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

Respondent/Cross-Appellant,

and

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

Respondent.

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APPELLANT'S OPENING BRIEF

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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 the judges of this Court may evaluate possible disqualification or recusal.

Appellant Desert Aire Wellness, LLC, is a Nevada limited liability company that is neither owned nor affiliated with any publicly traded company. The law firms whose partners or associates gave or are expected to appear for Desert Aire Wellness, LLC are FENNEMORE CRAIG, PC, and MCLETCHIE SHELL, LLC.

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DATED this 12th day of December, 2016.

/s/ Margaret A. McLetchie

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JURISDICTIONAL STATEMENT

Appellant Desert Aire Wellness, LLC ("Desert Aire") appeals the April 28, 2016 order granting in part Respondent GB Sciences, LLC's ("GB Sciences") Motion for Summary Judgment and denying Desert Aire's Countermotion for Summary Judgment (4 JA846-55 ("the Order")[1].) The Notice of Entry of the Order occurred on April 28, 2016. (*Id.*) This Order constitutes a final judgment as to the claims asserted by GB Sciences against Desert Aire. This Court has jurisdiction pursuant to Nevada Rule of Appellate Procedure ("NRAP") 3A(b)(1).

ROUTING STATEMENT

This Court should exercise its jurisdiction over this matter pursuant to NRAP 17 for four reasons. First, this matter qualifies for review by this Court under NRAP 17(a)(8) because it stems from conflicting interpretations of NRS Chapter 453A. Second, the Supreme Court retains jurisdiction pursuant to NRAP 17(a)(13), as it raises as a principal issues a matter of first impression for this Court involving the Nevada common law. Third, this appeal is presumptively retained by the Supreme Court under NRAP 17(a)(14) because it raises as a principal issue a question of statewide public importance. Finally, this matter is not one that would be presumptively assigned to the Court of Appeals under NRAP 17(b).

[1] For the Court's ease of reference, citations to the Joint Appendix ("JA") cite to both volume and page number(s). Hence, "4 JA846-55" refers to volume 4 of the Joint Appendix at pages 846 through 855.

ISSUES PRESENTED FOR REVIEW

1. Whether, in granting summary judgment to GB Sciences Nevada, LLC, the district court ignored precedent from this Court holding that: (1) substantial compliance with statutes is sufficient; (2) under the doctrines of laches and estoppel, a license should not be revoked as a result of the government's mistake where the other party relied upon the State's actions in leading the person to believe that they were within their rights to proceed forward based upon the license or other governmental approval; and (3) the District Court should have construed the statute to avoid manifest injustice since (a) no one could have complied with the statute, and (b) the statute was clearly ambiguous since it stated the applicant had to submit its application on the State's prescribed form (and no additional information could be submitted) and the form did not include any spot for the allegedly missing information.

2. Whether district court misinterpreted the statutory scheme at issue and improperly inserted its own judgment for the Division of Public and Behavioral Health ("the Division"), thereby ignoring established Nevada Supreme Court case law regarding deference to an agency's interpretation of state law and acting in excess of its authority.

3. Whether the district court erred in granting summary judgment in this matter because GB Sciences is currently litigating against another dispensary, Nuleaf

Dispensary, for a registration certificate for this same dispensary location in the City of Las Vegas. *See Nuleaf Dispensary v. State of Nevada/GB Sciences v. State of Nevada*, Nevada Supreme Court Case No. 69909. If GB Sciences is successful in that case, it will have no standing to pursue its litigation against Desert Aire.

I. SUMMARY OF THE ARGUMENT

This is an appeal from a decision by the district court ordering the Division of Public and Behavioral Health—the State subdivision responsible for regulating medical marijuana businesses—to revoke the medical marijuana registration certificate the Division issued to Desert Aire.

In May of 2014, the Division issued a comprehensive application designed to allow the agency to evaluate applicants' fitness to operate a medical marijuana establishment ("MME") and serve patients. The State's process is twofold: first provisional registration certificates are issued. *See* NAC § 453A.312. Then, once all local requirements are met, final permission to operate is granted through a final registration certificate. *See* NAC § 453A.316. For the first phase, the Division informed all applicants for registration certificates they had until August 18, 2014 to submit the entire application. (1 JA139 (application timeline).) Pursuant to Nev. Rev. Stat. § 453A.322, the Division further advised that each applicant needed to follow the application as the State had drafted it, and that it would not consider any additional materials. (1 JA140 (Division submission requirements specifying that

"[m]aterials not requested in the application process will not be reviewed or evaluated.").)

Desert Aire, a small, woman-owned company, successfully participated in both phases of the Division's application process. It is passionate about providing safe access to medical marijuana, including to underserved groups. Desert Aire submitted an application by the deadline on the Division's required form. Its application included everything required, including proof of meeting local zoning restrictions in the form of a letter from a licensed surveyor. The City of Las Vegas did not issue any type of approval to any applicant before the State application deadline.

The Division reviewed and ranked numerous comprehensive applications. Based on the substance of the applications (which were reviewed anonymously), the Division determined that Desert Aire was better qualified to serve medical marijuana patients than numerous other applicants, including GB Sciences. Thus, on November 3, 2014 it granted Desert Aire a provisional registration certificate, but denied GB Sciences a provisional registration certificate. (*See* 2 JA240-41 (November 3, 2014 application approval letter); *see also* 3 JA591 (application disapproval letter addressed to GB Sciences).) Desert Aire then proceeded towards serving patients. It obtained final approval from the City of Las Vegas,[2] spent over $1 million building

[2] (2 JA249-50 (December 22, 2014 City of Las Vegas approval letter).)

out its facility (located on leased property), received final State approval in the form of a registration certificate (2 JA 299 (Registration Certificate)), spent sizable amounts of money and time getting the business open, opened the facility at the beginning of 2016, and has continued to spend significant time and money securing a patient base, developing compliant operating procedures, and training qualified medical marijuana agents. (4 JA822-23 (Declaration of Desert Aire member Brenda Gunsallas).) Desert Aire operates a fully compliant facility to this day.

