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.

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

Cross-Appellant,

vs.

THE STATE OF NEVADA DEPT. OF HEALTH AND HUMAN SERVICES, DIV. OF PUBLIC AND BEHAVIORAL HEALTH; DESERT AIRE WELLNESS, LLC, a Nevada limited liability company,

Cross-Respondents.

Supreme Court No. 70462

District Court Case No. A728448

RESPONDENT/CROSS-APPELLANT GB SCIENCES NEVADA, LLC'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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On Appeal from Judgment Granted by the Eighth Judicial District Court of the State of Nevada, in and for Clark County
Case No. A728448

James E. Shapiro, Esq.
Nevada Bar No: 7907
Sheldon A. Herbert, Esq.
Nevada Bar No: 5988
SMITH & SHAPIRO, PLLC
2520 St. Rose Pkwy, Suite 220
Henderson, NV 89074
(702) 318-5033
Attorneys for Respondent/Cross-Appellant, GB SCIENCES NEVADA, LLC

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. GroBlox Sciences, Inc.
2. Smith & Shapiro, PLLC
3. Moran Brandon Bendavid Moran

Dated this 25th day of January, 2017.

SMITH & SHAPIRO, PLLC

/s/ James E. Shapiro, Esq.
James E. Shapiro, Esq.
Nevada Bar No: 7907
Sheldon A. Herbert, Esq.
Nevada Bar No: 5988
2520 St. Rose Pkwy, Suite 220
Henderson, NV 89074
Attorneys for Respondent/Cross-Appellant, GB SCIENCES NEVADA, LLC

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I.

JURISDICTIONAL STATEMENT FOR CROSS-APPEAL

Cross-Appellant GB Sciences Nevada, LLC ("***GB Sciences***") cross-appeals the March 15, 2016 Minute Order and April 28, 2016 Order, which partly denied GB Science's request for a mandatory injunction against Respondent State of Nevada Department of Health and Human Services, Division of Public and Behavioral Health (the "***Division***") to reissue a medical marijuana establishment provisional registration certificate to GB Sciences, which had been revoked from Appellant/Cross-Respondent Desert Aire Wellness, LLC ("***Desert Aire***"). (Joint Appendix Volume IV: JA749 and JA846-55) The underlying matter became final upon the entry of the April 28, 2016 Order. Notice of Entry of Order for the April 28, 2016 Order was served on April 28, 2016. (App. Vol. IV: JA846-55) This Court has jurisdiction to hear this Cross-Appeal in accordance with NRAP 3A(b)(1). On June 8, 2016, the District Court denied a motion for reconsideration filed by Desert Aire. (App. Vol. V: JA995-99)

The Order also constituted a denial of a mandatory injunction against the Division to issue the revoked certificate to GB Sciences. (App. Vol. IV: JA846-55) Thus, this Court also has jurisdiction to hear this Cross-Appeal in accordance with NRAP 3A(b)(3).

II.

ROUTING STATEMENT FOR CROSS-APPEAL

This case is presumptively retained by the Supreme Court because it: (1) arises from the District Court's interpretations of NRS Chapter 453A and NAC 453A (NRAP 17(a)(8)); (2) raises questions of first impression involving Nevada law (NRAP 17(a)(13)); and (3) involves medical marijuana establishments which are of public importance (NRAP 17(a)(14)). This case is not presumptively assigned to the Court of Appeals under NRAP 17(b).

III.

ISSUES PRESENTED FOR REVIEW

A. DESERT AIRE'S APPEAL:

In Desert Aire's Opening Brief, Desert Aire lists seven issues on appeal. Pursuant to NRAP 28(b)(3), those issues will not be relisted here.

B. GB SCIENCES' CROSS-APPEAL:

GB Sciences agrees with the District Court's ruling as it relates to the revocation of Desert Aire's provisional registration certificate. However, GB Sciences is appealing the District Court's ruling as it relates to the District Court's refusal to award the revoked certificate to GB Sciences. The following are the issues presented for review:

1. **Award of Revoked Certificate.** Did the District Court err by not awarding the revoked Provisional Registration Certificate to GB Sciences, which was next in line to receive one?

IV.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is a case involving the State of Nevada's issuance of registration certificates to Medical Marijuana Establishments ("***MMEs***"), under Nevada Revised Statutes Chapter 453A.

B. COURSE OF PROCEEDINGS.

1. The Complaint.

On December 2, 2015, GB Sciences filed a Complaint, seeking declaratory judgment, injunctive relief, a petition for judicial review, and a petition for writ of mandamus. (App. Vol. I: JA001-14) On December 17, 2015, Desert Aire filed its Answer and Counterclaim. (App. Vol. I: JA015-21) On December 24, 2015, the Division filed its Answer. (App. Vol. I: JA024-27) On January 19, 2016, the City of Las Vegas filed its Answer. (App. Vol. I: JA028-32)

2. GB Sciences' Initial Motion for Summary Judgment and Desert Aire's Countermotion for Summary Judgment.

On January 25, 2016, GB Sciences filed a Motion for Summary Judgment (the "***Initial MSJ***"). (App. Vol. I: JA033-229) On February 8, 2016, Desert Aire filed its Opposition to the MSJ and Countermotion for Summary Judgment ("***Initial CounterMSJ***"). (App. Vol. II: JA230-99) On February 18,

2016, GB Sciences filed its Reply to the Opposition to the Initial MSJ and Opposition to the Initial CounterMSJ. (App. Vol. II: JA305-74) On February 22, 2016, Desert Aire filed its Supplement. (App. Vol. II: JA375-79)

On February 23, 2016, the District Court conducted a hearing on the Initial MSJ and CounterMSJ and denied them both, without prejudice. (App. Vol. II: JA380-81 and JA382-417)

3. GB Sciences' Second Motion for Summary Judgment and Desert Aire's Countermotion for Summary Judgment.

On February 26, 2016, GB Sciences filed its second Motion for Summary Judgment (the "***MSJ***"). (App. Vol. III: JA418-619) On March 3, 2016, the Division filed its Response. (App. Vol. III: JA620-55) On March 3, 2016, Desert Aire filed its Opposition to the MSJ and Countermotion for Summary Judgment (the "***CounterMSJ***"). (App. Vol. IV: JA656-64) On March 8, 2016, GB Sciences filed its Reply to the Division's Response. (App. Vol. IV: JA738-48) On March 8, 2016, GB Sciences also filed its Reply to the Opposition to the MSJ and Opposition to the CounterMSJ. (App. Vol. IV: JA665-737)

4. The MSJ Hearing.

On March 15, 2016, a hearing was held on the MSJ and the Counter MSJ. (App. Vol. IV: JA749 and JA750-76) At the hearing, the MSJ was granted, in part, and the provisional registration certificate (the "***PRC***") issued to Desert

Aire was revoked. However, the District Court refused to award the revoked PRC to GB Sciences. Id.

5. The District Court's MSJ Order.

On April 28, 2016, the District Court entered an Order (the "***MSJ Order***"), wherein the District Court granted the MSJ, in part, ordering the Division to revoke Desert Aire's PRC. (App. Vol. IV: JA846-55) In the MSJ Order; however, the District Court did not award the PRC to GB Sciences or any other person or entity. Id.

