

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant/Cross-Respondent,

vs.

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

Respondent/Cross-Appellant,

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.

Electronically Filed  
Mar 15 2017 11:27 a.m.  
Supreme Court No. 70462  
Elizabeth A. Brown  
Clerk of Supreme Court  
District Court Case No. A728448

**RESPONDENT/CROSS-  
APPELLANT GB SCIENCES  
NEVADA, LLC'S REPLY TO  
STATE RESPONDENT'S  
ANSWERING BRIEF ON  
CROSS-APPEAL**

**RESPONDENT/CROSS-APPELLANT GB SCIENCES NEVADA,  
LLC'S REPLY TO STATE RESPONDENT'S ANSWERING BRIEF**

On Appeal from Judgment Granted by the Eighth Judicial  
District Court of the State of Nevada, in and for Clark County  
Case No. A710597

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 15<sup>th</sup> day of March, 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*

## **TABLE OF CONTENTS**

I.	LEGAL ARGUMENT .....	1
A.	THE DIVISION RELIES UPON THE INCORRECT STANDARD OF REVIEW.....	1
B.	THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF TO GB SCIENCES.....	4
1.	NRS Chapter 453A Does Not Bar the Division From Rectifying its Mistake.....	4
2.	Compelling the Division to Reissue the PRC Would Not Leave the 2014 Application Pool Indefinitely Open .....	5
3.	Opening a New Application Pool for the Now Available PRC Fixes Only Half of the Problem .....	7
4.	A Consistent Result With <i>NuLeaf</i> Would be Reissuance of the PRC to GB Sciences, As Next-in-Line .....	9
II.	CONCLUSION .....	10
	CERTIFICATE OF COMPLIANCE.....	12
	CERTIFICATE OF SERVICE.....	14

## **TABLE OF AUTHORITIES**

### **CASES**

<u>Brock v. Pierce County</u> , 476 U.S. 253, 106 S. Ct. 1834, 90 L. Ed. 2d 248 (1986) ..	4
<u>Bulbman, Inc. v. Nevada Bell</u> , 108 Nev. 105, 825 P.2d 588 (1992) .....	1
<u>City of Henderson v. Kilgore</u> , 122 Nev. 331, 131 P.3d 11 (2006) .....	4
<u>City of Reno v. Matley</u> , 378 P.2d 256, 79 Nev. 49 (1963) .....	5
<u>Douglas Disposal, Inc. v. Wee Haul</u> , 123 Nev. 552, 170 P.3d 508 (2012) .....	1
<u>Leonard v. Stoebling</u> , 102 Nev. 543, 728 P.2d 1358 (1986) .....	5
<u>Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.</u> , 492 P.2d 123, 88 Nev. 1 (1972) .....	5
<u>Scott Plaza, Inc. v. Clark County</u> , 106 Nev. 320, 792 P.2d 398 (1990) .....	7
<u>Sustainable Growth Initiative Committee v. Jumpers, LLC</u> , 122 Nev. 53, 128 P.3d 452 (2006) .....	1

### **STATUTES**

NRS. Chapter 453A.....	4-5, 7
NRS § 453A.320.....	6
NRS § 453A.322(3).....	2, 4-5
NRS § 453A.322(3)(a)(5).....	4, 7-8

## I.

### LEGAL ARGUMENT

#### A. THE DIVISION RELIES UPON THE INCORRECT STANDARD OF REVIEW.

In its Answering Brief on Cross-Appeal, the Division argues that the proper standard of review for the MSJ Order at issue is for an "abuse of discretion" because "the District Court gave no indication that the denial of injunctive relief was based on a statutory interpretation." *See* Answering Brief of Division at 2. The Division cites to Douglas Disposal, Inc. v. Wee Haul, 123 Nev. 552, 170 P.3d 508 (2012) in support of its argument.

However, the Division is incorrect. First, the injunctive relief requested by GB Sciences was denied by the District Court in an Order that arose *from a motion for summary judgment*, and 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).