Unable to get registration certificates from the Division on its merits because it did not perform well enough the Division's ranking process (which, again, was both substantive and anonymous), GB Sciences initiated a number of lawsuits. Relevant here, GB Sciences filed suit against Desert Aire and the State of Nevada contending that the Court should require the Division to revoke Desert Aire's registration certificate since its name was not included on an October 30, 2014 letter from the City of Las Vegas that provided the Division with a list of the MMEs the City had granted preliminary approval. (2 JA 252-80 (Complaint in Eighth Judicial District Court Case No. A-14-710597-C).)

After compiling an initial ranking of its preferred applicants (1 JA190-95), the City of Las Vegas subsequently formally approved MMEs for business licensing and zoning, including Desert Aire. (2 JA 297.) The State did not review this information (and was not required to do so) before issuing provisional registration certificates.

Yet, inventing a technical requirement to obtain a City license that did not exist at the time of application and inserting its own judgment in place of the Division's, the district court ruled that the State should not have granted provisional certificates to any entity not on the City's October 30, 2014 letter. (4 JA 853 ll. 21-23 (April 28, 2016 Summary Judgment Order).) Specifically, the district court found that pursuant to NRS 453A.322 (3)(a)(5), Desert Aire needed to include in its Application proof that it had been licensed by the City of Las Vegas or a letter from the City stating applicant's facility met the medical marijuana zoning restrictions. (4 JA 852 at ll.15-21.)

The State never requested or required such proof from any applicant, and there was no place in the application to include such information. (3 JA622 (State's March 3, 2016 Response to GB Science's Motion for Summary Judgment) at ll. 16-26.) And, again, no entity could have submitted any such information from the City of Las Vegas before the application deadline. Nevertheless the district court—without allowing any discovery—granted summary judgment, ruling that the Division misapplied the law when it granted Desert Aire's provisional registration certificate back in 2014 and ordered the Division to revoke Desert Aire's registration certificate. (4 JA853-54.)

In issuing what amounts to the extreme remedy of a mandatory injunction without allowing Desert Aire to conduct discovery, the district court misunderstood

the statutory scheme at issue and inserted its own judgment for the Division's, in excess of its authority. The resulting order, if it is enforced, would lead to inequitable and absurd results that are odds with the underling policy and aim of Nevada's medical marijuana laws.

The district court also ignored precedent from this Court holding that: (1) substantial compliance with statutes is sufficient; (2) under the doctrines of laches and estoppel a license should not be revoked as a result of the government's mistake where the other party relied upon the State's actions in leading the person to believe that they were within their rights to proceed forward based upon the license or other governmental approval; and (3) the District Court should have construed the statute to avoid manifest injustice since (a) no one could have complied with the statute; and (b) the statute was ambiguous since it stated the applicant had to submit its application on the State's prescribed form.

NRS 453A.322 outlines the information that must be included in an application if the applicant wants a registration certificate and alpha numeric number. The statute begins by stating that the applicant, "must submit to the division an application on a form prescribed by the division." Subsection 453 A.322 (3)(a)(5) states, "if the city, town or county in which the proposed medical marijuana establishment will be located has enacted zoning restrictions, proof of licensure with the applicable local governmental authority or a letter from the applicable

governmental authority certifying that the proposed medical marijuana establishment is in compliance with those restrictions and satisfies all applicable building requirements."

Unfortunately, there were two problems with complying with this subsection. First, the State required all applicants to submit its application on its "prescribed" form as required by the statute. There was nothing on the form requesting the information referenced under subsection (3)(a)(5). Indeed, the form specified that no other information should be included or would be considered. It is undisputed that Desert Aire included all the information on the State's prescribed form, approximately 50 items.

Second, the subsection could not have been complied with by any applicant. Each application had to be filed by August 14, 2014. As of that time the City of Las Vegas had not issued any medical marijuana licenses nor had it issued any zoning approval letters. Instead, it made all of its applicants submit a letter from a licensed surveyor showing that it met the City's medical marijuana restrictions. As a result the best applicants could do was submit a letter from a licensed surveyor showing that its facility in fact met the Las Vegas specific medical marijuana zoning restrictions. Desert Aire in fact submitted such a letter. (4 JA811.) Thus, the purpose of the statute (the State making sure that each applicant's facility met the local governments' medical marijuana specific zoning restrictions) was met by Desert

Aire at all times.

In addition to failing to consider Desert Aire's substantial compliance with the Division's application process, the district court misinterpreted the statutory scheme set forth in NRS Chapter 453A, and failed to defer to the State's own interpretation of that scheme. This was error given substantial precedent from this Court stating that courts must defer to a state agency's interpretation and implementation of the laws under which they operate. *See, e.g., Folio v. Briggs*, 99 Nev. 30, 656 P.2d 842 (1983). Reversal of the district court's Order is also appropriate because GB Sciences lacks standing.

II. STATEMENT OF FACTS

A. The State of Nevada's Enactment of Laws Designed to Allow for the Production, Cultivation, and Distribution of Medical Marijuana.

The underlying purpose of NRS Chapter 453A, the statutory scheme at issue in this case, is to provide a statewide system to register and regulate medical marijuana establishments to supply medical marijuana to registered patients. In 1998, Nevada voters approved a proposed amendment to the Nevada Constitution which allowed for the medicinal use of marijuana without criminal penalty via a ballot initiative. In 2000, voters approved the amendment. *See* Nev. Const. art. IV, § 38. In 2013, the Nevada legislature enacted SB 374, chapter 547, Statutes of Nevada at p. 3695, to establish a statutory scheme governing the cultivation, production, testing, and dispensing of medical marijuana. *See* NRS 453A.010 *et seq.*

(2013).

Throughout late 2013 and 2014, multiple workshops and committee meetings were held with various stakeholders and members of the public in an effort to create a system that balanced the needs of patients who would benefit from medical marijuana and the needs of the public for the safe and controlled production and distribution of medical marijuana. These efforts led to the regulatory framework for the cultivation, production, testing, and dispensing of marijuana codified within NAC 453A.010 *et seq*.