6. Desert Aire's Motion for Reconsideration.

Meanwhile, on April 14, 2016, Desert Aire filed a Motion for Reconsideration and Request that the Court Reverse and Grant Defendant Summary Judgment to Defendant or at a Minimum Grant a Stay Pending Appeal (the "***Motion for Reconsideration***"). (App. Vol. IV: JA781-838) On April 26, 2016, the Division filed its Response. (App. Vol. IV: JA839-45) On May 2, 2016, GB Sciences filed its Opposition to the Motion for Reconsideration. (App. Vol. V: JA856-943) On May 10, 2016, Desert Aire filed its Reply to Opposition to Motion for Reconsideration. (App. Vol. V: JA944-77)

On May 16, 2016, a hearing was conducted on the Motion for Reconsideration. (App. Vol. V: JA978) The District Court denied the Motion for

Reconsideration. Id. On June 8, 2016, an Order was entered denying the Motion for Reconsideration. (App. Vol. V: JA995-99)

C. DISPOSITION BELOW.

The disposition below has been set forth in full in the preceding two sections, III(A) and (B).

V.

STATEMENT OF FACTS

A. GENERAL BACKGROUND.

In 2013, SB 374, which was codified into NRS Chapter 453A, was passed by the Nevada State Legislature, which provided for the registration of medical marijuana establishments ("***MMEs***").

Under NRS § 453A.320 et seq., the Division, in partnership with the local jurisdiction, plays a role in the ultimate licensing of MMEs. The Division is responsible for processing and ranking applications for MMEs, focusing on public health and public safety, while the local jurisdiction maintains the right to determine issues such as site plans, zoning, safety, and proximity to schools, public facilities, or other businesses.

In relation to NRS § 453A.322, Senator Tick Segerblom called a meeting of the Advisory Commission on the Administration of Justice's Subcommittee on the Medical Use of Marijuana. (App. Vol. III: JA448-71) During that meeting,

Senator Segerblom addressed the question of what happened if one of the applicants who was highly ranked by the State failed to qualify at the local level. Id. Mr. Westom made it very clear that it was the intent of the legislature that if an application was denied at the local level, the State also denied it and would let them know "who was the next ranked entity." (App. Vol. III: JA454)

B. THE DIVISION'S APPLICATION PROCESS.

The Division issued its own application packet. (App. Vol. III: JA519-63) While the Division was allowed to *accept* all applications submitted, under NRS § 453A.322, the Division could only issue a PRC if the applicant's application included six (6) specific items and if the applicant otherwise met the other requirements established by NRS Chapter 453A.

One of the six (6) items required by law before the Division could issue a PRC is found in NRS § 453A.322(3)(a)(5), which 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 local governmental authority*** certifying that the proposed medical marijuana establishment is in compliance with those restrictions and satisfies all applicable building requirements.

NRS § 453A.322 (emphasis added). Thus, before the Division could issue a PRC, the applicant must obtain either proof of licensure or a letter from the local jurisdiction ("***Local Approval***").

C. THE CITY'S APPLICATION PROCESS.

In accordance with its own responsibilities, the City of Las Vegas (the "***City***") enacted Ordinance No. 6321 and 6324 to establish zoning regulations, licensing regulations, and standards for MME locations and issued an MME business license application form. (App. Vol. III: JA473-517) Further, the City enacted Las Vegas Municipal Code 6.95.080(D) which provided:

> Upon approval of a medical marijuana compliance permit, **the Director shall prepare a notice to the State regulating authority pursuant to NRS 453A.322.3(a)(5)**, outlining that the proposed location has been found in conformance with land use and zoning restrictions and that the applicant is eligible to be considered for a medical marijuana establishment business license....

LVMC 6.95.080(D) (emphasis added). (App. Vol. III: JA489-515) As evidenced by LVMC 6.95.080(D), the City specifically created a process to notify the Division as mandated by and in compliance with NRS § 453A.322(3)(a)(5).

D. DESERT AIRE'S APPLICATION.

Desert Aire was one of the forty-nine (49) applicants for one of the twelve (12) registration certificates allotted to the City. (App. Vol. III: JA568) Desert Aire submitted its City application but subsequently withdrew it, presumably because the Planning Commission had voted 4-1 to deny Desert Aire's application. (App. Vol. III: JA570-76) Thus, on October 28-29, 2014, the Las Vegas City Council did not issue to Desert Aire a special use or compliance

permit, because Desert Aire had withdrawn its application (Items No. 16 and 17). (App. Vol. III: JA570-76)

As mandated by LVMC 6.95.080(D) and with the specific intention of complying with NRS § 453A.322(3)(a)(5), on or about October 30, 2014, the City sent a letter to the Division notifying the Division that Desert Aire had failed to obtain Local Approval. (App. Vol. III: JA578-83) Notwithstanding the City's notification, the Division inappropriately issued a PRC to Desert Aire. (App. Vol. III: JA424)

E. GB SCIENCES' APPLICATION.

Meanwhile, unlike Desert Aire, on October 28-29, 2014, the City approved GB Sciences' applications for special use permit and compliance permit and GB Sciences was included in the City's Notice to the Division as being approved. (App. Vol. III: JA585-89)

On or about November 3, 2014, GB Sciences was notified by the Division that it was not issued a PRC because it was not ranked in the top twelve (12) by the Division. (App. Vol. III: JA591-92 and JA594-96) Rather, GB Sciences was ranked No. 13 by the Division, just one position outside the twelve (12) PRCs allocated to the City of Las Vegas. (App. Vol. III: JA592)

If the Division had complied with NRS § 453A.322(3)(a) and disqualified Desert Aire due to Desert Aire's failure to obtain the letter required by NRS §

453A.322(3)(a)(5), GB Sciences would have been ranked 12th in the Division's ranking and would, therefore, have received one of the twelve allotted PRCs. (App. Vol. III: JA591-92 and JA594-96)

F. GB SCIENCES' INITIAL LAWSUIT (THE "NULEAF CASE").

On or about December 5, 2014, GB Sciences file a Complaint with the Eighth Judicial District Court against the Division, the City, Desert Aire, and NuLeaf CLV Dispensary, LLC ("***NuLeaf***"), being Case No. A710597, Dept. XX (the "***NuLeaf Case***"). (App. Vol. I: JA252-80). In the NuLeaf Case, NuLeaf was another MME applicant that had been ranked by the Division within the top-12 candidates for one of the twelve (12) MME Dispensary PRCs allocated to the City of Las Vegas, just like Desert Aire. Id. (at ¶ 65) However, NuLeaf had failed to obtain Local Approval from the City on or before November 3, 2014. Id. (at ¶ 21 and 56) Nonetheless, the Division had issued a PRC to NuLeaf, even though NuLeaf had failed to obtain the Local Approval. Id. (¶ 65)

On or about April 1, 2015, GB Sciences voluntarily dismissed Desert Aire as a party to the NuLeaf Case, without prejudice, because GB Sciences only needed the District Court in the NuLeaf Case to revoke one PRC and award it to GB Sciences. (App. Vol. IV: JA670 and JA706-07).

