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 REPLY TO DESERT AIRE'S ANSWERING 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. A710597

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), 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.
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Dated this 28th day of March, 2017.

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LEGAL ARGUMENT

A. DESERT AIRE'S ARGUMENTS ON THE CROSS-APPEAL ARE WITHOUT MERIT.

In its Reply Brief on Appeal and Answering Brief on Cross-Appeal ("***Desert Aire's Brief***"), Desert Aire sets forth a reiteration of its Opening Brief arguments as support for its opposition to GB Sciences' Cross-Appeal. *See* Desert Aire's Brief at 1-2. However, Desert Aire's arguments simply do not pass muster.

1. Desert Aire Did Not Comply With the Statute, Substantially or Otherwise.

Desert Aire asserts that the Supreme Court should rule against GB Sciences on the Cross-Appeal because GB Sciences "did not comply with the subsection either." Id. at 27. Desert Aire argues that it "substantially complied" with NRS Chapter 453A, while GB Sciences did not. Id. at 4-12 and 27.

However, Desert Aire is incorrect. Desert Aire claims that it submitted its "best available proof" because it submitted a surveyor letter with its application. However, Desert Aire conveniently disregards the October 30, 2014 letter from the City, which is not only the 'best available proof', but which established that Desert Aire ***had not*** complied with obtaining Local Approvals. (App. Vol. III: JA578-83).

Further, unlike Desert Aire, GB Sciences ***did*** comply with the MME Statutes, and with N.R.S. § 453A.322(3)(a)(5), in particular. Unlike, Desert Aire, GB Sciences submitted and maintained its applications for special use permits from the City prior to the November 3, 2014 deadline. (App. Vol. III: JA578-89). Consequently, unlike Desert Aire, GB Sciences was among the approved MME Dispensaries identified in the letter which was provided by the City to the Division on October 30, 2014.[2] (App. Vol. III: JA578-89). Because Desert Aire keeps reiterating a false interpretation of the statutes (*See* Desert Aire's Brief at 6), it bears repeating that the statute did not require that actual licensure or the letter from the City be obtained at the time that the MME applications were submitted (as Desert Aire continues to argue), but that it be obtained before a Registration Certification, provisional or otherwise, was issued by the Division. GB Sciences obtained that letter. Desert Aire did not.

Rather, Desert Aire voluntarily withdrew its applications for special use permits from the City before the PRCs were issued by the Division. In fact, prior

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[2] Desert Aire also accuses GB Sciences of mistakenly asserting that Desert Aire received a notice of denial from the City of Las Vegas. *See* Desert Aire's Brief at 15, fn. 5. However, GB Sciences actually asserted that Desert Aire was "denied the Local Approval" (i.e. had not complied with the "Local Approval" requirement of N.R.S. § 453A.322(3)(a)(5)) because it had voluntarily *withdrawn its applications*. *See* GB Science's Answering Brief and Opening Brief on Cross-Appeal at 17. This is true and the October 30, 2014 letter stated as such. (App. Vol. III: JA578-89). Later obtaining a special use permit from the City in December 2014 is of no use to Desert Aire because that was *after* the November 3, 2014 MME application deadline had passed.

to the issuance of the PRCs, and prior to Desert Aire's withdrawal of its application, the City of Las Vegas Planning Commission had even voted 4-1 to ***deny*** Desert Aire's application for a special use permit. (App. Vol. III: JA570-76 and JA578-83).