Second, the decision of the District Court, below, *was* based upon statutory interpretation, and, thus, *de novo* review is appropriate. While the MSJ Order, itself, does not provide the basis for the District Court's denial of injunctive relief to GB Sciences in gross detail, the arguments of the parties in their moving

papers, and the statements and questions of the District Court during the arguments of counsel leading up to the entry of the MSJ Order, do shed light on the basis for the District Court's decision.

Specifically addressing the issue of whether GB Sciences could obtain a mandatory injunction from the District Court to have the revoked PRC reissued to GB Sciences, the record shows as follows:

(1) In its State Response to Motion for Summary Judgment (the "Division MSJ Response"), the Division argued to the District Court that "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).'" See App. Vol. III: JA623 at 14-16 (emphasis added).

(2) In the Division MSJ Response, the Division further argued: "[a]bsent intervention from this Court, the Division does not have statutory authority to advance the applicants from the 2014 application pool after the 90-day period which has already run as of November 3, 2014." See App. III: JA623 at 16-18 (emphasis added).

(3) In the Division MSJ Response, the Division similarly argued: "the Division cannot waive the statutory timeframe of 90 days and alter its authority to issue registrations." See App. III:JA623 at 21-22 (emphasis added).

(4) In the Division MSJ Response, the Division further argued: "[w]hile advancing the next ranked applicant would have provided an expedited approach to meet the needs of the community, it was not an option that the Nevada Legislature provided to the Division." See App. III:JA623 at 22-23 (emphasis added).

(5) The District Court ultimately ruled as it did, stating "that unfortunately because of the deadlines that were put to the State they acted quickly and when the smoke cleared not in compliance, complete compliance with the law . . . I don't know the scope of the concerns that the State is able to exercise. It may have been quite limited by the Legislature . . . [b]ut whatever is the proper ambit of the State's care and concern for the health and welfare of this state, I hope that they will not forget to bear that in mind as they go through whatever process they believe is in accordance with the statute." See App. IV: JA775 at 1-13 (emphasis added).

Finally, it is ironic that the Division makes the claim in the Answering Brief to the Cross-Appeal that "statutory interpretation" was not at the heart of the District Court's decision, and the Division then goes on to argue its interpretation of the statute. See Answering Brief of Division at 2. In doing so, the Division implicitly concedes that the District Court's decision *did* involve statutory interpretation, which is reviewed *de novo*, whether that interpretation is the



subject of a summary judgment ruling or not. City of Henderson v. Kilgore, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). Therefore, the refusal of the District Court to order the Division to reissue the revoked PRC to GB Sciences is subject to *de novo* review.

**B. THE DISTRICT COURT ERRED IN DENYING INJUNCTIVE RELIEF TO GB SCIENCES.**

**1. NRS Chapter 453A Does Not Bar the Division From Rectifying its Mistake.**

In its Answering Brief on Cross-Appeal, the Division argues that the District Court acted appropriately in not ordering the Division to reissue the revoked PRC to GB Sciences because the "not later than 90 days after receiving an application" language found in NRS § 453A.322(3) prevented the Division from issuing or reissuing any PRCs after November 3, 2014. *See* Answering Brief of Division at 2-3.

GB Sciences already explained in its Opening Brief on Cross-Appeal that the "not later than 90 days" language was clearly intended as a spur to action on the part of the Division, not an absolute bar to action. *See Brock v. Pierce County*, 476 U.S. 253, 265, 106 S. Ct. 1834, 1841, 90 L. Ed. 2d 248, 258-259 (1986).

The District Court clearly found that the Division violated the statute by issuing the PRC to Desert Aire in violation of NRS § 453A.322(3)(a)(5) and

appropriately revoked the PRC. However, incorrectly finding that the "not later than 90 days" language of NRS § 453A.322(3) prohibited the District Court from awarding the PRC to GB Sciences, the District Court simply ordered the Division to reissue the PRC as it saw fit.