Following a ruling via Minute Order on November 13, 2015, on or about December 14, 2015, the District Court in the NuLeaf Case entered an Order,

partially granting summary judgment in favor of GB Sciences after hearing the same arguments as those asserted in this case. (App. Vol. III: JA608-17) The District Court in the NuLeaf Case revoked NuLeaf's PRC. Id. The District Court in the NuLeaf Case recognized that because NuLeaf did not meet the statutory requirements as of November 3, 2014, the Division erred in issuing a PRC to NuLeaf. Id. It really did not matter why NuLeaf did not qualify, all that mattered was that as of November 3, 2014, NuLeaf did not qualify. Id.

Unfortunately for GB Sciences, through a twist of events not present here[2], the revoked PRC was awarded to an intervening applicant, Acres Medical, LLC ("***Acres***"). Id. The Division was directed to rescind the registration of NuLeaf and issue a PRC to Acres. Id.

Consequently, on or about November 16, 2015, GB Sciences filed a Motion to Amend its Complaint in the NuLeaf Case to bring Desert Aire back into the NuLeaf Case as a party defendant. (App. Vol. IV: JA709-33). On or about December 2, 2015, that Motion was denied by the District Court (and reduced to written Order entered on January 25, 2016). (App. Vol. IV: JA735-37) The District Court ruled simply that the deadline for amending pleadings in the

[2] Acres claimed to have a higher score and higher ranking than GB Sciences, based upon an Order obtained in separate action initiated by Acres. Acres Medical, LLC v. Department of Health and Human Services, Division of Public and Behavioral Health, et al., Eighth Judicial District Court Case No. A-15-719637-W. Based upon that Order, the District Court awarded the PRC to Acres instead of to GB Sciences. (App. Vol. III: JA608-17, at ¶¶ 20, 21, and 41)

scheduling order had passed and good cause did not exist to amend the scheduling order "at this juncture" because it would prevent timely resolution of the litigation Id. Thus, as stated earlier, on December 2, 2015, GB Sciences filed its Complaint in the case below. (App. Vol. I: JA001-14)

The NuLeaf Case was appealed by NuLeaf and cross-appealed by GB Sciences, and is currently pending as Appeal No. 69909.

VI.

SUMMARY OF THE ARGUMENT

The District Court did not err in revoking Desert Aire's PRC because the District Court had the authority to interpret and apply NRS § 453A as it related to Desert Aire and correctly did so in light of the fact that Desert Aire did not comply with NRS § 453A.322(3)(a)(5) prior to the issuance of the PRC. There is nothing ambiguous about the relevant statutes, and even if there was, Desert Aire did not substantially comply with them. Further, the District Court had full authority to put the parties in the position they should have been in if the law had been followed. Additionally, the District Court did not abuse its discretion in refusing to apply either equitable estoppel or laches because Desert Aire was aware of the fact that PRCs are always revocable and was included as a Defendant in the original NuLeaf Case. Finally, GB Sciences had standing to bring its underlying claims because it complied with the provisions of NRS §

453A.322(3)(a)(5) and the City of Las Vegas had provided the Division with proof of GB Sciences' compliance.

However, the District Court erred in refusing to award Desert Aire's revoked PRC to GB Sciences. Contrary to Desert Aire's arguments, the District Court had the authority to issue a mandatory injunction to award the revoked PRC to GB Sciences as next in line and the statute does not impose a hard deadline that could frustrate the District Court's ability to issue the mandatory injunction. Finally, the District Court's refusal to order the Division to issue Desert Aire's PRC to GB Sciences created a gross inconsistency in the application of the law which needs to be addressed and fixed.

VII.

LEGAL ARGUMENT - APPEAL

A. STANDARD OF REVIEW.

There are two standards of review applicable to the underlying appeal in chief.

1. De Novo Review.

Statutory interpretation is a question of law which this court will review *de novo*. City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). The District Court's interpretation of NRS Chapter 453A, whether Desert Aire substantially complied, whether the statute was ambiguous, the

District Court's exercise of discretion and application of the statute to the facts in this case, and the issue of GB Science's standing to bring the underlying action are subject to *de novo* review.

2. Abuse of Discretion.

Although not declared by the Nevada Supreme Court, other courts hold that equitable determinations are reviewed by the appellate court under the abuse of discretion standard. *See* A. C. Aukerman Company v. R. I. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992)(*reviewing* laches and equitable estoppel); Dickson, Carlson & Campillo v. Pole, 99 Cal. Rptr. 2d 278 (Ct. App., 2nd Dist. 2000) (unclean hands). Assuming this standard applies in the State of Nevada, the District Court's issuance of a mandatory injunction revoking Desert Aire's PRC, and the District Court's refusal to apply equitable estoppel or laches is subject to this standard of review.

B. THE DISTRICT COURT DID NOT ERR IN REVOKING DESERT AIRE'S PRC.

1. The District Court had the Authority to Interpret and Apply NRS § 453A.

Statutory interpretation is a question of law. City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). It is the District Court's responsibility to determine the law. *See* Baron v. District Court, 95 Nev. 646,

648, 600 P.2d 1192, 1193-94 (1979). Therefore, the District Court had the authority to interpret NRS Chapter 453A.

However, in its Opening Brief, Desert Aire complains that the District Court improperly substituted its judgment for that of the Division. *See* Opening Brief at 2 (Issue Presented for Appeal #2), at 6-7 (Summary of the Argument), and at 31-35 (Argument - "F. The District Court Misapprehended the Statutory Scheme and Erroneously Substituted the State's Judgment With Its Own").

However, Desert Aire never raised this argument to the District Court below. It is fundamental that the Nevada Supreme Court will not consider an issue raised for the first time on appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); Cummings v. City of Las Vegas Mun. Corp., 88 Nev. 479, 482, 499 P.2d 650, 652 (1972).

Moreover, Desert Aire essentially argues that the District Court should have abdicated its responsibility to determine the law, by giving unfettered deference to the Division with respect to all aspects of interpretation and implementation of NRS Chapter 453A. However, courts will not defer to the secretary of a division of the State of Nevada where the secretary's interpretation is unreasonable and conflicts with legislative intent. Nev. State Democratic Party v. Nev. Republican Party, 256 P.3d 1, 10 (Nev. 2011); State, Div. of Ins. v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000).

Desert Aire complains about the City "dictating" to the Division its "preferred" MME applicants. *See* Opening Brief at 34. However, the plain language of NRS Chapter 453A shows that the law was designed to be implemented as a balanced partnership between the Division and the local authorities.

This is evident in the clear language of the provision at issue, as well as the remainder of NRS Chapter 453A (physical address considerations (NRS § 453A.322(3)(a)(2)); registration certificate provisional until license issued by local authority (NRS § 453A.326); location considered (NRS § 453A.328(5)); local inspections and record maintenance (NRS § 453A.330); revocation of PRC if failure to pay fee to local authority (NRS § 453A.340(4)); applicant must comply with local ordinances and rules of zoning and use (NRS § 453A.350(1)(b)); applicant can move locations if approved by local authorities (NRS § 453A.350(2)); applicant cannot supersede local fire safety rules (NRS § 453A.352(2)); etc.

In this case, the issuance of the PRC to Desert Aire, which failed to comply with NRS § 453A.322(3)(a)(5), and the refusal to revoke the PRC and reissue it to GB Sciences (the next in line) was clearly unreasonable and in conflict with the legislative intent of the statute: to provide PRCs to the most qualified applicants who satisfied both the State and the local authorities' criteria. Thus, the District

Court was not obliged to defer to the Division when it issued a PRC in violation of NRS § 453A.322(3)(a)(5).