At the local level, local government entities established their own regulatory framework to implement Chapter 453A of the Nevada Revised Statutes and to establish criteria for the issuance of business licenses to cultivation, production, and testing facilities, as well as the issuance of licenses to medical marijuana dispensaries. Relevant here, in June of 2014, the City of Las Vegas adopted Chapter 6.95 of the Las Vegas Municipal Code. *See* Las Vegas, Nevada, Municipal Code § 6.95.010 *et seq.*

This regulatory scheme created by the Nevada Revised Statutes, Nevada Administrative Code, and Las Vegas City Code provides the relevant procedures and policies medical marijuana dispensaries and cultivation facilities are required follow to obtain registration certificates, special use permits, and business licenses, and also provides the procedures and policies the State and City of Las Vegas are

required to follow in issuing those licenses. Under the scheme, local governments must defer to the State's implementation and interpretation of the Nevada Revised Statutes and Nevada Administrative Code.[3]

B. The 2014 Application.

In May 2014, the Division issued a comprehensive application, designed to allow the agency to evaluate applicants' fitness to operate a medical marijuana establishment. (1 JA132-75 (application).) The State's process is twofold: first provisional certificates are issued. *See* NAC 453A.312. Then, once all local requirements are met, final permission to operate is granted through a final registration certificate. *See* NAC 453A.316. For the first phase, the Division informed all applicants for registration certificates they had until August 18, 2014 to submit the entire application. (1 JA139.)

Pursuant to NRS 453A.322, the Division further advised that each applicant needed to follow the application the State had drafted and that it would not consider any additional materials. (1 JA140.) Under NRS 453A.322, "[e]ach medical marijuana establishment must register with the Division. 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 (1) and (2). NAC

[3] *See Falcke v. Douglas Cty.*, 116 Nev. 583, 588, 3 P.3d 661, 664 (2000) ("Because counties obtain their authority from the legislature, county ordinances are subordinate to statutes if the two conflict.") (citation omitted).

453A.306 is entitled **Applications to operate establishment; Required provisions**. It states that the applicant must pay a one-time nonrefundable $5,000.00 application fee and fill out an application on a form prescribed by the Division pursuant to Subsection II of NRS 453A.322, and then lists approximately 50 things required in the application.

Desert Aire submitted its application prior to the August 14, 2014 deadline. Desert Aire used the State's required form and submitted an application with each and every piece of required information, which again mirrored the requirements set forth in NAC 453A.306. Upon receipt of the medical marijuana applications on August 14, 2014, the State began the process of ranking the applicants in order. (3 JA622 (State's Response to GB Science's Motion for Summary Judgment).) The State did this without any consideration for whether the applicants had received local government approval. (3 JA623.)[4]

C. Desert Aire is Awarded a Provisional Registration Certificate by the Division and Obtains a Special Use Permit from the City.

Desert Aire was ranked within the top twelve applicants for those seeking a license in the City of Las Vegas, which had only 12 licenses available for

[4] In its Response to GB Sciences' Motion for Summary Judgment, the State acknowledged that it "does not dispute that they did not make any changes based on the notification by the City of Las Vegas after the applications had been submitted and issued registrations to applicants who had been scored and ranked as the top twelve for the City of Las Vegas by the Division without consideration of local zoning approval." *Id.*

dispensaries. (3 JA622 (noting that Desert Aire was ranked tenth).) It received a letter from the State so stating on November 3, 2014. (2 JA240-41.) Thereafter, in December 2014, Desert Aire received a City of Las Vegas SUP approval (2 JA249-50), spent over a million dollars building out its facility, spent hundreds of hours getting the facility ready to open for business, marketed the facility, and opened for business at the beginning of 2016. (4 JA 891-92.)

At the time of the August 14, 2014 deadline, the City of Las Vegas had not issued any of its own medical marijuana Special Use Permits ("SUPs"). Instead, on October 30, 2014, the City of Las Vegas issued a list of its preferred applicants for medical marijuana facilities. (1 JA190-95.) The City of Las Vegas then issued SUPs to businesses, including Desert Aire Wellness. (2 JA249-50 (December 22, 2014 SUP approval letter).)

D. GB Sciences' Failed Application and Its Litigation Campaign.

GB Sciences apparently submitted its own application to the State prior to the August 14, 2014 deadline. (3 JA621.) That application could not have contained any proof that it had obtained local government approval from the City of Las Vegas either because (a) there was no section on the State's form allowing such information to be provided and again, the applicants had to submit their application on the State required form and not provide any additional information; and (b) because the City had not issued any SUP approvals or zoning letters. GB Sciences was not ranked

within the top twelve and thus did not get to open a medical marijuana facility. (3 JA621 (noting that GB Sciences was initially ranked thirteenth in the State application process); *see also* 3 JA591 (November 3, 2014 disapproval letter).)

GB Sciences then filed a lawsuit against multiple defendants at the end of 2014 alleging that it should somehow be moved up on the list because of supposed technicality under the law. (1 JA252-80.) Specifically, GB Sciences asserted that applicants above it—including Desert Aire—did not submit with their application information GB Sciences believed was required under NRS 453A.322. (*See generally id.*)

NRS 453A.322 states that the Division "shall" give any applicant a registration certificate and a random 20 digit alpha numeric identification number if the person submitted an application containing numerous items set forth in the statute's subsections. NRS 453A.322(3). One of those subsections—NRS 453A.322(3)(a)(5)—requires an applicant to submit proof of licensure from the applicable local governmental authority or a letter from the applicable local governmental authority certifying that the proposed medical marijuana establishment was in compliance with any specific medical marijuana zoning restrictions for that local government. NRS 453A.322(3)(a)(5).

It would have been impossible for any applicant to have submitted such information because, as discussed above, the City of Las Vegas had not issued any

licenses to any entity at that time nor had it issued any letters certifying the proposed medical marijuana establishment was in compliance with the City of Las Vegas medical marijuana zoning restrictions. Indeed, the City of Las Vegas relied upon each of the applicants to prove that their proposed facility met the City of Las Vegas medical marijuana zoning restrictions in the form of a letter from a licensed surveyor. (4 JA 830 (City of Las Vegas Department of Planning SUP Submittal Requirements).) Moreover, the City of Las Vegas medical marijuana zoning restrictions were no different than the State's restrictions. *Compare* Las Vegas, Nevada Municipal Code § 19.12, p. 356 *and* NRS 453A.322(3)(a)(2)(II). Thus, the subsection is really not applicable, as the State required every applicant to show its facility was 1,000 feet from any school and at least 300 feet from any community facility. NRS 453A.322(3)(a)(2)(II).

