IN THE SUPREME COURT OF THE STATE OF NEVADA

DESERT AIRE WELLNESS, LLC, a Nevada limited-liability company,

Appellant/Cross-Respondent,

vs.

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

Respondent/Cross-Appellant.

STATE OF NEVADA, DIVISON OF PUBLIC AND BEHAVIORAL HEALTH OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

FILED

AUG 26 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

CASE NO.: 70462

DISTRICT COURT CASE NO.: A-15-728448-C

REPLY IN SUPPORT OF MOTION FOR STAY

I. THE STATE'S RESPONSE SHOWS WHY A STAY IS NEEDED

The State's Response requesting this Court grant the stay so that Desert Aire Wellness, LLC ("Desert Aire") can continue to serve the community while the litigation is pending highlights the importance of a stay in this action. In addition to having Desert Aire remain open in order to continue to serve the community, the Response further points out the problems that will occur if the stay is not granted. There are two possible reversals. First, Desert Aire could get a reversal, in which case its registration certificate would not be revoked. Second, Respondent GB Sciences Nevada, LLC ("GB Sciences") could win its appeal, in which case, it could be awarded a city license

If this Court does not grant a stay and the State is forced to give a registration certificate to someone else, havoc will occur. By law, there can

only be 12 certificates in the City of Las Vegas. Therefore, if the Court rules that either Desert Aire or GB Sciences is entitled to the certificate, then the entity granted the certificate in the meantime will lose that certificate. This situation would obviously create more havoc. As a result, there is no question that a stay is warranted, not only for all the reasons set forth in Desert Aire's motion for a stay, but in the State's Response as well.

II. GB SCIENCES' OPPOSITION OFFERS NO REAL ARGUMENT THAT THE OBJECT OF THE APPEAL WILL NOT BE DEFEATED.

This Court considers four factors in deciding whether to issue a stay: (1) "whether the object of the appeal will be defeated if the stay is denied;" (2) "whether appellant will suffer irreparable or serious injury if the stay is denied;" (3) "whether respondent will suffer irreparable or serious injury if the stay is granted;" and (4) "whether appellant is likely to prevail on the merits in the appeal." Nev. R. App. P. 8(c). Although the Court has not indicated that any one factor carries more weight than the others, and instead recognizes that if one or two factors are especially strong they may counter balance other weak factors, the Court has ruled that if the object of the appeal will be defeated, this may be enough alone to warrant the issuance of a stay. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).[1]

---

[1] In its Opposition, GB Sciences cites to cases from the United States Court of Appeals for the Sixth and Eighth Circuits indicating that those courts give greatest weight to the appellant's likelihood of success on appeal when considering a motion for a stay. (*See* Opposition at p. 7:1-5.) The two cases cited by GB Sciences, however, are inapposite because they dealt with Federal Rule of Appellate Procedure 8, and apply a different set of criteria than those set forth in NRAP 8(c) and this Court's precedent. *Compare Shrink Missouri Government PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998) (setting out standard for stays pursuant to FRAP 8) *and* NRAP 8(c).

That is the case here. Without a stay, the object of the appeal will be completely defeated since Desert Aire will likely be put out of business forever. Desert Aire's business will be closed if a stay is not granted. It will have no business and no funds to pay for the lease or other ongoing expenses, such as taxes, utilities, certificate fees, and security, and will likely lose all of the goodwill with its patients that it has expended time and money to develop.

Desert Aire consists of three women who have spent the last two years of their lives working on this project without pay, giving up their other careers and investing their life savings. As described in the Declaration of Brenda Gunsallus included with Desert Aire's motion for a stay, (*see* Motion at p. 8:6; *see also* Exh. 7), she and another one of the three principles of Desert Aire have already invested their life savings into the business, and there is no money left for further investment. To have to close the business and try to reopen a year and a half from now when the appeal is finished would therefore be virtually impossible. All the competitors would have a one and a half year advantage. In addition, Desert Aire as outlined above could not possibly come up with the money necessary to remarket the property and try to recoup the customer base after such a lengthy period. Indeed, there is a significant product in the facility already, which would go to waste, and over $1 million in tenant improvements would deteriorate.