2. The District Court Correctly Interpreted and Applied NRS § 453A.322(3)(a)(5).

The District Court must interpret a statute in a reasonable manner, that is, "[t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results." Desert Valley Water Co. v. State, Engineer, 104 Nev. 718, 720, 766 P.2d 886, 886-87 (1988). In reviewing a statute, it "should be given [its] plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." Mangarella v. State, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (internal quotation omitted). When the language of a statute is unambiguous, courts are not permitted to look beyond the statute itself when determining its meaning. Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995).

When "the [L]egislature has failed to address a matter or . . . addressed it with imperfect clarity, [it becomes the responsibility of this court] to discern the law." Baron, 95 Nev. at 648, 600 P.2d at 1193-94. Similarly, when a statute is susceptible to more than one reasonable but inconsistent interpretation, the statute is ambiguous, and this court will resort to statutory interpretation in order to discern the intent of the Legislature. Gallagher v. City of Las Vegas, 114 Nev.

595, 599, 959 P.2d 519, 521 (1998). In this case, the applicable statutory provisions were clear and the District Court properly applied them in revoking Desert Aire's PRC.

a. The Statute Was Not Ambiguous.

Desert Aire argues that the statutes are ambiguous so Desert Aire should be rewarded for failing to strictly comply with them. *See* Opening Brief at 21-22. Specifically, Desert Aire argues that it submitted the official application form provided by the Division and the form did not include the requirements set forth in N.R.S. § 453A.322(3)(a)(5). *See* Opening Brief at 18.

However, Nevada Revised Statutes § 453A.322(3) makes it clear that the Division was authorized to issue a PRC if, and only if, in addition, the applicant ***had complied*** with NRS § 453A.322(3)(a)(5). Filling out the form was actually only one of six requirements set forth in N.R.S. § 453A.322(3)(a). Specifically, NRS § 453A.322(3) states in pertinent part:

> 3. ... ***not later than 90 days after receiving an application***..., the Division shall register the medical marijuana establishment and issue a medical marijuana establishment registration certificate and a random 20-digit alphanumeric identification number ***if***:
>
> (a) The person who wishes to operate the proposed medical marijuana establishment ***has submitted*** to the Division ***all of the following***:
>
> * * *
>
> (5) 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 local governmental authority*** certifying that the proposed

> medical marijuana establishment is in compliance with those restrictions and satisfies all applicable building requirements; and . . .

NRS § 453A.322(3) (emphasis added). In other words, ***before*** the Division could issue a PRC, the applicant must have received the Local Approval and submitted proof to the Division.

There is no uncertainty in this language. The words "***if***" "has submitted... ***all*** of the following" leave no ambiguity as to whether or not the requirements set forth in NRS § 453A.322(3)(a)(5) are discretionary or mandatory. They are mandatory.

b. Desert Aire Failed to Satisfy N.R.S. § 453A.322(3)(a)(5) Prior to the Issuance of the PRC.

In this case, Desert Aire was denied the Local Approval by the City on October 30, 2014 because it had voluntarily withdrawn its applications, and the City advised the Division of that fact with its October 30, 2014 letter. (App. Vol. III: JA578-83) Therefore, the plain language of the statute prohibited the Division from issuing a PRC to Desert Aire.

c. Desert Aire Did Not Substantially Comply With The Statute.

Desert Aire tries to excuse its failure to follow the law by arguing that it "substantially complied" with the MME laws. *See* Opening Brief at 16-21. However, substantial compliance means "***actual compliance*** in respect to the substance essential to every reasonable objective of the statute." Costa v. Superior

Court, 39 Cal. Rptr. 3d 470 n.24 (Ct. App., 3rd Dist., 2006)(emphasis added). "Substantial compliance may be sufficient 'to avoid harsh, unfair or absurd consequences.' Under certain procedural statutes and rules, however, failure to strictly comply . . . can be fatal to a case." Leven v. Frey, 123 Nev. 399, 407, 168 P.3d 712, 717 (2007) (quoting 3 Norman J. Singer, Statutes and Statutory Construction § 57:19, at 58 (6th ed. 2001)). To determine whether a statute and rule require strict compliance or substantial compliance, this court looks at the language used and policy and equity considerations. Id. at 406–07, 168 P.3d at 717.

Desert Aire argues that it substantially complied because it submitted the Division's application form, the application was accompanied by a survey which demonstrated that Desert Aire satisfied requirements of the statute which were "virtually the same" as the Local Approvals, and the form did not permit Desert Aire to provide any other information. *See* Opening Brief at 18-20.

However, Desert Aire did not substantially comply with the statute at issue. The purpose of the statute is not simply to get medical marijuana "out on the street" as fast as possible, as Desert Aire seems to suggest. The purpose of the statute, and its very detailed requirements, is also to ensure that only truly qualified establishments are registered by the Division and licensed by the local authorities to conduct such a business. This is also evident from the fact that relatively few

applicants are granted certificates each year (only twelve (12) for the City of Las Vegas).

Contrary to the arguments of Desert Aire, a letter from a surveyor containing a separation analysis is not "virtually the same" but is far from satisfying N.R.S. § 453A.322(3)(a)(5) or the purposes of the statute. *See* Opening Brief at 18-19. The purpose of the statute was to involve the local jurisdiction in the decision making process. Yet Desert Aire's argument eliminates that essential element, bypassing the local jurisdiction, and leaving the entire decision making process in the hands of the State, contrary to the clear intent of the law. Because N.R.S. § 453A.322(3)(a)(5) required applicants to provide the Division with proof of Local Approval, it was critically important to the State of Nevada that only those applicants with locations that the State knew were acceptable to local communities be permitted to operate an MME dispensary. Desert Aire could not satisfy this State concern because it failed to fulfill the requirements of N.R.S. § 453A.322(3)(a)(5) during the Division's 90-day application period.

What is more troubling in Desert Aire's case is the fact that before the 90-day application period had expired, the City of Las Vegas Planning Commission had voted 4-1 to ***deny*** Desert Aire's application for a special use permit and Desert Aire had ***voluntarily withdrawn*** its application. (App. Vol. III: JA570-76 and JA578-83) If Desert Aire's application and proposed business was so agreeable to

the local community, then it did not make sense why the Planning Commission would have voted to reject it or why Desert Aire would have withdrawn its application with the City. Clearly Desert Aire's actions speak louder than words regarding the suitability of its proposed MME dispensary at the expiration of the 90-day application period.

3. The District Court Had Authority to Issue a Mandatory Injunction.

The Nevada Supreme Court has specifically held that district courts have the authority to issue mandatory injunctions "to restore the status quo, to undo wrongful conditions." Leonard v. Stoebling, 102 Nev. 543, 728 P.2d 1358 (1986); Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc., 492 P.2d 123, 88 Nev. 1 (1972). One of the stated purposes of mandatory injunctions is to "compelling the undoing of acts that had been illegally done." City of Reno v. Matley, 378 P.2d 256, 79 Nev. 49 (1963). A mandatory injunction is an appropriate remedy, even where government entities are involved. *See* Mirin v. Ace Cab Company, Inc., 85 Nev. 690, 462 P.2d 523 (1970).