As discussed above, Desert Aire submitted that proof in the manner required by the City. Specifically, Desert Aire submitted a letter from licensed land surveyors Baughman and Turner, Inc., stating as follows:

> (1) There are no churches, teenage dance halls, parks or playgrounds, public libraries, daycare facilities or any other facility that would meet the definition of a "community facility" as defined by NRS 453 A.322 located within a 300 foot radius of the proposed establishment.
>
> (2) There are no schools, public and/or private that provide formal education associated with pre-school through grade 12 within a 1,000 foot radius of the proposed establishment.

(4 JA811.)

Simply put, when it enacting these new laws involving medical marijuana, the Nevada legislature did not contemplate the potential conflicts between state and local laws and regulations. This included the potential that the State would issue its licenses prior to any local jurisdictions. As a result, chaos ensued. GB Sciences then took advantage of this chaos by trying to use this unforeseen technicality against Desert Aire.

First, it filed the aforementioned lawsuit in November, 2014. (2 JA252-80.) GB Sciences then dismissed Desert Aire from that lawsuit in April of 2015. (2 JA292-93 (Notice of Voluntary Dismissal).) For the next nine months, Desert Aire spent millions of dollars to build out its facility and spent hundreds of hours in order to get ready for the 2016 opening of its facility. Then, for some reason GB Sciences filed a second suit against Desert Aire in November of 2015. (1 JA01-14.)

III. ARGUMENT

Although the district court granted GB Sciences summary judgment in the proceedings below, Desert Aire asserts it is entitled to summary judgment for the numerous reason cited in this brief, any one of which would be sufficient to overturn the district court's decision.

A. Desert Aire Substantially Complied With the Requirements of NRS 453A.322.

This Court has repeatedly stated courts should not technically enforce statutes where there has been substantial compliance. *See, e.g., Leven v. Frey*, 123 Nev. 399,

407, 168 P.3d 712, 717 (2007) ("Substantial compliance may be sufficient to avoid harsh, unfair or absurd consequences.") (quotation omitted). This is particularly true where policy and equity principals dictate allowing substantial compliance. At a minimum, Desert Aire substantially complied with the State's medical marijuana application requirements, including those enumerated in NRS 453A.322. The statute mandates that, "a person who wishes to operate a medical marijuana establishment must submit to the division an application on a form prescribed by the division." It is undisputed that Desert Aire submitted an application on the form prescribed by the Division, and submitted the required information on that form. Desert Aire therefore substantially complied with NRS 453A.322.

In *Markowitz v. Saxon Special Servicing*¸ 129 Nev. Adv. Op. 69, 310 P.3d 569 (2013), this Court held that despite the fact that a statute required a bank to come to a foreclosure mediation with an appraisal no more than 60 days old, the bank should not have lost the case merely because its appraisal was 83 days old. The *Markowitz* Court held a court should consider policy and equity principles along with the language of the statute as a whole to determine whether it should allow technical deviation from form requirements of a statute. *Id.* at 571.

Similarly, in *Schleining v. Cap One, Inc.* 130 Nev. Adv. Op. 36, 326 P.3d 4 (2014), this Court noted that where the purpose of the statute has been met by the person, allowing substantial compliance is proper. *Id.* at 30 Nev. Adv. Op. 36, 326

P.3d 4, 8; *see also Nevada Equities v. Willard Pease Drilling Co.*, 84 Nev. 300, 303, 440 P.2d 122, 123 (1968) ("[T]he claimant substantially complied with the licensing scheme under both chapters. It is not suggested that Willard Pease Drilling Co. was wanting in experience, financial responsibility, or indeed, in any particular detriment to the safety and protection of the public. It had passed the scrutiny of the Contractors' Board in these respects and was issued a license. We shall not condone a forfeiture in the absence of any ascertainable public policy requiring us to do so.") *Id.* Here, as in the cases cited above, when taking into account the purpose of the statute, the policy of the statute and equity principals dictate that Desert Aire should prevail. Otherwise it would suffer forfeiture.

In this case, Desert Aire filed its application on the State required form and included every piece of information required on that form. The application requirements, format and content state as follows:

> 5.1.7. For ease of evaluation, the application must be presented in a format that corresponds to and references sections outlined within this submission requirements section and must be presented in the same order.

(1 JA140.)

Thus, not only did the statute require that the application must be on the State application form, the form further required that all the information applicants submitted in the application form had to correspond to certain tabs. The only tab on the form dealing with local approvals was section 5.2.13, which required a

professionally prepared survey demonstrating the applicant has satisfied all the requirements of NRS 453A.322 (3)(a)(2)(II). (1 JA145.) Those requirements are virtually the same as these covered by the subsection cited by Desert Aire herein, as the zoning requirements for the City of Las Vegas (1,000 feet from schools and 300 feet from community centers) were the exact same as the State's requirement.

Desert Aire provided all the information requested on the State form. The State form specifically stated that any additional information should not be included since it would not be reviewed or evaluated. (1 JA140.) Nevertheless, GB Sciences alleges that Desert Aire should have provided some additional information that was not on the State's prescribed form pursuant to NRS 453A.322 (3)(a)(5). Specifically, GB Sciences asserts Desert Aire should have submitted proof that its medical marijuana facility complied with the City of Las Vegas' medical marijuana zoning restrictions. (*See generally* 1 JA01-14.)

This argument fails. NRS 453A.322(3)(a)(5) does not require Desert Aire or any applicant to provide proof of licensure by the City. Instead, the statute only requires an applicant to prove that it meets the local jurisdiction's medical marijuana zoning restrictions through proof of licensure from the City of Las Vegas or a zoning letter from the City of Las Vegas showing the applicant's facility met the local governments medical marijuana specific zoning restrictions. Thus, the purpose of the statute was not to require proof that the applicant had already been awarded a

license by the City of Las Vegas. Instead, the purpose of the subsection was merely to require the applicant to provide evidence that its facility met the zoning restrictions for medical marijuana facilities under the local government's medical marijuana specific zoning restrictions.