Ruling in favor of Desert Aire and denying GB Sciences the relief it seeks on Cross-Appeal would not satisfy the requirements of the statute. Rather, it would completely gut a portion of the statute that mandates that Local Approvals be obtained before a PRC be issued (N.R.S. § 453A.322(3)(a)(5)), it would deny the City its statutory right to be part of the selection process for suitable MME establishments, and it would reward a non-compliant applicant (Desert Aire) to the detriment of a compliant applicant (GB Sciences) with a comparable rank and score from the Division.[3]

Contrary to the protestations of Desert Aire, the purpose of the statute is not to have the Division simply divine whether local zoning requirements are met (*see* Desert Aire's Brief at 9), but, rather, it is to involve the City in the decision-making process such as that which takes place with a special use permit: applications, document reviews, analyses by various public officials, local public hearings, etc. Therefore, N.R.S. § 453A.322(3)(a)(5) was made part of the MME

[3] GB Sciences was ranked #13 by the Division with a score of 166.86, while Desert Aire was ranked #10 by the Division with a score of 172.33 (only 3.3% higher than GB Sciences).

statutes to ensure that the Division not move forward on the issuance of a PRC if the local authority had not given Local Approvals before the deadline for issuance of PRCs[4]. Unfortunately, in this case, the Division did move forward and issued a PRC to the non-compliant Desert Aire, instead of GB Sciences, which was next in line and fully compliant with N.R.S. § 453A.322(3)(a)(5).[5]

2. GB Sciences is Entitled to a Reversal on Cross-Appeal Because the Division Simply Got it Wrong.

Desert Aire further argues that GB Sciences is not entitled to relief, by essentially arguing that the District Court should have given deference to the Division and endorsed the Division's blatant disregard of the law. *See* Desert Aire's Brief at 12-16. As cited previously by GB Sciences, 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,

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[4] Desert Aire also argues that GB Sciences is conflating the requirements for issuance of a PRC with those for issuance of a Registration Certificate. *See* Desert Aire's Brief at 11. However, there is no distinction in requirements between the two under the statute and nowhere in the statute does it state that the Division can issue a PRC to an applicant that has not complied with N.R.S. § 453A.322(3)(a)(5).

[5] Desert Aire also argues that GB Sciences lacks standing because it did not comply with the statute, arguing that Local Approvals were needed at the time that an MME application was first submitted to the Division. *See* Desert Aire's Brief at 25-26. The statute, however, does not state that. Rather, the statute merely requires that the Division issue PRCs within 90 days and that Local Approvals (i.e. license ***or*** City letter) be obtained prior to issuance of the PRC.

Div. of Ins. v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000). In this case, however, Desert Aire is asking the Supreme Court to grant deference to the Division in its disregard of the plain language of N.R.S. § 453A.322(3)(a)(5). The Division is not entitled to disregard the plain language of the provisions set forth in N.R.S. § 453A.322(3)(a)(5). The Division simply got it wrong.

3. There is no Ambiguity in the Statute, nor Would Applying the Statute as Written Create an Absurd Result.

Desert Aire next claims that N.R.S. § 453A.322(3)(a)(5) is ambiguous, and that applying it to strip Desert Aire of the PRC and reissuing the PRC to GB Sciences (as requested in the Cross-Appeal), creates an absurd result. *See* Desert Aire's Brief at 17-20. Again, this is simply not true.

N.R.S. § 453A.322(3)(a)(5) states in plain language that the Division is not authorized to issue a PRC, unless an applicant ***had complied*** with that subsection, including the requirement that Desert Aire produce a letter from the local jurisdiction evidencing compliance with N.R.S. § 453A.322(3)(a)(5). The City of Las Vegas issued a letter to the Division listing GB Sciences in compliance and Desert Aire not in compliance. There is nothing ambiguous about the statute or the City of Las Vegas' letter. Likewise, there is nothing absurd in taking a PRC improperly issued to Desert Aire back and reissuing it to GB Sciences, the "next-

in-line applicant" which should have received it in the first place. The district court in *NuLeaf* did just that.[6]

4. There is no Basis Under Estoppel or Laches to Punish GB Sciences.

In the Desert Aire Brief, Desert Aire also reiterates its estoppel and laches arguments against GB Sciences as a basis to deny GB Sciences the right to receive the revoked PRC. *See* Desert Aire Brief at 19-25.