In this case, there can be no dispute that NRS § 453A.322(3)(a)(5) required the Division to only issue PRCs to those entities who had actually obtained the required Local Approval at the time of issuance of the PRC. Desert Aire did not have such Local Approval, and the Division had been notified of that fact, yet the

Division issued a PRC to Desert Aire, in direct violation of NRS § 453A.322(3)(a)(5).

Where an applicant is ineligible for a PRC, such as Desert Aire, the PRC should be revoked and granted to the "next in line". (App. Vol. III: JA454) This was GB Sciences (ranked #13 by the Division, for one of the 12 PRCs allocated to the City of Las Vegas). (App. Vol. III, JA592) Thus, the District Court correctly ordered that Desert Aire's PRC should be revoked.

Desert Aire argues that the District Court's mandatory injunction stripping Desert Aire of its PRC does not maintain the "status quo." *See* Opening Brief at 34. However, Desert Aire is mistaken. The mandatory injunction ***restores*** the status quo: that being no PRC issued to an applicant that did not qualify (Desert Aire) and undoes "acts that had been illegally done".

4. The District Court Did Not Err in Refusing to Apply Equitable Estoppel Against Either The Division or GB Sciences.

Desert Aire complains that the Court should ignore Desert Aire's failure to comply with the MME Laws of the State of Nevada because: (1) the Division approved its application for the PRC; (2) the provision at issue (N.R.S. § 453A.322(3)(a)(5)) was not included in the PRC application form, and (3) the principals of Desert Aire "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." *See* Opening Brief at 25-29.

However, Desert Aire cannot make out the defense of equitable estoppel. Desert Aire knew that it had withdrawn its application with the City before the PRCs were issued. Desert Aire was, likewise, on notice of the law, including the provisions of N.R.S. § 453A.322(3)(a)(5). Thus, it was not ignorant of the fact that the issuance of its PRC by the Division was improper.

Further, Desert Aire seems to imply that there was some level of "unfair notice" in the fact that the application form provided by the Division (and "mirrored" by NAC 453A.306) did not include the requirements of N.R.S. § 453A.322(3)(a)(5). However, Desert Aire is on notice of all of the law, not just what the Division may choose to put in its initial application form. Further, if there is any conflict between the Nevada Revised Statutes (which is the law of the land) and Nevada Administrative Code (which cannot trump the NRS, but which must comply with the NRS), the provisions of the Nevada Revised Statutes control.

Nevada Revised Statutes § 453A.322(3)(a) provided six (6) separate and distinct requirements prior to issuance of a PRC, only one of which was filling out the application form. The form was never intended to be all-encompassing. For example, the form did not reference the handling of edibles, which is also a

requirement of N.R.S. § 453A.322(3)(a)(4), where applicable. (App. Vol. III: JA519-63)

Moreover, Desert Aire cannot claim to be "blind-sided" by the Division regarding the issue of the necessity of Local Approval. Section 5.2.13 of the Division's application form requires attachment to the application form of a professional survey in instances where "a local government in which a proposed medical marijuana establishment will be located ***has not*** enacted zoning restrictions or the applicant ***is not required to secure approval*** that the applicant is in compliance . . ." (emphasis added). (App. Vol. III: JA519-63) This section is also referenced in NAC 453A.306(13).

While not applicable to the present situation, because the City ***does have*** zoning restrictions, what this means is that Desert Aire cannot claim reliance on anything communicated to Desert Aire from the Division by virtue of the contents of the application form, or that Desert Aire was led to believe by the contents of the application form that the Local Approval of N.R.S. § 453A.322(3)(a)(5) was not necessary. Rather the form, itself, raised the issue of Local Approval and referenced the need for an applicant to still attach a survey where Local Approval was not required. In fact, Desert Aire's own actions in pursuing Local Approval belies the fact that Desert Aire knew full well that the City ***had*** zoning and special use requirements (regardless of the contents of the Division's application form).

Moreover, whether or not the principals of Desert Aire assumed the risk of "spending millions of dollars" in pursuit of a PRC, they were on notice that it was fully revocable pursuant to N.R.S. § 453A.320: "[a]ny medical marijuana establishment registration certificate issued pursuant to NRS 453A.322 and any medical marijuana establishment agent registration card issued pursuant to NRS 453A.332 ***is a revocable privilege*** and the holder of such a certificate or card, as applicable, does not acquire thereby any vested right." NRS § 453A.320 (emphasis added).

Desert Aire references the matters of Nevada Public Employees Retirement Board v. Byrne, 96 Nev. 276, 607 P.2d 1351 (1950) and Southern Nevada Memorial Hospital v. The Department of Human Resources, 101 Nev. 387, 705 P.2d 139 (1985) in support of its claim for equitable estoppel against the actions of government actors, like the Division.

However, the court in Southern Nevada also held that whether the elements of equitable estoppel are present, (thereby justifying application of the doctrine of equitable estoppel), depends upon the particular facts and circumstances of a given case. 101 Nev. at 391, 705 P.2d at 142. The Southern Nevada court also observed:

> While governmental subdivisions may be estopped from asserting a right or defense which it otherwise could have raised, courts are still concerned with the public policy aspects of estopping governmental agencies. ***The circumstances surrounding this case are of such a nature that this type of situation is unlikely to arise again.***

> Accordingly, such public policy considerations are not diminished by our ruling.

101 Nev. at 392, 705 P.2d at 143 (emphasis added).

The facts in Southern Nevada were notably distinct from the present case. In Southern Nevada, public policy was furthered by application of equitable estoppel because the applicant for a certificate of necessity provided ***all*** resident indigent and emergency medical care in Clark County. 101 Nev. at 393, 705 P.2d at 143. In contrast, in the instant case, Desert Aire was only one of many applicants for the several PRCs issued by the Division.[2]

Moreover, in granting equitable estoppel, the court in Southern Nevada observed that the applicant was unaware of any facts which would have qualified or negated its reliance. Id. In contrast, issuance of Desert Aire's PRC was in error; however, Desert Aire only has itself to blame for failing to comply with the law, especially where Desert Aire voluntarily withdrew its applications for the Local Approval, and Desert Aire is aware of facts qualifying or negating its alleged reliance: its own failure to obtain the Local Approval and the revocable nature of a

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[2] Similarly, Byrne is nothing like the instant case. In Byrne, the court applied equitable estoppel to protect the rights of ***an individual*** who had retired and sold his house, purchasing a more expensive one, upon the representations by the Nevada Public Employees Retirement Board as to what amount he could expect at retirement. 96 Nev. at 278, 607 P.2d at 1352. The benefits later offered were only 12% of the figure he had been informed of. Id. Desert Aire is not an individual, but a business entity attempting to do business in a highly privileged industry. Further, the employee in Byrne likely could not reverse his home transaction or become re-employed so his damage was permanent. In contrast, if Desert Aire is

PRC. If there was any doubt as to the risks associated with GB Sciences proceeding forward, they were clarified when Desert Aire was named as a party in the original NuLeaf lawsuit. The reality is that Desert Aire was well aware of the risks of proceeding, yet chose to proceed notwithstanding the risks. The material facts were not in dispute and the District Court did not abuse its discretion in finding no justification for applying equitable estoppel.

