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,

Case No.: 70462

District Case No.: A-15-728448-C

STATE RESPONDENT'S ANSWERING BRIEF TO CROSS APPEAL

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SUMMARY OF ARGUMENT

In the Opening Brief on Cross-Appeal of GB Sciences Nevada, LLC, they contend that the District Court was "apparently persuaded by the arguments of the Division" to deny their request to issue the rescinded registration of Desert Aire Wellness, LLC to GB Sciences Nevada, LLC. *See,* Opening Brief on Cross-Appeal, p. 36. There is nothing in the record to support that the District Court based its decision on the interpretation of NRS 453A.322(3) by the Division of Public and Behavioral Health (hereinafter "the Division"). Instead, the District Court chose an alternate remedy to require the Division to open up a new application process to rectify the error the District Court found in approving the application of Desert Aire Wellness as a dispensary in the City of Las Vegas.

ARGUMENT

I. STANDARD OF REVIEW

In its cross-appeal, GB Sciences is appealing the District Court's partial denial of their request for injunctive relief. The District Court directed the Division to rescind the registration of Desert Aire Wellness but it did not order the Division to issue a registration to GB Science as requested by GB Sciences and instead directed the Division to take new applications for the newly vacant dispensary slot in the City of Las Vegas. The Nevada Supreme Court "reviews a district court order denying injunctive relief for abuse of discretion." *Douglas*

Disposal, Inc. v. Wee Haul, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007). GB Sciences points out that the proper standard of review for questions of law is *de novo* but the District Court gave no indication that the denial of injunctive relief was based on a statutory interpretation.

II. DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING INJUNCTIVE RELIEF.

GB Sciences is correct that the Division continues to take the position that the Division does not have statutory authority to extend the initial application pool and issue additional registrations without further intervention by a court. The Nevada Legislature only authorized the Division to issue registration certificates "not later than 90 days after receiving an application to operate a medical marijuana establishment" as set forth in NRS 453A.322(3). In examining the "not later than" language in NRS 453A.322(3), GB Sciences does not address the context of the rest of the unique legislative scheme for medical marijuana.

The Nevada Legislature specified that the Division could accept applications only for ten business days once a calendar year as described in NRS 453A.324(4). Therefore, the Legislature not only limited the period of the application process to 90 days but authorized the possibility of an annual application process if any of the establishments required by a community were vacant. The Division contends that it did not have statutory authority to advance the applicants from the 2014

application pool in perpetuity after the 90-day period had run as of November 3, 2014. Returning to the 2014 application pool until all contenders were exhausted would be inconsistent with the opportunity for an annual application period provided by the Nevada Legislature if establishment slots were available. In addition, extending the 2014 application pool for years might not result in the most qualified applicants as circumstances change as time goes forward. The Legislature affirmed this interpretation in the last session when they established a "one time extension period opened by the Division in calendar year 2014 for the purpose of issuing eleven additional registrations by September 1, 2015" in Section 5 of Senate Bill 276. (JA Vol. III pp. 643-648).

While the Division took this position, the District Court gave no indication that its denial of the requested injunctive relief to replace Desert Wellness with GB Sciences was based on this statutory interpretation. The law did not require that the District Court issue a replacement registration when it substituted its judgement for the decision of the Division to find that Desert Aire Wellness should not have been qualified in the 2014 application process almost a year and a half later in April of 2016. Although the Court's order would require an operating dispensary to close, it would allow the community to receive the best scoring applicant in 2016 or whenever this appeal is concluded. Desert Aire Wellness, GB Sciences and all other applicants in the City of Las Vegas would be eligible to apply.

The ruling in *Scott Plaza, Inc. v. Clark County,* 106 Nev. 320, 322, 792 P.2d 398, 400 (1990) does not apply to this matter because the different injunctive relief granted by the Courts is not based on a statutory interpretation. Ironically, if Judge Cory were required to rule consistently with Judge Johnson, he would have found that GB Sciences was too late to pursue litigation against Desert Aire Wellness in December of 2015. (JA Vol. IV pp. 735—737). Not only is the alternative ruling granting the injunctive relief also on appeal before this Court[1], GB Science is seeking to receive the rescinded registration in both cases even though GB Sciences can only receive one registration for a single location in the City of Las Vegas. The difference of a year in the bringing of these actions resulted in the District Court finding that the Division should open a new application period in 2016 because it would better serve the City of Las Vegas than returning to the 2014 pool and could avoid the possibility of further disputes between the 2014 applicants.

CONCLUSION

Again, no property interest exists for any registrant or applicant in this matter and the Division does not have an interest in any particular establishment receiving a registration. However, the Division wishes to minimize any

[1] *See, Nuleaf Dispensary v. State of Nevada/GB Sciences v. State of Nevada.* Case No. 69909.

unnecessary disruption or barriers to access for patients in their choice of treatment and therefore, supports stability in the operation of existing dispensaries including Desert Aire Wellness in order to meet the needs of the community. As argued in their responding brief, the Division should be entitled to deference in the process it used to score and rank medical marijuana dispensaries. However, if this Court concludes that the Division should not have registered Desert Aire Wellness, the District Court did not abuse its discretion in ordering the Division to accept new applications for a dispensary in the City of Las Vegas.

Dated: January 30, 2017.

ADAM PAUL LAXALT
Attorney General

By: */s/ Linda C. Anderson*
Linda C. Anderson
Chief Deputy Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in proportional spaced typeface using Microsoft Word 2010 in Times New Roman in 14 point font size.

I further certify that his brief complies with the page or type-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed thirty (30) pages.

I further 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: January 30, 2017.

ADAM PAUL LAXALT
Attorney General

By: */s/ Linda C. Anderson*
Linda C. Anderson
Chief Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on January 30, 2017, pursuant to NRAP 25 and NEFCR 8 and 9, I electronically served the foregoing by using the electronic filing system to e-serve a copy on all parties registered and listed as users of the Nevada Supreme Court's electronic filing system.

/s/ Linda Aouste
Employee of the Office of the Attorney General