First, Desert Aire complains that it never received notice from the Division that its application for a PRC had been denied but instead was issued a PRC, and that Desert Aire relied upon the Division's actions by spending millions of dollars to build a store and open for business. Id. at 20-22. However, Desert Aire unquestionably knew that it had withdrawn its application with the City of Las Vegas. Likewise, Desert Aire knew all along that even if it ultimately received the PRC, the PRC was revocable. Therefore, such expenditures were at Desert Aire's peril, and they cannot form the basis for denying the revocation of Desert Aire's PRC and its reissuance to GB Sciences. Whether the Division now wishes to avoid "the disruption of operations" or not, as a result of the problem it caused, is irrelevant. Any time a license or permit is revoked from a going concern, there is a disruption of operations. That does not justify keeping a license in place

[6] However, it awarded the PRC to an intervening claimant which the District Court

when it was improperly issued in the first place. Finally, Desert Aire cites Southern Nevada Mem. Hospital, 101 Nev. 387, 705 P.2d 139 (1985), for the proposition that a citizen "has the legitimate expectation that the government should deal fairly with him or her." *See* Desert Aire Brief at 22. The proposition actually applies to GB Sciences, which has the right to expect that the Division would ***not*** issue a PRC to an applicant that did not comply with the law (Desert Aire). In contrast, Desert Aire had no expectation that the Division's issue of a PRC to Desert Aire in this case was proper, when Desert Aire knew that, as of the deadline, it did not have a license, and that it would not be identified on any letter from the City of Las Vegas as an approved applicant, because Desert Aire had voluntarily withdrawn its applications for special use permits.

Second, whether GB Sciences initially dismissed Desert Aire as a defendant in *NuLeaf*, Desert Aire was originally a defendant in that case which was initiated shortly after the Division had made its error in issuance of some of the PRCs, dismissal was without prejudice, any costs that Desert Aire incurred it would have incurred even if it had remained an active participant in *NuLeaf*, and Desert Aire always knew that its PRC was revocable. Thus, its expenses were at its own peril and cannot form the basis to deny the reissuance of the PRC to GB

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determined was "next-in-line".

Sciences, regardless of the manner in which GB Sciences sought judicial assistance to undo what the Division had improperly done.

Third, Desert Aire challenges the alleged "timeliness" of GB Science's challenge. *See* Desert Aire's Brief at 23. In referencing the Division's response to the motion for reconsideration in the underlying case, Desert Aire actually concedes that GB Science's challenge to Desert Aire's PRC in the original *NuLeaf* matter was timely. Id. Desert Aire, however, takes exception to the underlying action (filed approximately one year later) which was only made necessary because the district court in *NuLeaf* did not permit GB Sciences to amend its complaint to bring Desert Aire back in as a party.

However, as explained above and on multiple occasions, GB Sciences challenged Desert Aire's revocable PRC initially in *NuLeaf*, dismissed Desert Aire after a few months (*without* prejudice) once it was determined that only one improperly-awarded applicant (NuLeaf) had to be challenged, and tried to bring Desert Aire back in once it was determined to now be a necessary party (when NuLeaf's PRC was awarded to an intervening claimant, Acres Medical). Notably, the district court in *NuLeaf* did not prohibit GB Sciences from filing the underlying case, even though he did not allow the pleadings in *NuLeaf* to be reopened past the deadline in the scheduling order. What all this means, is that

GB Sciences timely and diligently pursued its claim to the improperly issued PRCs.

Desert Aire cannot seriously contend that it relied on any of GB Sciences' actions to Desert Aire's detriment. If GB Sciences had not dismissed Desert Aire as a party in *NuLeaf*, but kept the challenge to its PRC alive in that case, Desert Aire would have still ***incurred the exact same expenses*** in trying to establish an MME dispensary (even with entitlement to the PRC legally unsettled). In other words, Desert Aire did not ***rely on the dismissal*** by making any other expenditures that it would not have made without the dismissal. Rather, Desert Aire would have still moved forward to set up its business in the hope that it would prevail at trial in *NuLeaf*. It would not have ceased such activity.