Nonetheless, Desert Aire argues in its Opening Brief that under the District Court's ruling, no entity could ever have complied with the statute. *See* Opening Brief at 25. Desert Aire reaches this conclusion by relying upon two false premises: that the District Court concluded that an MME applicant could not obtain the PRC unless the applicant ***(1) had already obtained a business license and (2) had already satisfied all applicable building requirements***.

However, this is not what the law states nor what the District Court concluded. Rather, the law simply states, and the District Court concluded:

> (5) If the city, town or county in which the ***proposed*** medical marijuana establishment ***will be located*** has enacted zoning restrictions, **[1]** ***proof of licensure*** with the applicable local governmental authority ***or*** **[2]** ***a letter*** from the applicable local governmental authority certifying that the ***proposed*** medical marijuana establishment is in compliance with those restrictions and satisfies all applicable building requirements; and . . .

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as qualified to operate an MME business as it claims, it can obtain a PRC in a subsequent year.

N.R.S. § 453A.322(3)(a)(5)(emphasis added). The only requirement of the law in this subsection is that ***either*** an applicant obtain the necessary business license, ***or*** that it obtain a letter from the local authority ***certifying*** two things: (1) the proposed MME is in compliance with the restrictions; and (2) the *proposed* MME satisfies all applicable building requirements. The letter need only certify those two items. In this case, the City did have a mechanism to help applicants satisfy this requirement before the 90-day deadline, that was LVMC 6.95.080(D) and the letter sent on October 30, 2014 in compliance with LVMC 6.95.080(D) and NRS §453A.322(3)(a)(5). (App. Vol. III: JA578-83)

Contrary to the arguments of Desert Aire, an applicant is not required to have ***already satisfied all applicable building requirements*** within the 90 day period before issuance of a PRC to satisfy NRS § 453A.322(3)(a)(5). This is obvious in the fact that the Subsection refers to a "proposed" MME and to the local city, town or county where the MME "will be located." The applicant need only either obtain the business license, or receive the letter sent pursuant to LVMC 6.95.080(D). Ultimately satisfying all building requirements, like many other aspects of the MME business could come later. *See* NRS § 453A.326(3). If the MME's plans never materialized, then revocation of the PRC was always within the Division's discretion, pursuant to NAC 453A.324.

In fact, if the District Court had interpreted the statute in the manner that Desert Aire suggests, then no one could ever be issued a PRC as it would require the Division to either deny all applications or completely ignore NRS § 453A.322(3)(a)(5). Clearly this absurd result is not what was intended by the Legislature and the District Court properly accepted the City's October 30, 2014 Letter, which was drafted specifically to comply with NRS § 453A.322(3)(a)(5), as sufficient compliance. This was a reasonable interpretation and application of the statute and gives the full faith and meaning to the statute and the legislature's intent behind it. The District Court did not abuse its discretion in refusing to apply equitable estoppel.

5. The District Court Did Not Err in Refusing to Apply Laches.

Desert Aire also asserts laches as a defense to its failure to comply with N.R.S. § 453A.322(3)(a)(5). *See* Opening Brief at 29-31. Laches is an equitable doctrine which will 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. Erickson v. One Thirty-Three, Inc. and Assoc.; 104 Nev. 755, 766 P.2d 898, 900 (1988)(emphasis added); Pub. Service Comm'n v. Sierra Pacific, 103 Nev. 187, 734 P.2d 1245 (1987); Leaver v. Grose, 610 P.2d 1262 (Utah 1980). Laches implies some kind of ignorance on the part of the supposed victim of the matter that is being delayed. Otherwise, as the

doctrine is understood, the alleged victim would not have changed its circumstances based upon such a delay.

Desert Aire complains that this Court should disregard the law because GB Sciences: (1) filed an earlier lawsuit against Desert Aire (i.e. the NuLeaf Case); (2) Plaintiff dismissed Desert Aire from the NuLeaf Case; and (3) Desert Aire incurred costs in the meantime. *See* Opening Brief at 29-30.

However, the NuLeaf Case was initiated within 30 days after the PRC was issued to Desert Aire, Desert Aire was initially a party to the NuLeaf Case and remained as such for four months. (App. Vol. IV: JA670) Even though it was dismissed as a party on April 1, 2015, the dismissal was without prejudice and GB Sciences attempted to amend its Complaint to bring Desert Aire back into the case in mid-November 2015. (App. Vol. IV: JA670 and JA706-37) Desert Aire was not ignorant that GB Sciences was asserting claims against its PRC because it was served with the Complaint in the NuLeaf Case, and Desert Aire was also not ignorant of the fact that the dismissal was ***without prejudice***, thus GB Sciences was preserving a right to make the same claims later.

Desert Aire did not rely to its detriment on anything GB Sciences did or did not do. Desert Aire likely incurred development and start-up costs all along, including: (1) before it obtained the PRC; (2) after it obtained the PRC and while Desert Aire was still an active party to the NuLeaf Case for four months before the

April 1, 2015 dismissal; and (3) on and after November 16, 2015, when GB Sciences sought to bring Desert Aire back into the NuLeaf Case. (App. Vol. IV: JA670) In fact, Desert Aire likely incurred its alleged expenses in the same manner as every other successful and unsuccessful applicant for a PRC: with the hope that it would be able to eventually open for business, but in clear recognition of the risks referred to above which might prevent that from happening. This is regardless of any of the legal disputes in cases moving through the court system, and whether certain parties were asserting certain claims. Simply put, Desert Aire would have incurred all of the same expenses whether GB Sciences dismissed Desert Aire as a party to the NuLeaf Case or not; therefore, there is no delay by GB Sciences that ***caused*** Desert Aire to incur costs it would not have otherwise incurred anyway. There was nothing GB Sciences did or did not do which would have changed any of that. Therefore, laches cannot excuse Desert Aire's failure to satisfy the provisions of N.R.S. § 453A.322(3)(a)(5).

Moreover, Desert Aire was always on notice of the law, including N.R.S. § 453A.320 which clearly recognizes that a PRC is revocable at any time. There are numerous reasons why this can happen, and Desert Aire (along with everyone else) proceeds forward at their own risks. Nonetheless, Desert Aire apparently continued to expend costs in the face of this unsettled legal environment.

In its Opening Brief, Desert Aire relies on Carson City v. Price, 113 Nev. 409, 934 P.2d 1042 (1997). *See* Opening Brief at 30. However, in Price, the Nevada Supreme Court observed that the question of laches (just like equitable estoppel) turns on the specific facts of the case. 113 Nev. 409, 934 P.2d at 1043. Unlike our case, the critical facts upon which the court's finding of laches hung were: (1) the respondent in Price had notice of an August 18, 1994 public hearing and failed to attend the hearing to object; (2) Carson City conveyed land at issue by deed on November 30, 1994; (3) on December 7, 1994 another notice was provided to the respondents that construction would begin; (4) on February 17, 1995 the public works department issued building permits; (5) construction began in February 1995; and (6) on April 11, 1995, the Respondents filed suit after a substantial amount of construction had been completed. *See* Price at 1043-44. Essentially, the respondents had done nothing to prosecute claims after receiving notice of what was going to transpire, which ultimately included conveyance of real property, issuance of construction permits, and a substantial amount of actual construction completed.

In contrast, the District Court did not abuse its discretion when it observed that Desert Aire was made a party to the NuLeaf Case soon after the PRC at issue was improperly issued by the Division and was an active defendant in that case for four months.