In doing so, the Division disregards the authority of the District Court (which is well-established by the Nevada Supreme Court), to issue mandatory injunctions to “restore the status quo, to undo wrongful conditions . . .” and to compel “the undoing of acts that had been illegally done.” 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); City of Reno v. Matley, 378 P.2d 256, 79 Nev. 49 (1963). Nothing set forth in NRS Chapter 453A exempts that chapter from the District Court's established authority to correct errors committed by the Division in interpreting and executing the provisions of NRS Chapter 453A. Therefore, the Division can be ordered by the District Court to reissue the revoked PRC to GB Sciences. It was reversible error for the District Court to refuse to do so.

**2. Compelling the Division to Reissue the PRC Would Not Leave the 2014 Application Pool Indefinitely Open.**

The Division also argues that a ridiculous scenario would ensue if the Division had to return to the 2014 application pool "until all contenders were exhausted" which might not result in the most qualified applicants ending up with

PRCs as circumstances changed going forward. *See* Answering Brief of Division at 3.

However, there is no need to keep going back to the list in this case. Rather, it is simple. There are twelve (12) PRCs allocated to the City of Las Vegas for 2014, and eleven (11) are issued. The Division need only reissue to GB Sciences (the 13<sup>th</sup> applicant and "next-in-line") the PRC wrongfully issued to Desert Aire. That is all. There is no danger of unqualified candidates being advanced, because the Division would just need to go to the next-in-line among its top-ranked applicants. In this case, GB Sciences was ranked #13, just barely outside the list of the top twelve (12) applicants for the PRCs allocated to the City of Las Vegas.

Whether the circumstances of any of the twelve (12) applicant's with PRCs in the City of Las Vegas subsequently changed (thus making them undesirable as an operating licensed MME dispensary), such an event could happen whether or not the revoked 12<sup>th</sup> PRC is issued to GB Sciences. PRC revocation is always available to the Division if any applicant falls below the necessary standard. *See* NRS § 453A.320.

The Division argues that the Nevada State legislature addressed this concern when it established a one-time extension period for the 2014 applications for the purpose of issuing eleven additional registrations. *See* Answering Brief of

Division at 3. However, the one-time extension referenced by the Division actually only arose under one narrow set of circumstances: certain counties had no qualified MME applicants so the PRCs allocated to those counties would be reallocated to other counties (including Clark County), and additional PRCs issued. *See* App. Vol. III at JA643.

Further, the Division is incorrect when it argues that Scott Plaza, Inc. v. Clark County, 106 Nev. 320, 322, 792 P.2d 398, 400 (1990) does not apply because injunctive relief was not based upon statutory interpretation. *See* Answering Brief of Division at 4. As explained above, the District Court's refusal to grant a mandatory injunction against the Division and in favor of GB Sciences with respect to the revoked PRC was based upon the District Court's statutory interpretation that NRS Chapter 453A prohibited the District Court from doing so after November 3, 2014.

**3. Opening a New Application Pool for the Now Available PRC Fixes Only Half of the Problem.**

The problem at issue is the fact that the Division inappropriately issued a PRC to Desert Aire, notwithstanding the fact that Desert Aire was not one of the twenty-seven (27) applicants approved by the City of Las Vegas as required by NRS § 453A.322(3)(a)(5).

If the Division had considered NRS § 453A.322(3)(a)(5), as it was required to do, it would have disqualified Desert Aire, thereby removing Desert Aire from

its top rankings. This would have moved GB Sciences from its 13<sup>th</sup> rank, to 12<sup>th</sup> rank, and the Division would have issued the PRC to GB Sciences.

Revoking Desert Aire's PRC was appropriate under the circumstances, but that decision only fixed half of the problem. No one disputes that the Division determined that GB Sciences was the next best qualified applicant. But for the Division ignoring NRS § 453A.322(3)(a)(5), GB Sciences would have received the PRC inappropriately issued to Desert Aire. Thus, while revoking Desert Aire's PRC is the first step in fixing the problem, it fails to address the full problem.