GB Sciences' Opposition merely states that because the division made it clear that the certificate issued was a revocable privilege, no party could claim a right to any of the certificates and thus having it revoked does not defeat the object of the appeal, as the division can always reissue the certificate if ordered to do so. This argument does not oppose or address the issue of whether the object of the appeal will be defeated. Stating that the

State could have revoked the Appellant's certificate does not contest the argument that since Desert Aire would be out of business and likely unable to reopen its business. Thus, the object of the appeal would be defeated, and winning its appeal would be little more than a pyrrhic victory. Nor does GB Sciences' position address the argument that even if it could reopen for business, Desert Aire would be irreparably harmed in that it would lose all of its customers and competitive advantage in being one of the first to market.

Further, GB Sciences' argument that the object of the appeal will not be defeated because the State could have revoked that certificate at any time is disingenuous. Obviously, the State cannot revoke an entity's certificate after providing the same without good cause. Here, there has been no good cause to revoke Desert Aire's certificate. To the contrary, Desert Aire has gotten glowing inspection reports. Moreover, the State has submitted a response fully supporting keeping Desert Aire's business open. This completely belies GB Sciences' argument that the State could have revoked Desert Aire's certificate.

III. FOR THE SAME REASONS, IT IS CLEAR DESERT AIRE WILL SUFFER IRREPARABLE HARM.

The second factor under NRCP 8(c) is whether Desert Aire will suffer irreparable or serious harm. This Court has held in the context of an appeal from an order granting an injunction that "acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury." *Sobol v. Capital Management*, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) (determining that where a person has "interfere[ed] with the operation of a legitimate business by creating public confusion, infringing on goodwill, and damaging reputation in the eyes of

creditors," it may result in irreparable harm).

Again, Desert Aire will suffer significant irreparable harm in the form of losing its entire business. Desert Aire opened its dispensary in early 2016, and immediately began providing patients with access to medical marijuana. If the Court does not grant a stay, Desert Aire will lose the $100,000 worth of product, which is currently in the business. Desert Aire will lose all of its patients with whom it has spent significant time and resources building a confidential and supportive relationship. All of its competitors will gain a significant advantage, which will be impossible to overcome. Desert Aire will not have the income to pay its lease, nor will it have the income or money to remarket the property. In addition, Desert Aire would lose several months of the most lucrative sales time for marijuana, which is the period after Nevada legalizes marijuana recreationally.

All of this harm would come without just cause. As discussed in Desert Aire's emergency motion, during the application period, the Division of Public and Behavioral Health ("DPBH") viewed and ranked numerous applications. Based on the substance of the applications, DPBH determined that Desert Aire was better qualified to serve medical marijuana patients than numerous other applicants, including GB Sciences. After failing to obtain a provisional certificate from DPBH, GB Sciences initiated several suits in district court in an effort to circumvent DPBH's determination that it was simply not as well-qualified as other applicants. Desert Aire now stands to lose a business its owners have spent years and millions of dollars trying to build.

Further, as discussed in Desert Aire's motion, the public policy underpinning Nevada's medical marijuana laws will be thwarted if Desert

Aire's certificate is revoked, as Desert Aire is safely providing medical marijuana in full compliance with all state and local laws. GB Sciences, on the other hand, does not stand to suffer any harm from a stay, as the district court did not grant GB Sciences the certificate being revoked. Thus, unlike Desert Aire, GB Sciences could not possibly suffer any harm during the stay.

IV. THE THIRD FACTOR REGARDING GB SCIENCES' INJURY ALSO SUPPORTS A STAY.

GB Sciences will not be granted the certificate if Desert Aire's certificate is revoked. Thus, not only will GB Sciences not suffer any harm if the Court grants a stay, it will actually benefit GB Sciences if the stay is granted. This is because if the stay is not granted, the State will have to put the certificate up to the general public. This means many, many applicants will apply for the certificate. At this point, it is unclear whether GB Sciences has a property on which to operate a medical marijuana facility, and it is also unclear whether GB Sciences can get the final approvals necessary to commence operation. Revoking Desert Aire's certificate is therefore not in GB Sciences' best interest.

Instead, it is in GB Sciences' best interest that the Court grant a stay. If the Court does not grant the stay and someone else gets the certificate in the meantime, GB Sciences' appeal would be mooted. This is because by law there can only be a certain amount of certificates. If the State grants someone else the certificate, GB Sciences would not be able to obtain a registration certificate even if the Court were to rule the lower court should have granted the certificate to GB Sciences. Thus, it makes no sense for GB Sciences to even oppose this Motion for Stay but certainly, it will not suffer any harm but in fact will benefit.