NRS 453A.322(3)(a)(5) states that if the city, town or county has enacted marijuana establishment zoning restrictions, then the applicant must either provide proof of licensure from the local government authority or "a letter from the applicable local governmental authority certifying that the proposed medical marijuana establishment is in compliance with those restrictions." *Id.*

It is undisputed that Desert Aire's facility met the City of Las Vegas' medical marijuana zoning restrictions. Thus, although it did not provide a letter from the City of Las Vegas stating that its facility met the City of Las Vegas' zoning restrictions or a license indicating its facility met the City of Las Vegas medical marijuana zoning restrictions, Desert Aire did in fact meet the medical marijuana zoning restrictions for the City of Las Vegas. (3 JA578-80.)

Thus, as in *Nevada Equities v. Willard Pease Drilling Co.*, the safety and protection of the public is not at issue since Desert Aire met all the zoning requirements. Also, as in the cases cited above, Desert Aire would suffer incredibly if the decision were not reversed. Thus, equity and the law cited above clearly favor the Court following the substantial compliance rule. Accordingly, this Court should

not condone a forfeiture of Desert Aire's registration certificate.

B. Because the Language of NRS 453A.322 is Ambiguous, This Court Should Not Require Strict Compliance.

Further supporting this conclusion is the fact that the statute in question is ambiguous because it required Desert Aire to submit its application on the form prescribed by the Division, but the form did not include a requirement that applicants submit the information GB Sciences alleges was required under NRS 453A.322 (3)(a)(5).

According to a literal reading of NRS 453A.322(3)(a)(5), each applicant would have had to submit, *at the time of initial application,* not only proof of licensure from the City of Las Vegas or a letter from the City of Las Vegas certifying that the proposed medical marijuana establishment was in compliance with the City of Las Vegas' zoning restrictions, but also proof that it satisfied all applicable building requirements. This would have been impossible for any applicant to achieve. First, at the time the applications were submitted no entity had received a license from the City of Las Vegas. Second, the City of Las Vegas did not issue any letters certifying the proposed medical marijuana establishments were in compliance with the zoning restrictions but instead required the applicant to obtain a letter from a licensed surveyor stating the requirements were met. Desert Aire submitted such a letter. (4 JA811.)

The State accepted Desert Aire's application, and never indicated that its

application had been denied or was missing any information. Indeed, if the State Division did not approve the application it had an affirmative duty to inform Desert Aire its application had not been approved. NAC 453A322 (4). No disapproval letter was ever sent. Instead, the State approved the application. (2 JA240-41.) Thereafter, Desert Aire received preliminary approval from the City of Las Vegas (2 JA249-50), and began to take all the steps necessary to open its facility.

Thus, the facts are that the Desert Aire submitted a lengthy application containing an exhaustive list of information on the form prescribed by the State as required by the statute in question and a corresponding Nevada Administrative Code section. GB Sciences' argument is that even though Desert Aire complied with submitting the fifty or so items on the application, it missed one which was not even on the State required form but instead was included in the subsection of a statute—a subsection that could not have been complied with. Even if this were true, Desert Aire substantially complied with statute and its companion administrative code sections under the Supreme Court case authority cited above.

C. The Doctrine of Equitable Estoppel Requires Reversal of the District Court's Decision.

This Court has held that courts have a duty to construe statutes as a whole so that all provisions are considered together and, to the extent practicable reconciled and harmonized. *See, e.g., Southern Nev. Homebuilders v. Clark County*, 121 Nev.

446, 449, 117 P.3d 171, 173 (2005). In interpreting statutes, this Court considers the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result. *Smith v. Kisorin USA, Inc.*, 127 Nev. Adv. Op. 37, 254 P.3d 636, (2011). Similarly, the Court has held that "whenever the interpretation of a statute or constitution in a certain way will result in manifest injustice, or public inconvenience, courts will always scrutinize the statute or constitution closely to see if it will not admit some other interpretation." *State ex. Rel. McMillian v. Sadler*, 25 Nev. 131, 58 P.2d 84 (1899). The Court has further held that it is not for the court to step into the shoes of the state and make decisions for them. *North Lake Tahoe Fire Protection District v. Washoe County Board of County Commissioners*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 585-587 2013.[5]

Here, there is nothing in the statute in question that states that the State could not issue a registration certificate if the application did not include proof of licensure from the City of Las Vegas. The statute in question merely states that if an application included certain things the division "shall issue the registration certificate and give the applicant a random 20 digit alpha numeric identification number." NRS 453A.322(3). The only requirements regarding the application were that the applicant submit its application on the form prescribed by the division under NRS 453A.322. That application form mirrored NAC 453A.306, which specifically

[5] None of these cases were cited in the opposition by prior counsel.

enumerates what is required in a medical marijuana application. Desert Aire not only submitted the application on the form prescribed by the division, but also included all of the information required under NAC 453A.306.

Under NRS 453A.326, the State could not issue the final medical marijuana approval until the proof of conformance with local zoning requirements and the business license was obtained by the applicant. Desert Aire accomplished these things.

Thus, the State interpreted the statute as requiring the application to include the things contained in NAC 453A.306 in order for the applicant to receive a provisional certificate, and then required the proof of zoning and business license from the City of Las Vegas before issuing the final approval under NRS 453A.326. (*See generally* 4 JA825-28 (State Response to Motion for Preliminary Injunction filed in Eighth Judicial District Court Case No. A-14-710488-C and attached as Exhibit 7 to Desert Aire's Motion for Reconsideration).) There is nothing wrong with this interpretation. There is no provision in NRS 453A.322 that prohibits the State from issuing a registration certificate if the applicant does not provide proof of licensure.

As discussed above, the statute is ambiguous since it states that the applicant must submit its application on the State prescribed form and that form does not include the information contained in NRS 453A.322(3)(a)(5). Indeed, the

application states no other information can be provided or at least that it will not be considered. Similarly, as outlined above the alleged information required could not have been submitted since it was not available.

Accordingly, based on the above case law the Court should find that in interpreting the statute it is unclear or ambiguous as to when proof of City of Las Vegas licensure was required. Therefore, when taking into account the equities, to avoid a manifest injustice or an absurd result Desert Aire believes the Court should find that the way the State interpreted the statute is correct.

