opportunity to litigate claims against Acres through its counterclaims. A discussed in Part II below, GB Sciences was unable to assert any viable claims that would challenge Acres's superior score. Accordingly, there was no basis for the District Court to modify the summary judgment ruling. These proceedings established that GB Sciences had both notice and an opportunity to raises its defenses with respect to Acres's rank, and an attendant entitlement to the provisional certificate.

As GB Sciences has failed to establish any violation of due process, the judgment should be affirmed.

B. The District Court Properly Considered the Mandamus Order.

GB Sciences contends that the District Court should not have considered the effect of the Mandamus Order, because judicial notice should not be taken of decisions in other cases, and because the contents of the Order constituted law, rather than fact. Both contentions are without merit.

First, while the District Court asserted that it was taking judicial notice of the Mandamus Order, it was not necessary that it do so in order to deny GB Sciences's Motion with respect to its own entitlement to the provisional license. "Judicial notice" involves a court accepting a fact as true without the requirement of proof. *Lemel v. Smith*, 64 Nev. 545, 566, 187 P.2d 169, 179 (1947) ("Judicial notice takes the place of proof, and is of equal force."). Here, however, evidence

of Acres's status as the next highest ranked applicant was in the record before the Court. Specifically, the Division conceded during the November 9, 2015 hearing that Acres was the next highest ranked applicant. **III APP 534:8-11.**

Furthermore, there was no need for the District Court to judicially notice the existence of the Mandamus Order. That Order was itself properly included within the evidentiary record, because it had been authenticated through the affidavit of Acres's counsel in the Motion to Intervene. **III APP 430-445; *see also*, NRS 52:025** (providing that testimony of a witness with knowledge is sufficient to establish authenticity of document). Furthermore, the Order was also included as an exhibit with Acres's Complaint. **III APP 480-484**. GB Science did not challenge the authenticity of the Order in its Answer; to the contrary, it asserted that "the Order speaks for itself." **I R. App. 73, ¶ 17.** In ruling on a motion for summary judgment, the District Court is entitled to consider pleadings and affidavits on file. **NRCP 56(c).** Accordingly, GB Science's arguments regarding the propriety of the taking of judicial notice of the Order are moot, as judicial notice of of the Order was unnecessary.

However, even if it had been necessary for the District Court to take judicial notice of the Mandamus Order, there would have been no error. It is entirely proper for a Court to take judicial notice of its records in other cases where a valid reason to do so exists. *Mack v. Estate of Mack*, 125 Nev. 80, 92, 206 P.3d 98, 106

(2009). In *Mack*, the Court held that it was proper to consider the outcome of a murder trial, in a civil case involving the convicted murderer entitlement to benefits from the victim's estate. The Court noted the close relationship between the two cases justified an exception from the general common law rule that judicial notice would not be taken of court records. Because the outcome of the murder trial had a direct bearing on the issue to be resolved in the appeal, judicial notice of the murder conviction was warranted. Similarly, in the case cited by GB Sciences, *Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568 (1981), the judicial order in question was deemed properly noticed, because the order from the prior case had direct bearing on the viability of the second case.

Here, the Mandamus Order had a direct bearing on the issue of who was the highest ranked applicant once Nuleaf's application was removed. Thus, the two cases were connected in a manner sufficient to warrant an exception to the common law rule.

Relying on NRS 47.140, GB Sciences also contends that the Mandamus Order constituted law, but it is not a law that may be judicially noticed.GB Sciences further contends that the District Court erroneously cited NRS 47.150, which governs judicial notice of facts. However, GB Sciences mistakenly identifies factual findings in the Mandamus Order as legal conclusions. The conclusion of the Acres Court that Acres should have been the 13th ranked

applicant was a *factual* conclusion reached on the basis of evidence that 1) a portion of Acres's score had been omitted from its total score; and 2) the total score Acres would have received had the omitted portion been included was 167.3. The *legal* conclusion arising from that factual determination was that the Division should be directed to correct the score and rankings, and that is what the District Court ordered.