V. DESERT AIRE IS VERY LIKELY TO SUCCEED ON THE MERITS SINCE IT HAS NUMEROUS VALID ARGUMENTS ANY ONE OF WHICH WOULD BE SUFFICIENT TO OVERTURN THE LOWER COURT'S DECISION.

In its Motion for Stay, Desert Aire cited many different arguments why the District Court's decision should be reversed. Desert Aire only needs to be successful on one of those arguments in order to prevail on appeal. Therefore, since each of the arguments has merit, Desert Aire has a likelihood of success on its appeal. Desert Aire will not restate each of the arguments set forth in the Motion, but will instead will refer the Court back to those arguments and point out a couple issues regarding the opposition to each argument.

A. The Statute in Question is Clearly Ambiguous and Does Not State That The Division Could Only Issue a Provisional Registration Certificate if The Information Set Forth in NRS 453A.322(3)(a)(5) is Complied With as GB Sciences Alleges.

GB Sciences alleges that NRS 453A.322(3)(a)(5) is not ambiguous, and states that the division could only issue a provisional registration certificate if the application included the criteria set forth in NRS 453A.322(3)(a)(5). (*See* GB Sciences' Opposition at p. 2:10-20.) Once the Court reads NRS 453A.322 in full, it will see that neither of these things are true. The statute is obviously ambiguous since it states that each application had to be on the State's prescribed form and the State's prescribed form did not request the information contained in NRS 453A.322(3)(a)(5). Based on the language of the statute, two interpretations of an applicant's responsibilities are possible: either an applicant is required to use the State's prescribed form—which does not include the information in NRS 453A.322(3)(a)(5)—as the statute states, or the applicant is required to

include information in the application which is not contained on the State's prescribed form Given these two possible interpretations, the statute is ambiguous. *See State, Dept. of Bus. and Indus., Off. of Lab. Com'r v. Granite Const. Co.*, 118 Nev. 83, 40 P.3d 423 (2002) (noting that "if a statute is susceptible to more than one natural or honest interpretation, it is ambiguous") (citations omitted).

Similarly, the statute did not state when Desert Aire had to submit the information listed under NRS 453A.322(3)(a)(5). If Desert Aire had to submit the information with the application (as alleged by GB Sciences), then no one could have submitted the information because the City had not granted any compliance permits by the application deadline. If the statute allowed for Desert Aire to provide the information after the fact (which is what GB Sciences did through a letter from the City), then Desert Aire met this test since it in fact received a permit from the City, which it then provided to the State.

However, in reality the statute never required the information for the State to issue a provisional certificate. Indeed, the statute does not mention the phrase "provisional certificate." Instead, the statute is merely a guideline for the State's acceptance of applications. Specifically, the statute states that if an applicant submits certain information, the State shall issue a registration certificate. There is nothing in the statute that says that the State cannot issue a registration certificate if all of the information contained in the statute is not provided. Indeed, GB Sciences has admitted that DPBH was allowed to accept all applications under NRS 453A.322. (*See* GB Sciences' Opposition at p. 2:10-11.) That is all NRS 453A.322 dealt with: registration certificates. It had nothing to do with provisional certificates.

Importantly, this is the way the State interpreted the statute. It did not require the information in NRS 453A.322(3)(a)(5) in order to rank the applicants. Instead, they ranked the applicants, issued provisional certificates, and required proof of licensure before they issued a final certificate. Pursuant to the wealth of Supreme Court authority cited below and in the Motion to Stay, the Court should defer to the State's interpretation because it is not inconsistent with the statute.

In other words, the litigation initiated by GB Sciences is really much ado about nothing. The statute in question merely sets forth guidelines for the State to accept applications. It does not talk about the issuance of provisional certificates. Furthermore, at best it is ambiguous since it (a) requires the application to be submitted on the State prescribed form, which does not include the information allegedly not submitted, and (b) would have been impossible to have been complied with since the local jurisdiction, the City of Las Vegas, had not issued any certificates at the time the applications were due. Based on these facts, it is clear Desert Aire has a likelihood of success on the merits.