This is especially true since no one could have complied with the statute. When interpreting the statute the courts have to be practical. It is not practical to revoke a person's license in 2016 after the State granted that license in 2014 based on an application submitted on the State required form that included all the items requested on that form. It is not practical to interpret a statute as requiring the applicant to include things in an application which were impossible to include because when the legislature enacted the statute it did not consider the possibility that the State would issue its licenses prior to local jurisdictions.

Here, the Court should find that since the statute is ambiguous (it states that the application must be on the form prescribed by the State which form did not include the information and does not specifically state that the information is required but merely states that the division shall issue a registration certificate if

certain information is submitted), was impossible to comply with and would lead to an absurd result and a manifest injustice if strictly interpreted the way GB Sciences asserts. Additionally, this Court should find that allowing proof of the local government medical marijuana specific zoning compliance through means other than the two specifically set forth in the statute (which were not available to any applicant) was sufficient.

D. GB Sciences Is Estopped From Bringing Suit.

In *Nevada Pub. Employees Retirement Board v. Byrne*, 96 Nev. 276, 607 P.2d 1351 (1950), the Court held that equitable estoppel prevented a government entity from denying benefits as a result of a technical violation of a statute stating:

> 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 inherent power to seek or do equity.

Id. at 280. Here, it would be unjust to take back Desert Aire's license after its three members spent three years of their life without pay, spent millions of dollars, went through an arduous licensing and building inspection process, marketed and then opened the facility, and built up a large patient base who have come to rely upon the facility for their medical marijuana needs all because of the State's actions. To prevent this the Court should use its inherent power to seek or do equity by applying equitable estoppel.

This was the decision reached in *Southern Nevada Memorial Hospital v. The*

Department of Human Resources, 101 Nev. 387, 705 P.2d 139 (1985). In that case, the Department of Human Resources issued a license to the appellant, but upon appeal from another applicant the Department changed its decision and attempted to rescind the appellant's license. *Id.* at 101 Nev. 387, 388, 705 P.2d 139, 140. Although the applicant obviously understood its license could get overturned on the appeal, the Nevada Supreme Court still found equitable estoppel against the government was necessary to avoid manifest injustice and hardship. *Id.* at 391; *see also id.* at 390 ("The doctrine of equitable estoppel is properly applicable in a case such as this, otherwise the whim of an administrative body could bankrupt an applicant who acted in good faith in reliance upon a solemn written commitment.") (quoting *State v. Sponburgh*, 66 Wash.2d 135, 401 P.2d 635, 640 (1965)). The Court stated that "rooted in concepts of justice and right is the idea that the sovereign is responsible and a citizen has a legitimate expectation that the government should deal fairly with him or her." *Id.* at 101 Nev. 390, 705 P.2d 139, 141 (quoting *Byrne*, 96 Nev. at 280, 607 P.2d 1351). Here, Desert Aire had a legitimate expectation that, because it submitted everything required in its application for a registration certificate and was ranked among the top twelve Las Vegas applicants, the State would issue it a registration certificate.

GB Sciences asserted in the proceedings below that equitable estoppel should not be applied because Desert Aire was on notice that its application was deficient.

(5 JA 874 (Opposition to Motion for Reconsideration).) This could not have been further from the truth. Under NAC 453A.322, if Desert Aire's application was rejected by the State the State had an affirmative obligation to advise Desert Aire of this fact. NAC 453A.322 states as follows: "if the division denies an application for...a medical marijuana registration certificate…, the division must provide notice to the applicant or medical marijuana establishment that includes, without limitation, the specific reasons for the denial…."

The State never informed Desert Aire that its application was rejected. To the contrary, the State informed the Desert Aire that its application had been approved—first provisionally and then finally. Moreover, to say Desert Aire knew that its application was deficient is ridiculous since the statute in question states that the application had to be on the State's prescribed form, and Desert Aire filled out its application based on that form. Further, the application stated no other information would be considered other than what was on the form. Additionally, the information could not have been included in the application since it was not available. In addition, GB Sciences dropped its original lawsuit against Desert Aire. (2 JA292-93.)

In summary, there cannot be a case where equitable estoppel is more appropriate. The State prescribed the form on which the application was to be made. The statute stated that the application had to be on that form. Desert Aire complied

with that direction. The State never rejected the application as required by law if it were to be rejected. This all occurred in 2014.

Between 2014 and 2016, Desert Aire spent all of its time, energy and money building a facility, opening the facility, spent significant monies on marketing and advertising, and has built up a significant patient base. and now for the State to revoke that license would be patently unfair. Equitable estoppel and the above citations from the Nevada Supreme Court clearly prevent this action.

E. Laches Also Warrants Reversal.

As pointed out in one of the State's briefs in the proceedings before the District Court below, GB Sciences' own actions warrant a reversal to the decision on estoppel grounds. As the State explained in response to Desert's Aire's Motion for Reconsideration:

> The Second issue of "timing" is whether the challenge brought by GB Sciences to Desert Aire Wellness in this case is timely. Certainly the initial action in case number A-14-710597 filed on December 5, 2014, in Department 20 was timely because it was filed within 30 days of the notice of the registrations and before any medical marijuana establishment was operating. However, on April 1, 2015, GB Sciences chose to dismiss Desert Aire Wellness from the litigation without prejudice and then filed a motion for summary judgment against the other Appellant Nuleaf on September 18, 2015. The motion for summary judgment was granted but the dispensary was awarded to another intervening party. GB Sciences then sought to bring Desert Aire Wellness back into the litigation in a motion filed November 16, 2015, but the Court denied that request. See, Exhibit 1 for Order Denying Appellant's Motion for Leave to Amend. Therefore, GB Sciences filed our present case against Desert Aire Wellness on December 2, 2015, which is a year after the initial challenge was brought and apparently after Desert Aire Wellness had taken the necessary steps to open the dispensary.

(4 JA840 (State Response to Motion for Reconsideration).)

