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

CROSS RESPONDENT ACRES MEDICAL, LLC'S PETITION FOR REHEARING

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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 16th day of April 2018.

GREENBERG TRAURIG, LLP

/s/ Tami D. Cowden

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Pursuant to NRAP 40(c)(A) and (B), Respondent/Cross Respondent Acres Medical, LLC ("Acres") respectfully submits this Petition for Rehearing.

INTRODUCTION

This Court's March 29, 2018 Opinion appears to contemplate that the ruling therein, which resolved an issue of statutory interpretation, was dispositive of all issues raised in these proceedings. However, this Court's acceptance of NuLeaf's interpretation of the statutory language means that the issue of the propriety of NuLeaf's ranking is not finally resolved. Accordingly, this Petition seeks clarity on this point, because if this Court purposefully suggested such ranking had been finally established, then the Court has overlooked significant evidence in the record that presents such a conclusion.

The dispute in question concerned whether the Department was required to reject an application that failed to include evidence of compliance with local zoning requirements, or if the application could be accepted despite such lack. This Court accepted NuLeaf's proposed interpretation that a lack of such evidence did not result in ineligibility, but instead, was merely a factor that the department should consider. Here, however, the Department *conceded* both that it should have considered such lack, but failed to do so. Given the Department's acknowledged failure to consider factors that it should have considered, the propriety of NuLeaf's

ranking remains in doubt. Accordingly, this Court should clarify its instructions to the lower court to for a remand for continuation of the litigation.

FACTS RELEVANT TO THIS PETITION

In *NuLeaf CLV Dispensary, LLC v. Nevada Department of Health and Human Services,* 134 Adv. Op. 17 (2018), this Court accepted the argument presented by Nuleaf that NRS 453A.322(3)'s requirements are "factors for the Department to consider in issuing a certificate." 134 Adv. Op 17, at 9-10. However, it is undisputed that the Department did not consider those factors, even though the Department conceded in the proceedings below that it should have done so. Specifically, the following dialogue occurred in the proceedings below:

> THE COURT: I mean, was there any discussion at the end of the game, when the 90 days was coming up -- and you did have some that had the theoretical letter requiring –
>
> MS. ANDERSON: Actually, none of them – none of them did until -- and I -- and I apologize. You know, it's a year ago. But the -- the decision made by the City was made on the last possible day. So I'm not even -- there actually wasn't even clearly a decision not to decide it. ***It was just missed completely*** because we looked at it with -- the Division looked at it without even considering that local approval because we didn't have that in place--
>
> THE COURT: Okay.
>
> MS. ANDERSON: --as part of the application.
>
> THE COURT: So that -- you didn't even – the Division didn't even realize that there had been any sort of letter issued by the City of North Las Vegas?

MS. ANDERSON: We did not. And what we were focused on is that we had to issue within that 90-day period. So that was -- they went forward with the rankings as they had done

THE COURT: I mean, if -- let's say City of Las Vegas had done it two days before and had called up the Division and said, "Hey, I just want to make sure you know, here's what we've issued today," how is that --

MS. ANDERSON: We certainly would have been -- been advising them differently if we had that scenario. I -- but we just never even had even the scenario when we were looking at what the City of Las Vegas was doing because it wasn't part of that application process.

THE COURT: Okay. So --

MS. ANDERSON: So it's very unique. Clark County, Henderson we did make errors there. They had actually made their decisions prior to our application process. The City of Las Vegas stands alone because it did not make a decision until

THE COURT: Theoretically did make a decision before; you just didn't know of it.

MS. ANDERSON: But not in a way that we could act in a timely manner towards it --

THE COURT: Okay. All right.

MS. ANDERSON: is the best I can give you, Your Honor.

THE COURT: In the case of Henderson and Clark County, those zoning letters, did they influence in terms of who got registration or not?

MS. ANDERSON: The -- the Division has been very candid, ***that we did not even look at those but we should have.***

III APP. 539-540.

Furthermore, while this Court stated that the Department "would likely" have missed its statutory deadline had it considered the letter submitted by the City of Las Vegas,[1] noting that the Department had 519 applicants, the Court overlooked the fact that the Department *presented no evidence regarding its ability to consider the information*. *See State Response to Summary Judgment*, **II APP 348-363**. Additionally, the reference to 519 applications includes applications for other local jurisdictions.