B. Desert Aire Substantially Complied With The Statute If The Information Was Necessary.

It is doubtful that the information under NRS 453A.322 was necessary as outlined above. In addition, it is doubtful the information was necessary since the subsection relied upon only required the information if the marijuana zoning requirements for the City of Las Vegas were different from those of the State, which they were not. Specifically, the subsection relied upon by Desert Aire requires proof that if the City of Las Vegas had different medical marijuana zoning than the State, the Applicant should provide proof

in the form of a letter from the City, or the granting of a permit by the City showing it met those medical marijuana restrictions. In fact, the State's medical marijuana restrictions (i.e., 1,000 feet from schools; 300 feet from a community property, such as a house of worship) were the same as the City of Las Vegas requirements. Thus, the subsection is inapplicable to begin with.

However, if the information was required, then Desert Aire's submission of a letter from a licensed surveyor showing that the City of Las Vegas medical marijuana zoning restrictions were met by the facility combined with its eventually providing the State with proof of its licensure from the City constitutes substantial compliance. *Markowitz v. Saxon Special Servicing*, 129 Nev. Adv. Op. 69, 310 P.3d 569 (2013). Indeed, such a letter was the best anyone could have done at the time the application was submitted.

Like in *Markowitz,* it is very important to note that at all points in time, the facility in question did in fact meet the purpose and intent of NRX 453A.322(3)(a)(5) since in complied in all respects with the City of Las Vegas' medical marijuana restriction as shown by Desert Aire's survey letter attached to the application and its eventual receipt of a permit and license from the City of Las Vegas.

C. As GB Sciences Admits in Its Opposition, The District Court's Order Would Lead To An Absurd Result.

GB Sciences admits in its Opposition that if the information was required at the time the applications were submitted then all of the certificates would have to be revoked because no one submitted the information with the application. However, GB Sciences argues that since it submitted the required information later (as did Desert Aire but simply later than GB Sciences), NRS

453A.322 is inapplicable to it. This is disingenuous. If the information was required, it was required at the time the application was submitted. Thus, if the Court's interpretation that the information was required is upheld, it will lead to an absurd in the form of a revocation of all certificates granted years after they were granted. Interpreting the statute leading to such an absurd result is contrary to numerous Supreme Court cases and GB Sciences' Opposition. (*See* Opposition at p. 8:7-24.)

D. Desert Aire's Equitable Estoppel and Laches Arguments Are Extremely Strong

As the Supreme Court stated in *Nevada Public Employees v. Byrne*, 96 Nev. 276, 280, 607 P.2d 1351 (1980), "we would turn the doctrine of equitable estoppel up on its head if we were to hold that the power to correct an inequity, as unjust as the one here, would, without more, defeat our court's inherit power to **seek or do equity**." (emphasis added).

It would grossly unfair to revoke Desert Aire's registration certificate under the facts set forth in this case including the substantial reliance by the Defendant on the actions of the State. The State required Desert Aire to submit the information (and only the information) on the State application form, which did not include the information GB Sciences alleges should have been required. Thus, if the information was required, it was the State's fault that it was not submitted and not Desert Aires's, since the State's form did not include a request for the information. Next, the Nevada Administrative Code required the State to notify Desert Aire if its application was deficient. Not only did the State not notify Desert Aire that its application was deficient, but it actually awarded Desert Aire both the provisional and final certificates. Desert Aire relied upon this to spend years of their lives, working for free,

spending their life savings, building out the facility and opening for business. Accordingly, pursuant to the doctrines of equitable estoppel and laches, the decision should be reversed.

This is especially true with respect to not only the State, as shown above, but also GB Sciences itself. GB Sciences filed a similar lawsuit against Desert Aire, but later moved to dismiss it. After that dismissal, Desert Aire spent over $1 million building out the facility. It would be grossly unfair to allow the GB Sciences—who had previously dismissed the suit, leaving Desert Aire to rely upon the dismissal to build the facility—to come back and bring the action again.

E. The Appellant believes the Court's Eventual Order Could Read as Follows:

1. Appellant, having completed an application on the State's required form as the statute in question required substantially complied with the statute in question. This is especially true since the one piece of information which was not provided (out of approximately 20 pieces of information) was unclear, impossible to comply with and whose purpose of which was in actuality met by the Appellant's facility, which met the requirements of the statute. Thus, in balancing the equities as required pursuant to the Nevada Supreme Court cases on substantial compliance, the Court finds substantial compliance is appropriate.

2. The statute at best is ambiguous, since it requires the applicant to submit its application on the State required form, specifically states that it will not consider any other additional information, and yet the form did not include the information allegedly required under NRS 453.322(3)(a)(5). As a result, to avoid manifest injustice, the Court finds that proof of licensure was not necessarily required at the time the certificate was submitted and Appellant's obtaining that licensure later suffices.