GB Sciences has stated that Desert Aire should not prevail in its estoppel argument, as Desert Aire's expenditures of money during the eight-month timeframe between when GB Sciences dismissed its first suit against Desert Aire and then reinitiated its action was done at Desert Aire's own risk since the dismissal was without prejudice. (2 JA292-93.) This is disingenuous. Certainly the Desert Aire or any other applicant in that position would have moved forward after being dismissed from the lawsuit by GB Sciences and the State not taking any action against the Desert Aire. It was during those eight months that Desert Aire incurred the bulk of its costs. Thus, that eight-month period was crucial, and it was GB Sciences that took the risk when it dismissed Desert Aire because it knew that Desert Aire would rely upon that dismissal to incur those expenses. Accordingly, this provides another reason why the district court's order should be reversed.

The case of *Carson City vs. Price*, 113 Nev. 409, 934 P3d 1042 (1997), supports a reversal on laches grounds. The State accepted Desert Aire's application and did not provide notice that the application was deficient as the Nevada Administrative Code required. The State then provided Desert Aire with a provisional certificate. When the State did this they clearly knew that the Desert Aire would move forward and expend significant sums based on that issuance.

For the State to be able to now come in two years later and assert that it made a mistake in issuing a certificate to Desert Aire would be exceptionally inequitable.

As this Court explained in *Price*:

> Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992). "Thus, laches is more than a mere delay in seeking to enforce one's rights; it is a delay that works to the disadvantage of another." *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). "The condition of the party asserting laches must become so c hanged that the party cannot be restored to its former states.

Id., at 412-13.

Similarly, GB Sciences' decision to wait a year to file its lawsuit—during which time Desert Aire took the above actions—warrants a laches finding.

F. The District Court Misapprehended the Statutory Scheme and Erroneously Substituted the State's Judgment With Its Own.

Nev. Rev. Stat. § 453A.322 does not state that the State cannot issue a provisional registration certificate if the applicant does not provide proof of licensure from the local government. Rather, NRS 453A.322 states that if an application includes certain things, the division "shall issue to the establishment a medical marijuana establishment registration certificate." NRS 453A.322(5). The only statutory requirements regarding the application were that the applicant submit the application on the form prescribed by the division under NRS 453A.322. The application form issued by the Division mirrored the requirements NAC 453A.306. Desert Aire not only submitted the application on the form prescribed by the division, but also included all of the information required.

Pursuant to NRS 453A.326, the State could not issue the final registration

certificate until the proof of conformance with local zoning requirements and the business license was obtained by the applicant. Reflecting that GB Sciences' case at best relies on a technicality, Desert Aire has since been issued a special use permit and a business license from the city of Las Vegas. (*See* 2 JA249-50; *see also* 2 JA 297 (Agenda Summary of January 6, 2016 Las Vegas City Council Meeting approving license for Desert Aire).) Thus, the Division interpreted the statute as requiring the application to include the items set forth in NAC 453A.306 in order for the applicant to receive a provisional certificate, and then the proof of zoning and business license from the City of Las Vegas before issuing the final approval under NRS 453A.326. (*See* 4 JA827 (State's Response to Motion for Preliminary Injunction in Eighth Judicial District Court Case No. A-14-710488-C).)

There is nothing wrong with this interpretation, and the district court should have deferred to it. This Court has explained that the judicial branch should refrain from stepping into the shoes of the State and making decisions for it. *North Lake Tahoe Fire Protection District v. Washoe County Board of County Commissioners*, 129 Nev. Adv. Op. 72, 310 P.3d 583, 585-587 (2013). Indeed, the district court failed to consider that the Division has considerable discretion to interpret and implement the statutes governing the issuance of registration certificates. *See Int'l Game. Tech., Inc. v. Second Jud. Dist. Court of Nevada*, 122 Nev. 123, 157, 127 P.3d 1088, 1106 (2006); *see also Boulder City v. Cinnamon Hills Assocs.*, 110 Nev. 238, 247, 871

P.2d 320, 326 (1989) (city's interpretation of its own laws is "cloaked with a presumption of validity"). Because agencies such as the Division have discretion to construe the laws under which they operate, courts "are obliged to attach substantial weight to the agency's interpretation." *Folio v. Briggs*, 99 Nev. 30, 33, 656 P.2d 842, 844 (1983).

Moreover, given that the statutory scheme at issue here is so new, the Division's discretion in interpreting and implementing the scheme is at its apex. Courts have recognized that deference to an agency is "heightened where . . . the regulations at issue represent the agency's initial attempt at interpreting and implementing a new regulatory concept." *Texaco, Inc. v. Dep't of Energy*, 663 F.2d 158, 165 (D.C. Cir. 1980) (quotation and parentheticals omitted). This is so because administrative agencies like the Division are often presented with statutory schemes that contain gaps or contradictions. Thus, administrative agencies are vested with the authority to fill the gaps and reconcile statutory contradictions consistent with the power vested in them by the legislature to best carry out the statutory purpose. *See Atwell v. Merritt Sys. Prot. Bd.*, 670 F.2d 272, 282 (D.C. Cir. 1981) (an agency is empowered to reconcile arguably conflicting statutory provisions, and the court's role is limited to ensuring that the agency effectuated an appropriate harmonization within the bounds of its discretion). Here, the statutory purpose the Division is tasked with carrying out is making sure the most qualified applicants are the ones authorized to

dispense medical marijuana to licensed patients.

Particularly in light of the case law regarding deference to agencies, and in light of the standing issues discussed below, the extreme relief issued by the district court was improper. Mandatory injunctions are generally issued "to restore the status quo, to undo wrongful conditions." *Leonard v. Stoebling*, 102 Nev. 543, 550-51, 728 P.2d 1358, 1363 (1986). Here, however, the district court's issuance of a mandatory injunction does not maintain the status quo. Rather, it undermines the Division's interpretation and implement of the statutory scheme. This was error, as a court cannot exercise its equitable powers in conflict with a statute. *See Blaine Equip. Co. v. State*, 122 Nev. 860, 866, 138 P.3d 820, 823 (2006) ("On remand, the district court may not rely on its equitable power to disregard the mandatory language of NRS 333.810(1)."); *see also State, Victims of Crime Fund v. Barry*, 106 Nev. 291, 292-93, 792 P.2d 26, 27-28 (1990) (a court cannot "grant a remedy which contradicts the statute").