When Desert Aire was dismissed, it was ***without prejudice***, meaning the claims were not being abandoned by GB Sciences and were still hanging over Desert Aire's head as a real possibility. Further, GB Sciences tried to formally bring Desert Aire back into the NuLeaf Case, but was unable to, due to procedural issues. (App. Vol. IV: JA709-33) Unlike in Price, the entire time since the PRC was issued to Desert Aire, it has been an active defendant or was aware that it could easily become an active defendant. Moreover, Desert Aire was always aware, or should have been aware, that its PRC could be revoked at any time, pursuant to N.R.S. § 453A.320, even if it had never previously been a party to the NuLeaf Case.

Desert Aire is not the only applicant to claim an affirmative defense of laches and estoppel. Both NuLeaf and Wellness Connection of Nevada, LLC asserted those defenses in their answers in the NuLeaf Case and in the matter of Henderson Organic Remedies v. State of Nevada, et al., Eighth Judicial District Court Case No. A-14-710193-C, but to no avail. (App. Vol. IV: JA684-704 and App. Vol. V: JA880) The courts in both cases revoked their improperly issued PRCs for violation of the MME laws, nonetheless. (App. Vol. IV: JA678 and App. Vol. III: JA608-17)

Desert Aire is also not the only applicant that has been incurring substantial costs in pursuit of an MME business. (App. Vol. IV: JA678) GB Sciences has

been incurring the same or similar expenses for tenant build-outs, lease payments, and legal expenses necessary to obtain the proper permits and licenses, and to obtain the PRC that should have been issued to it in the first place. (App. Vol. IV: JA678 and App. Vol. V: JA880) However, unlike Desert Aire, GB Sciences actually complied with N.R.S. § 453A.322(3)(a)(5), but was denied a PRC through the Division's error. Desert Aire simply cannot assert laches to remedy its failure to follow the law.

Certainly, there is no indication that Desert Aire would have simply rolled over, disgorged its PRC, and ceased development if it had not been dismissed as a party on April 1, 2015. Rather, it likely would have actively litigated the issue of entitlement to the PRC, until a result was obtained. Desert Aire would have also continued to incur the same business start-up costs that it complains that it has incurred while the legal issues were in play. Desert Aire admitted to the District Court that its construction costs and the $10,000.00 per month in lease payments which Desert Aire complains it had to make ***began on January 1, 2015, while Desert Aire was a party to the NuLeaf Case and three months before Desert Aire was dismissed as a party in the case.*** (App. Vol. II: JA232) Further, in order to complete its applications, Desert Aire had to have the lease agreement in place even before the PRC was improperly issued, whether it retained its PRC or not. Thus, the dismissal did not "cause" Desert Aire to incur those costs, and

Desert Aire is not entitled to invoke the doctrine of laches to save it from its failure to follow the law.

6. GB Sciences Had Standing to Bring the Underlying Action.

Desert Aire argues that GB Sciences has no standing to bring the underlying action because it, too, failed to satisfy N.R.S. § 453A.322(3)(a)(5). *See* Opening Brief at 35-37. Desert Aire claims that the October 30, 2014 letter from the City did not qualify because it was sent after GB Sciences submitted its MME application back in August 2014. Id.

However, Desert Aire's arguments are based upon a false premise that the requirement for Local Approval set forth in N.R.S. § 453A.322(3)(a)(5) must be satisfied when the parties initially submitted their applications to the Division in August 2014. See Opening Brief at 21-22. Nowhere in the statute does it require that.

However, the statute does impose a 90 day deadline for issuance of a PRC, and set the Local Approval as a mandatory precursor to issuance. Consequently, GB Sciences did satisfy N.R.S. § 453A.322(3)(a)(5) when the City sent its letter, dated October 30, 2014, inside of those 90 days, informing the Division which applicants were in compliance with the Local Approval requirement of the statute. Unlike Desert Aire, GB Sciences was one of the applicants on the City's approved

list of applicants. Thus, GB Sciences had standing to maintain its claims in the underlying case.

VIII.

LEGAL ARGUMENT - CROSS-APPEAL

A. STANDARD OF REVIEW.

Statutory interpretation is an question of law which this court review *de novo*. City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). The District Court's interpretation of NRS Chapter 453A, and its application to the facts in this case are subject to *de novo* review. *See also* Seino v. Employers Ins. Co. of Nevada, 121 Nev. 146, 149, 111 P.3d 1107, 1110 (2005).

As stated earlier, equitable determinations are matters committed to the sound discretion of the trial judge and the trial judge's decision is reviewed by the appellate court under the abuse of discretion standard. *See* A. C. Aukerman Company v. R. I. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992) (*reviewing* laches and equitable estoppel). However, a District Court's discretion to grant an equitable defense is not unlimited. The court must consider the material facts affecting the equities between the parties; the failure to do so is an abuse of discretion. *See* Dorman v. DWLC Corp., 42 Cal. Rptr. 2d 459 (Ct. App. 1995). A decision based on bare "equity" unsupported by established precedent and lacking evidentiary support does not disclose the proper exercise of discretion.

Dickson, Carlson & Campillo v. Pole, 99 Cal. Rptr. 2d 278 (Ct. App., 2nd Dist. 2000).

Notwithstanding the foregoing, the Nevada Supreme Court will review an appeal from an order granting a motion for summary judgment *de novo*. Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992); Sustainable Growth Initiative Committee v. Jumpers, LLC, 122 Nev. 53, 128 P.3d 452, 458 (2006).

In this case, the equitable determinations of the District Court were made in the context of competing motions for summary judgment. Therefore, all such determinations should be reviewed by the Nevada Supreme Court, *de novo*.

B. THE DISTRICT COURT ERRED IN REFUSING TO AWARD DESERT AIRE'S REVOKED PRC TO GB SCIENCES.

1. The District Court Misinterpreted a Portion of N.R.S. § 453A.322(3).

Unfortunately, the District Court refused to award the revoked PRC to GB Sciences. The District Court was apparently persuaded by the arguments of the Division, which argued that the "not later than 90 days" language in N.R.S. § 453A.322(3) prohibits the Division and the Court from rectifying their clear error after expiration of the original 90 day period. (App. Vol. III: JA620-55 (JA623)

However, as stated earlier, the District Court has the authority to issue a mandatory injunction against the Division. Further, the "not later than" language in the statute can be rightfully understood as a spur to the Division to issue the PRCs in a timely manner, but not a prohibition on the Division from curing clear errors.

Nevada Revised Statutes § 453A.322(3)'s "not later than" is clearly a command by the Nevada legislature to spur the Division to act quickly. However, this language does not deprive the Division of the authority to take necessary action to fulfill the statute's purpose beyond that time.

The two-fold purpose behind the passage of S.B. 374 (codified later as NRS 453A) could not be more clear. The first motivation: answer a Constitutional mandate to provide medical marijuana patients with access to medical marijuana. The second motivation: provide for the safe, speedy establishment of MMEs.