Accordingly, this Court should grant the Petition for Rehearing, and issue a clarified ruling that takes the above factual matters into account, and clarifies the instructions to the District Court on remand.

LEGAL ARGUMENT

Pursuant to NRAP 40(c)(2)(A), a petition for rehearing may be filed where the Court has overlooked a material issue of fact contained in the record. Here, given the suggestions contained in the Opinion that NuLeaf's entitlement to a provisional certificate has been finally decided,[2] it appears that the Court has overlooked material issues of fact that must now be resolved due to this Court's

[1] 134 Adv. Op 17, at 11.

[2] For example, this Court's decision not to resolve the dispute between Respondent/Cross Appellant GB Sciences, LLC and Acres could be interpreted as such dispute being deemed permanently mooted by this Court's resolution of the statutory interpretation question.

determination of the appropriate interpretation of NRS 453A.322's requirements. Accordingly, the Petition for Rehearing should be granted.

I. This Court's Resolution of the Interpretation of NRS 453A.322 Did Not Decide the Issue of the Validity of NuLeaf's Ranking.

This Court decided the propriety of the District Court's ruling on the summary judgment issue presented to it. Specifically, in the proceedings below, GB Sciences had sought summary judgment on the issue of the proper interpretation of NRS 453A.322. **I APP 160-176.** NuLeaf opposed that motion, and counter moved for summary judgment based on its theory of interpretation of NRS 453A.322. **II APP 377-419.** The Department did not join or oppose either summary judgment motion, but merely agreed to abide by the Court's decision. Because the lower court accepted the interpretation proffered by GB Sciences, concluding NuLeaf was ineligible, the District Court had no need to consider other flaws in the Department's ranking efforts. **II APP 348-363.** Accordingly, other issues relating to the propriety of the District Court's ruling were not addressed by the lower court, or by this Court.

However, as shown above, the Department conceded that it had failed to consider the evidence, or lack thereof, of local zoning approvals and compliance shown by the respective applicants for City of Las Vegas dispensary facilities licensing, even though it also conceded that it "should have." **III App. 540.** Accordingly, Acres should be entitled to pursue this issue in the lower court.

This Court's Opinion refers to the likelihood that, had the Department considered the City's letter containing information regarding the applicants who had and had not received local approvals, the Department might have missed its statutory deadline to release the rankings. Consideration of such a theoretical delay is justifiable in determining the appropriate interpretation of the relevant statutory language. However, whether or not the Department could, in the circumstances here, have considered the information provided by the City of Las Vegas in a timely manner is a factual determination, for which no evidence has been presented. Accordingly, this Court should clarify that it was not ruling on this factual issue.

Such a clarification is particularly appropriate given this Court's reference to a total of 519 applications, perhaps referring to the total number of applications received for marijuana facilities statewide. 134 Adv. Op 17, at 11. There were only 49 applicants for a dispensary facility in the City of Las Vegas. **II APP 332-33**. Furthermore, the letter from the City refers only to 43 of those applicants.[3] **II App. 320-321.** If this Court's ruling was intended to suggest that the City of Las Vegas letter would have required re-review of 519 applications, then this Court has overlooked a material fact.

[3] Moreover, logically, any effect on each of these applicant's scoring of having received an approval or a denial was likely to be fixed, i.e., a specific increase or decrease of a specific score. But these are issues that should be determined through discovery on remand.

CONCLUSION

This Court should clarify its Opinion to preclude any misunderstanding as to the dispositive nature of this Court's ruling. The only issue determined by this Court was the correct interpretation of NRS 453A.322(3)(a)'s requirements, and consequently, the propriety of the lower court's rulings on the summary judgment motions directed at that issue, and such ruling should not be deemed to prevent the parties and the District Court from determining remaining issues as to the validity of the Department's ranking.

Respectfully submitted this 16th day of April 2018.

GREENBERG TRAURIG, LLP

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I hereby certify that this Petition 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 1445 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 16th day of April 2018.

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CERTIFICATE OF SERVICE

This is to certify that on April 16, 2018, a true and correct copy of the foregoing ***CROSS RESPONDENT ACRES MEDICAL, LLC'S PETITION FOR REHEARING*** was served via this Court's e-filing system, on counsel of record for all parties to the action.

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