In addition, allowing the City's initial list of preferred medical marijuana facility applicants to dictate to whom the Division should award registration certificates would turn Nevada's comprehensive medical marijuana statutory scheme on its head, and would also violate the doctrine of preemption. As this Court explained in *Lamb v. Mirin*, 90 Nev. 329, 332, 526 P.2d 80, 82 (1974), when a legislature adopts a "general scheme for the regulation of a particular subject, local

control over the same subject . . . ceases." *Accord State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 773, 32 P.3d 1632, 1276 (2001). As discussed above, the Nevada legislature adopted a comprehensive statutory scheme to register and regulate medical marijuana establishments. Thus, the fact that the City of Las Vegas sent a list to the State of its preferred establishments after the Division had already reviewed and ranked applicants cannot trump the Division's determination about which applicants should receive registration certificates.

G. GB Sciences Lacks Standing.

As if all of the above was not sufficient to merit reversal of the district court's decisions, GB Sciences also lacks standing to bring the action. This is because it did not submit any proof that the City of Las Vegas had issued it a medical marijuana license or a zoning letter showing its facility met the City of Las Vegas medical marijuana specific zoning restrictions.

GB Sciences asserts that because the City sent a letter on October 30, 2014 to the State advising the State of who received SUP approval it somehow complied with NRS 453A.322(3)(a)(5). (5 JA 873 (Opposition to Motion for Reconsideration).) That is not true.

The deadline for submission of applications was August 14, 2014. Neither the statute nor the State's rules allowed for any supplements or amendments to the application. The only exception was if the division received any findings from

a report concerning the criminal history of an applicant or a person who is proposed to be an owner, officer or board member of a proposed medical marijuana establishment that disqualify that person from being qualified to serve in that capacity. In that case, the Division would provide notice to the applicant and give the applicant an opportunity to revise its application *i.e.*, to remove that person. That is the only exception allowing an applicant an opportunity to revise its application. Indeed, since the rules specifically reference the one rule regarding when an application may be revised, no other revisions can be allowed under the old maxim *expressio unius est exclusio alterius* (the expression of one thing in a portion of a statute, rule or contract excludes the same in others). Thus, if there was a requirement that an applicant provide either a license or proof from the City of Las Vegas that the applicant met all of the City of Las Vegas' medical marijuana zoning restrictions, it was due at the time of the application.

Accordingly, if the Court were to construe the statute as requiring proof of licensure it would lead to an absurd result—*i.e.*, all applications being revoked since no one submitted proof of licensure at the time of their application.

Again, there is no language in NRS 453A.322(3)(a)(5) that requires zoning approval to be obtained within the 90 days of the application submittal due date. The statute states that the person must submit the application and a companion code section states that the application must be filed by a deadline. There is nothing in the

statute or any of the code sections which states that the proof of licensure or zoning approval letter could be submitted at a later time. To the contrary the statute's language makes it clear that if the letter was required it had to be submitted with the application by the deadline. Otherwise why have a deadline. That deadline was August 14th and no one submitted that information with their application including the Respondent. Further, no one ever supplemented their application with license approval.

It is true the City of Las Vegas sent a letter to the State on October 30, 2014 (October 31, 2014 was a holiday, and the next two days were a weekend. Thus, the State's provisional certificates had clearly been determined well before this timeframe). However, that is not the equivalent of the applicant submitting proof with its application. Indeed, neither GB Sciences nor any other applicant ever submitted any proof with their application. Instead, the City submitted a letter to the State stating who had been granted City licenses in the first go around. Thus, no one complied with the statute if it was required.

As a result, GB Sciences lacks standing to bring this action.

IV. CONCLUSION

Based upon the above and foregoing, Desert Aire asks that the Court issue an order reversing the lower Court decision and grant Desert Aire summary judgment on one or more of the following grounds:

1. Desert Aire's having completed an application on the State's required form as required substantially complied with the statue in question. This is especially true since the one piece of information which was not provided (out of approximately 50 pieces of information) was unclear, impossible to comply with and whose purpose of which was in actuality met by the Desert Aire'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 (Desert Aire has shown it would suffer significant injustice if the substantial compliance doctrine were not applied) the Court finds substantial compliance is appropriate.

2. The statute is, at best, ambiguous because 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 Desert Aire's act of providing the letter from a licensed surveyor showing its facility met the City of Las Vegas specific medical marijuana zoning restrictions adequately complied with the statute especially since no other proof was available at the time.

3. A ruling from this Court in favor of Desert Aire based on Supreme Court precedent holding that a court should construe statutes in a way as to avoid an absurd result.

4. A finding that equitable estoppel requires reversal of the district court's order and a grant of summary judgment in favor of Desert Aire for two reasons. First, it would be grossly unfair to revoke a party's license under the facts set forth in this case including the substantial reliance by Desert Aire and blatant errors of the State. Second, 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 license. Desert Aire 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, the doctrine of equitable estoppel mandates that Desert Aire's registration certificate cannot be pulled at this time. Similarly, GB Sciences' actions in dismissing Desert Aire from a lawsuit and then bringing a new suit seven months later—during which time Desert Aire relied upon the dismissal to spend significant sums of money—warrants equitable estoppel.

5. Pursuant to *Carson City vs. Price*, the doctrine of laches requires reversal of the district court's order granting summary judgment to GB Sciences.

6. A finding that the district court erred by failing to defer to the Division's interpretation and implementation of NRS Chapter 453A and NAC Chapter 453A.

7. GB Sciences lacks standing to bring suit against Desert Aire.

Neither the statute nor the State's rules allowed for supplementation of GB Sciences' application. Indeed, GB Sciences never even supplemented its own application. Therefore, the State sending a letter (well after the fact and after the State made its decision on who to give the provisional licenses to) did not equate to complying with the statute if the information was required as alleged by GB Sciences.

DATED this 12th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Nev. R. App. P. 28.2:

I hereby certify that this brief 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 Opening Brief has been prepared in a proportionally spaced typeface (14 point Times New Roman font).

I further certify that this Opening Brief complies with the type-volume limitation of Nev. R. App. P. 32(a)(7)(A)(ii) because it contains 10,139 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 Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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 12th day of December, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANT'S OPENING BRIEF was filed electronically with the Nevada Supreme Court on the 12th day of December, 2016. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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