3. The Court finds in favor of the Appellant based on a number of Supreme Court cases finding that a Court should construe statutes in a way as to avoid an absurd result. It would be an absurd result to revoke Appellant's certificate two years after it had been granted because it failed to include in an application a certificate from the City of Las Vegas when no such certificates had been issued. It is clear to the Court that the statutory scheme which was new was not well thought out and it would be unfair to punish the Appellant for the problems with the statute which did not consider the fact that the State's application deadline would be before local government issued certificates.

4. The Court grants Judgment in favor of the Appellant on equitable estoppel grounds for two reasons. First, it would be grossly unfair to revoke a party's certificate under the facts set forth in this case including the substantial reliance by the Appellant and blatant errors of the State. A wealth of Supreme Court case authority shows that the court should use its equitable powers to prevent a manifest injustice from occurring and this is such a case. The State requiring the applicant to submit the information (and only the information) on the State application form which did not include the information Respondent alleges should have been required, was the State's fault if it was required and not the Appellant's. Further, the Nevada Administrative Code required the State to notify the Appellant if its application was deficient. Not only did the State not notify the Appellant that its application was deficient, but it actually awarded the Appellant both the provisional and final certificate. The Appellant relied upon this to spend years of their lives working for free, spending their life savings, building out their facility and opening for business. Accordingly, pursuant to the doctrine of equitable estoppel the Court rules that the Appellant's certificate cannot be pulled at this time. Similarly, Respondent's actions in dismissing the Appellant from a lawsuit and then bringing a new suit seven months later, during which time Appellant relied upon the dismissal to spend significant sums of money warrants equitable estoppel.

5. Pursuant to the Nevada Supreme Court case of *Carson City vs. Price* and the factors in this case, the Court reconsiders its Order and reverses pursuant to the doctrine of laches.

6. It is clear that the Respondent has no standing to bring this action since it did not submit the allegedly required information with its application either. Neither the statute nor the State's rules allowed for supplementation of Respondent's application and indeed Respondent never actually supplemented its application anyway. Therefore, the State sending a letter (well after the fact and after the State made its decision on who to give the provisional certificates to) did not equate to complying with the statute if the information was required as alleged by Respondent.

VI. CONCLUSION

For all these reasons, emergency relief is warranted and a stay of the District Court's Order pending appeal should issue.

DATED this 18th day of July, 2016.

/s/ Margaret A. McLetchie

MCLETCHIE SHELL, LLC
Margaret A. McLetchie (Bar No. 10931)
Alina M. Shell (Bar No. 11711)
701 E. Bridger Ave., Suite 520
Las Vegas, NV 89101
and
FENNEMORE CRAIG, P.C.
Richard H. Bryan (Bar No. 2029)
Patrick J. Sheehan (Bar No. 3812)
300 S. Fourth St., Suite 1400
Las Vegas, NV 89101

Attorneys for Appellant,
Desert Aire Wellness, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 32(a)(9)(C):

I hereby certify that the attached proposed REPLY IN SUPPORT OF MOTION FOR STAY complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because the REPLY IN SUPPORT OF MOTION FOR STAY has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that the attached proposed Reply Brief exceeds the page limitation of Nev. R. App. P. 27(d)(2) because it consists of sixteen pages.

DATED this 18th day of July, 2016.

By: */s/Margaret A. McLetchie*

Margaret A. McLetchie
Nevada Bar No. 10931
MCLETCHIE SHELL LLC
701 E. Bridger Avenue, Suite 520
Las Vegas, Nevada 89101
(702) 728-5300
maggie@nvlitigation.com
Attorney for Desert Aire Wellness, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY IN SUPPORT OF MOTION FOR STAY was filed electronically with the Nevada Supreme Court on the 18th day of July, 2016. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

James E. Shapiro, Nevada Bar No. 7907
Sheldon Herbert, Nevada Bar No. 5988
SMITH & SHAPIRO, PLLC
2250 St. Rose Pkwy., Suite 220
Henderson, NV 89074
Attorney for Respondent GB Sciences, LLC

Linda Anderson, Nevada Bar No. 4090
Chief Deputy Attorney General
555 E. Washington Ave., Suite 3900
Las Vegas, NV 89101
Counsel for Respondent State of Nevada

By: */s/ Pharan Burchfield*
EMPLOYEE, McLetchie Shell, LLC