Significantly, GB Sciences offers no explanation for its assertion that the Mandamus Order constituted only legal conclusions, and cites no authority to support in support of its theory. However, there is authority for relying on NRS 47.150 when determining whether a court decision may be noticed. Specifically, in *Mack*, *supra*, the Nevada Supreme Court expressly noted the applicability of NRS 47.150 to allow it to consider court rulings in the Mack murder trial. The Court also indicated that the court records showing that Mack had been adjudged a murdered satisfied the requirement for sources whose accuracy cannot be questioned under NRS 47.130. *Mack*, 125 Nev. at 91, 206 P.3d at 106. Similarly, in *Occhiuto*, 97 Nev. at 146, 625 P.2d at 570, the Court cited NRS 47.150 as governing. Thus, the very authority on which GB Sciences relies refutes its claim.

C. The District Court Did Not Apply Res Judicata Against GB Sciences.

Finally, GB Sciences contends that District Court applied res judicata, or issue or claim preclusion to bar GB Sciences's request for a provisional certificate. However, the District Court did not rely on issue or claim preclusion in denying any relief to GB Sciences or in dismissing the counterclaims, nor did Acres rely on such doctrines in seeking dismissal of GB Sciences's counterclaims. Accordingly, GB Sciences's claims regarding the requirements for the application of these doctrines have no bearing on this matter.

As GB Sciences has failed to show any error in the entry of the summary judgment order which granted relief to Acres, the judgment should be affirmed.

II. THE DISTRICT COURT PROPERLY DISMISSED GB SCIENCES'S COUNTERCLAIMS.

The District Court properly dismissed GB Science's counterclaims, as the facts, as alleged, did not support the grant of the requested relief. A motion to dismiss is properly granted when it appears that the plaintiff could prove no set of facts that, even if accepted by the trier of fact as true, would entitled him to relief. *Buzz Stew*, *LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Here, GB Sciences itself alleged that Acres received a score of 167.8. **I R. APP. 201, ¶ 53**. GB Sciences also alleged that it had received a score of only 166.86. **I R. APP. 201, ¶ 45**. GB Sciences did not allege any facts that would

support a conclusion that GB Sciences had earned a score higher than Acres's score. Yet, the relief sought by GB Sciences was for the Division to skip over Acres and award the provisional certificate to GB Sciences, a lower scoring applicant. The allegations did not support a claim that would provide this relief, and accordingly, the counterclaim was properly dismissed.

A. GB Sciences Failed to State a Viable Claim Against Acres for Declaratory Relief.

The District Court properly dismissed GB Science's claim for declaratory relief, as the facts alleged, even if presumed true, would not support a grant of relief against Acres. The relief requested in GB Science's counterclaim would have placed restrictions on the conduct by the Division and the City. However, as the District Court noted, GB Sciences could not obtain relief against the Division and the City by asserting claims against Acres.

The Nevada Supreme Court has held that declaratory relief is only available when the following conditions are all met: "(1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination." *Knittle v. Progressive Cas. Ins. Co.*, 112 Nev. 8, 10, 908

P.2d 724, 725 (1996) (quoting *Doe v. Bryan,* 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)). However, a "controversy" does not exist between parties simply because the actions or rights of one party have the potential to affect another party or that a party has a practical interest in the outcome of a lawsuit between others. *Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 637 (9th Cir. 2014). "A controversy does not exist wherever an individual possibly, probably, or even certainly affected by litigation asks a federal court to resolve a legal question . . . . [i]t is not enough for a declaratory judgment plaintiff to assert . . . . a practical interest in the outcome of a lawsuit between other parties." *Id.* Likewise, a mere difference of opinion is not enough to constitute a judicial controversy with respect to action for declaratory relief. *See Kress*, *v. Corey, et al.*, 65 Nev. 1, 27, 30, 189 P.2d 352 (1948).