Further, the Division's interpretation is inconsistent with a significant body of case law analyzing similar allegedly prohibitory language. In fact, on several occasions the Supreme Court of the United States has analyzed similar "deadline" language and found that the use of the words "shall" and/or "not later than", coupled with a date or time frame, did not bar a government official from exercising his or her granted authority to fulfill the purpose of the legislation. Barnhart v. Peabody Coal Co., 537 U.S. 149, 152, 123 S. Ct 748, 752, 154 L. Ed,

2d 653, 661 (2003) (finding that benefit assignments by Commissioner of Social Security Administration were valid when assigned after October 1, 1993 despite language requiring that benefits be assigned by October 1, 1993); United States v. James Daniel Good Real Prop., 510 U.S, 43, 63-64, 114 S. Ct 492, 506, 126 l. Ed. 2d 490, 509-510 (1993) (holding that courts may not dismiss a forfeiture action for failure to comply with internal timing requirements set forth in legislation); United States v. Montalvo-Murillo, 495 U.S. 711, 717-718, 110 S. Ct 2072, 2077, 109 L. Ed. 2d 720, 730 (1990) (holding that defendant was not entitled to release despite a delay in a hearing where legislation required that hearing "shall be held immediately" upon defendant's first appearance, but hearing was not held immediately); Brock v. Pierce County, 476 U.S. 253, 265, 106 S. Ct. 1834, 1841, 90 L. Ed. 2d 248, 258-259 (1986) (holding "that the mere use of the word 'shall'" in legislation did not remove Secretary's power to act where language instructed that Secretary "shall act" "not later than 120 days after receiving [a] complaint") (emphasis added); French v. Edwards, 80 U.S. 506, 514, 20 L, Ed. 702, 704 (1872) (reasoning that there is no presumption or rule that for every mandatory duty imposed upon a government there must exist some corollary punitive sanction for departures or omissions, even if negligent).

If the Nevada State legislature had intended the 90-day period as an absolute deadline rather than a spur, it could have clearly identified a penalty with

language like "in no event shall the Division issue a registration certificate later than . . ." or "the Division shall have no authority to issue a registration certificate beyond . . ." However, no such limiting language was drafted into N.R.S. § 453A.322(3). As such, the argument that the "not later than" language in NRS § 453A.322(3) prohibits the District Court from revoking the PRC and reissuing it to GB Sciences after November 3, 2014 is unsubstantiated and should be disregarded.[3]

2. The District Court's Ruling Is Inconsistent With The Ruling in the NuLeaf Case.

Further, by refusing to award Desert Aire's revoked PRC to GB Sciences, the District Court issued a ruling inconsistent with another District Court ruling in the NuLeaf Case. The Nevada Supreme Court will reverse orders of District Courts that create inconsistent results. Scott Plaza, Inc. v. Clark County, 106 Nev. 320, 322, 792 P.2d 398, 400 (1990). Avoiding inconsistent results is so fundamental, that it is the policy behind other legal doctrines and rules, such as the joinder of parties and claims, claim and issue preclusion, class action lawsuits, and the exercise of discretion to hear a case by the Federal

[3] *Accord* Brock v. Pierce County, 476 U.S. 253, 260, 106 S. Ct. 1834 (1986) (holding that the mere use of the word "shall" in legislation did not remove a secretary's power to act where language instructed that secretary "shall act not later than" 120 days after receiving [a] complaint. . . . [t]his Court has frequently articulated the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided . . .).

Courts. *See* N.R.C.P. 19; Taylor v. Sturgell, 553 U.S. 880, 891, 218 S. Ct. 2161, 2171 (2008); Schuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530, 541 (2005); Archon Corp. v. Jung, (D. Nev. Oct. 6, 2015)(*quoting* Balestra-Leigh v. Balestra, 2010 WL 4280424, at *8 (D. Nev. Oct. 19, 2010)).

In this case, the Complaints against NuLeaf and Desert Aire were nearly identical. (App. Vol. I: JA001-14 and App. Vol. II: JA250-80) Both MME applicants failed to comply with N.R.S. § 453A.322(3)(a)(5), yet were issued PRCs by the Division. However, while the District Court in the NuLeaf Case ordering the reissuance of the revoked PRC to the applicant that the District Court deemed to be the next-in-line (Acres), the District Court below did not do so, but refused to reissue Desert Aire's PRC. (App. Vol. III: JA608-17 and App. Vol. IV: JA846-55) Either the Division could and should revoke the PRCs to the illegitimate recipients, such as NuLeaf and Desert Aire, or not. Similarly, either the Division could and should reissue the revoked PRCs to the applicants which were "next-in-line" or not. The result must be consistent.

The District Court below erred when it issued a result which was totally inconsistent with the District Court in NuLeaf. Therefore, the District Court below should be reversed to the extent that it refused to reissue Desert Aire's revoked PRC to GB Sciences, and the Nevada Supreme Court should direct the

District Court to enter an order directing the Division to reissue Desert Aire's revoked PRC to GB Sciences.

For the reasons set forth above, the District Court committed reversible error when it did not reissue the revoked PRC to GB Sciences, the next in line among the applicants.

IX.

CONCLUSION

For the foregoing reasons, the Nevada Supreme Court should affirm the District Court's decision to revoke the MME Provisional Registration Certificate from Desert Aire, but reverse the District Court's refusal to award the same MME Provisional Registration Certificate to GB Sciences and, instead, direct the District Court to award the revoked MME Provisional Registration Certificate to GB Sciences.

Dated this 25th day of January, 2017.

SMITH & SHAPIRO, PLLC

/s/ James E. Shapiro, Esq.
James E. Shapiro, Esq.
Nevada Bar No: 7907
Sheldon A. Herbert, Esq.
Nevada Bar No: 5988
2520 St. Rose Pkwy, Suite 220
Henderson, NV 89074
Attorneys for Respondent/Cross-Appellant, GB SCIENCES NEVADA, LLC

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Wordperfect in 14 point font Times New Roman type style; or

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2. I further certify that this brief complies with the page- or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 11,570 words; or

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[ ] Does not exceed 40 pages.

3. 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 N.R.A.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. 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 25th day of January, 2017.

SMITH & SHAPIRO, PLLC

/s/ James E. Shapiro, Esq.
James E. Shapiro, Esq.
Nevada Bar No: 7907
Sheldon A. Herbert, Esq.
Nevada Bar No: 5988
2520 St. Rose Pkwy, Suite 220
Henderson, NV 89074
Attorneys for Respondent/Cross-Appellant, GB SCIENCES NEVADA, LLC

CERTIFICATE OF SERVICE

I certify that on the 25th day of January, 2017, I served a copy of this **RESPONDENT/CROSS-APPELLANT GB SCIENCES NEVADA, LLC'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL** upon all counsel of record:

□ By personally serving it upon him/her; or

■ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.
MCLETCHIE SHELL, LLC
701 E. Bridger Avenue, Suite 520
Las Vegas, Nevada 89101

Richard H. Bryan, Esq.
Patrick J. Sheehan, Esq.
FENNEMORE CRAIG, P.C.
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Counsel for Appellant Desert Aire Wellness, LLC

Linda C. Anderson, Esq.
Chief Deputy Attorney General
555 E. Washington Ave., #3900
Las Vegas, Nevada 89101
Attorneys for Respondent/Cross-Respondent, STATE OF NEVADA, DIVISION OF PUBLIC AND BEHAVIORAL HEALTH OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES

/s/ Jill M. Berghammer
Jill M. Berghammer, an employee
of SMITH & SHAPIRO, PLLC