If a new application period is opened, then GB Sciences will have been denied the PRC which, if the law had been followed, it would have received. If the Division opens a new application period for the now available PRC, GB Sciences will be tested against a different set of applicants, under different circumstances, and could easily find itself once again left out. When considering the fact that GB Sciences would have received the available PRC if the Division had followed the law in the first place, this result would be manifestly unfair. To revoke Desert Aire's PRC without awarding it to GB Sciences denies GB Sciences all remedies available and simply puts GB Sciences in the same positions as other applications who, unlike GB Sciences, failed to qualify the first

time around. In order to fix the problem, the PRC must be awarded to GB Sciences.

4. **A Consistent Result With *NuLeaf* Would be Reissuance of the PRC to GB Sciences, As Next-in-Line.**

Finally, the Division argues that if the District Court in the case below had ruled consistently with the district court decision in the related matter on appeal in *NuLeaf CLV Dispensary et al. v. State*, then GB Sciences would have been denied injunctive relief because it brought its claims in the case below too late, being more than one year later. *See* Answering Brief of Division at 4.

However, the Division is, once again, incorrect. The inconsistency between the ruling in *NuLeaf* and the ruling of the District Court in the case below is as to whether the Division can be ordered to reissue a revoked PRC after the 90-day period described in the statute (i.e. November 3, 2014 in this case). Judge Johnson in *NuLeaf* said "yes" and ordered that the revoked PRC in that case be reissued to the Respondent in the case (Acres Medical), whom he determined was "next-in-line" among the applicants. In contrast, Judge Cory in the case below said "no" to the reissuance of a revoked PRC. When or in what manner GB Sciences pursued its claim for a mandatory injunction to correct the Division's error was not the basis for either ruling.

Further, as the record reflects, although the Complaint in the underlying case was not filed until December 2, 2015, GB Sciences originally included

Respondent Desert Aire as a party in *NuLeaf* when it initiated that action back in December 2014. (App. Vol. I: JA252-80) After Desert Aire was dismissed as a party-defendant (because GB Sciences only needed one PRC and there were two illegitimate PRC-holders: NuLeaf and Desert Aire), GB Sciences attempted to bring Desert Aire back in the case. (App. Vol. IV: JA709-33) The district court in *NuLeaf* was not willing to allow an amendment past the deadlines set forth in the scheduling order to bring Desert Aire back into that case because it would delay the other parties obtaining complete relief and a "timely resolution of the litigation." (App. Vol. IV: JA736) However, the *NuLeaf* court did not prohibit GB Sciences from re-initiating its claims against Desert Aire in a separate action. Thus, GB Sciences commenced the case below.

In any event, there would be no inconsistency in rulings if GB Sciences was granted a mandatory injunction against the Division to compel it to reissue Desert Aire's revoked PRC to GB Sciences. In fact, it would be quite the opposite. The only consistent result would be a reissuance of the revoked PRC to GB Sciences, just as the revoked PRC in *NuLeaf* was reissued to Acres Medical.

## II.

### CONCLUSION

For the foregoing reasons, the Nevada Supreme Court should reverse the District Court's refusal to reissue Desert Aire's revoked MME Provisional

Registration Certificate to GB Sciences, and remand the matter to the District Court with instructions to the District Court to issue a mandatory injunction compelling the Division to reissue the revoked PRC to GB Sciences.

Dated this 15<sup>th</sup> day of March, 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:

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

☐ This brief has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

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:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 3,456 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_\_ words or \_\_\_\_\_ lines of text; or

☒ Does not exceed 15 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 15<sup>th</sup> day of March, 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 15<sup>th</sup> day of March, 2017, I served a copy of this  
**RESPONDENT/CROSS-APPELLANT GB SCIENCES NEVADA, LLC'S**  
**REPLY TO STATE RESPONDENT'S ANSWERING 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