Moreover, Acres is powerless to enforce the right claimed by GB Sciences, i.e., to award a certificate to GB Sciences. A party who is powerless to perform the desired outcome may not be named in declaratory relief actions. *Doe v. Bryan*, 102 Nev. 523, 728 P.2d 443 (1986) (finding that a governor was an improper defendant to a declaratory relief action seeking interpretation of NRS 201.190 because his duties did not encompass the initiation of criminal prosecution and was thus powerless under the statute). Declaratory relief should not be granted where it is impossible to impose any acceptable remedy should a plaintiff prevail. *See Tam*

v. Colton, 94 Nev. 453, 461, 581, P.2d 447, 453 (1978). Here, there is no acceptable remedy to fashion against Acres.

Here, it is undisputed that Acres has no power to dictate GB Sciences's application score or ranking. Thus, Acres has no control or legal obligations concerning the scoring and ranking of GB Sciences's application. Accordingly, the Court could not fashion any declaration of rights between the parties and no justiciable controversy exists between GB Sciences and Acres.

B. GB Science's Claim for Injunctive Relief Was Not Alleged Against Acres.

As with its claim for declaratory relief, GB Sciences's claim for injunctive relief asked the court to grant relief against the Division and the City. Specifically, GB Sciences requested an injunction to prevent the Division from granting a provisional certificate to Acres, and to require the City to toll any deadlines for additional proceedings to continue the licensing process. Such relief could not be obtained from Acres, and thus, it did not state a claim as to Acres.

Tellingly, GB Sciences offers no basis upon which it should have a higher ranking over Acres. GB Sciences simply asserts that the court order directing the Division to rescore and re-rank Acres's application cannot have "prejudicial effect" on GB Sciences. This is simply untrue. There can be no prejudice to GB Sciences from the correct scoring of Acres's application. Putting the applicants in the correct order simply accords them the status to which they were entitled.

Simple enforcement of the order that Acres obtained may have a "practical effect" on GB Sciences ranking, but it does not entitle GB Sciences to set aside the order or request declaratory relief from this Court.

GB Sciences can bring a claim for declaratory relief against the Division, if an actual controversy exists between GB Sciences and the Division regarding the manner in which the Division ranked GB Sciences's application. Indeed, if GB Sciences had any issue with the manner by which the Division ranked GB Sciences's MME application, then GB Sciences can address that issue through its claims against the Division. However, Acres has absolutely no role in the Division's ranking of GB Sciences's MME application, and awarding declaratory relief would therefore fail to adjudicate any real controversy between the parties. GB Sciences's claim for declaratory relief against Acres must be dismissed.

C. GB Sciences's Estoppel Argument Was Properly Dismissed.

The District Court properly dismissed GB Sciences's claim for equitable estoppel, as GB Sciences failed to allege facts sufficient to establish the elements of that claim. To state a claim for equitable estoppel, the claimant must allege facts sufficient to show: "(1) the party to be estopped [was] apprised of the true facts; (2) he [intended] that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel [was] ignorant of the true state of facts; (4) he [] relied to his

detriment on the conduct of the party to be estopped." *Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.*, 98 Nev. 609, 614, 655 P.2d 996, 998–99 (1982). Here, GB Sciences recited the elements of equitable estoppel in its pleading in a conclusory fashion, but failed to allege facts that demonstrate these elements. While this Court has held that the factual allegations contained in a complaint must be accepted as true, it has never held that this type of conclusory legal allegation must be accepted as true. *See In re Amerco Derivative Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d 681, 706 (2011) (Pickering, J, dissenting and concurring) (internal quotation and citation omitted); *Buzz Stew,* 124 Nev. at 227–28, 181 P.3d at 672 (2008) (recognizing that dismissal of a complaint is proper when the complaint's factual allegations, even when recognized as true, do not satisfy the elements of the causes of action being asserted).

Here, GB Sciences did not allege any facts that would support these elements. There are no *facts* alleged that indicate that Acres knew or should have known of GB Sciences's specific score or of its activities in suing the Division. There are no facts showing any intent by Acres that GB Science should initiate its litigation against the Division. To the contrary, the pleadings show that GB Sciences initiated its litigation against the Division before Acres even learned of its scores and the scoring error. *Compare* **I APP 1** (showing *amended* complaint filed on December 14, 2014) to **II R. APP. 228, ¶ 37**.

Moreover, while GB Sciences alleges that Acres waited to intervene in this present litigation until "after GB Sciences had incurred the costs of the litigation," GB Science also alleged that Acres did not receive the Mandamus Order that established its rank as 13 until October 3, 2015. **I R. APP. 201, ¶ 53**. Until Acres's true score and rank were acknowledged, it had no standing to intervene in this action, as absent such score and rank, it could not establish any injury to be redressed. *See McNamara v. City of Chicago*, 93 C 1098, 1997 WL 151688 (N.D. Ill. 1997), *aff'd,* 138 F.3d 1219 (7th Cir. 1998) (finding that police officers whose exam scores were insufficient to qualify them for promotion if strict adherence to scoring ranks had been followed, lacked standing to assert claim for discrimination through failure to adhere to scoring ranks). Accordingly, GB Sciences's pleading contradicted itself. *Response Oncology, Inc. v. The Metrahealth Insurance Company,* 978 F. Supp. 1052, 1058 (S.D.Fla. 1997) (dismissal may not be avoided by alleging inconsistent allegations in a complaint).

Furthermore, questioning by the District Court at the hearing of the Motion to Dismiss established that GB Sciences was aware of the Acres's litigation, but chose not to intervene in that litigation. "Although the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Int'l Fid. Ins. Co. v. Quenzer Elec. Sys., Inc.*, 18 N.Y.S.3d

645, 647 (N.Y. App. Div. 2015). Indeed, the statements at the hearing established that GB Sciences sought equity with unclean hands, barring it from any equitable relief. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008) ("The unclean hands doctrine generally bars a party from receiving equitable relief because of that party's own inequitable conduct.") (citation omitted).

Moreover, equitable principles cannot alter the Division's statutory obligations. *See In re Fontainebleau Las Vegas Holdings, LLC,* 128 Nev. Adv. Op. 53 (Nev. Oct. 25, 2012); *see also Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001) ("We have recognized that . . . . equitable principles will not justify a court's disregard of statutory requirements."). Indeed, equitable estoppel "does not apply against the state in matters affecting governmental or sovereign functions." *Las Vegas Convention & Visitors Auth. v. Miller*, 124 Nev. 669, 698, 191 P.3d 1138, 1157 (2008) (citations omitted).

Finally, because GB Sciences did not obtain leave to amend its Counterclaim, as required by NRCP 15(a) and EDCR 2.30, dismissal of the amended counterclaim may be affirmed on that basis as well. *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 591, 216 P.3d 793, 802 (2009) ("A district court's correct result will not be disturbed on appeal even though its decision was reached by relying on different grounds.").

As GB Sciences has failed to establish that its equitable estoppel claim was improperly dismissed, the judgment should be affirmed.

CONCLUSION

This Court should affirm the judgment of the District Court. GB Sciences has failed to show any impropriety in the District Court's direction that, upon the revocation of Nuleaf's certificate, the Division should issue a provisional certificate to the next highest ranked applicant, Acres. GB Sciences has failed to show that its due process rights were violated, that judicial notice was improperly taken, or that issue or claim preclusion was improperly applied against it. Additionally, GB Sciences has failed to show any error in the District Court's dismissal of its counterclaims. Because GB Sciences has failed to show any infirmities in the judgment, it should be affirmed.

Respectfully submitted this 21st day of December, 2016.

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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 6893 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 21st day of December, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on December 21, 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.

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An employee of Greenberg Traurig, LLP