Fourth, Desert Aire relies heavily upon Carson City v. Price, 113 Nev. 409, 934 P.2d 1042 (1997) for the notion that laches will prevent the Division from rectifying its error because the Division led Desert Aire to believe it was qualified for a PRC when the PRC was issued. *See* Desert Aire's Brief at 25. Desert Aire also tries to apply it to GB Science's for "waiting a year to file its lawsuit." Id.

However, as explained above GB Sciences initially pursued Desert Aire in NuLeaf right out of the box. Further, as Price clearly states, "laches is more than a mere delay." It must be a delay that ***works to the disadvantage*** of another. It must be a delay that "***caus[es]*** a change of circumstances." 113 Nev. at 412-13,

934 P.2d 1042 (emphasis added). As explained above, nothing that the Division did or did not do, and nothing that GB Sciences did or did not do, ***caused*** Desert Aire to incur or continue to incur the expenses of trying to set up and operate an MME dispensary, that it would not have incurred otherwise. It would have always incurred such expenses in the hope that it would be successful in securing a PRC, whether there was an active legal challenge for such a coveted prize or not, and whether there was an ongoing risk of revocation (as there always is).

5. GB Sciences Has Standing to Bring the Action.

Desert Aire next argues that GB Sciences lacks standing because no applicant qualified if a license from the local authority was required before a PRC could be issued by the Division. *See* Desert Aire's Brief at 25-27. Desert Aire arrives at this conclusion by claiming that: (1) "the statute makes it clear that" proof would have had to be given when the applications were initially submitted in August 2014; (2) no one submitted a license with its application; (3) the statute does not allow the application to be supplemented; and (4) the October 30, 2014 letter from the City is not equivalent to proof of licensure in an application. Id.

However, Desert Aire is just trying to dance around what the statute actually does state. Applications are submitted pursuant to N.R.S. § 453A.322(2), which only requires that an applicant use the form "prescribed by the Division",

contain the information set forth in N.R.S. § 453A.322(3)(a)(2), and be accompanied by the fee under N.R.S. § 453A.322(3)(a)(1).

As an independent provision (i.e. in addition to the application), besides three other independent provisions (in N.R.S. §§ 453A.322(3)(a)(3),(4), and (6)), the applicants must comply with N.R.S. § 453A.322(3)(a)(5), which states that the Division "shall register the medical marijuana establishment and issue a medical marijuana registration certificate if" ***not later than 90 days*** a party has submitted ***proof of licensure*** or ***a letter*** from the applicable local government. 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 N.R.S. § 453A.322(3)(a)(5). The face of the October 30, 2014 shows that it was intended to comply with this provision (App. Vol. III: JA578-89).

Contrary to the arguments of Desert Aire, N.R.S. Chapter 453A ***does not*** require the license or letter when the applications were initially submitted in August 2014, no applicant needed to submit an actual license with its application, the application did not need to be supplemented because N.R.S. § 453A.322(2) and N.R.S. § 453A.322(3)(a)(5) are two entirely independent provisions, and the October 30, 2014 letter from the City did not need to be "the equivalent of proof of licensure with an application" because no proof was needed at time of application. The letter, was, however, the necessary proof of compliance with

N.R.S. § 453A.322(3)(a)(5). Simply put, the statutes do not state what Desert Aire claims they do.

6. Desert Aire's Reliance on the Division's Arguments are Unavailing.

Finally, Desert Aire refers to the answering brief filed by the Division and adopts its reasoning and arguments without any further elaboration. *See* Desert Aire's Brief at 27. However, for the reasons explained in GB Science's Reply to the Division's Answering Brief, the arguments of the Division are also without merit and the District Court should be reversed with respect to its refusal to reissue the revoked PRC to GB Sciences.

The reality is that Nevada courts have the authority to put the parties in the position that they should have been in if the law had been followed. *See* 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). Under the undisputed facts of this case, if the law had been followed the Division would have issued the PRC to GB Sciences, not Desert Aire.

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 28th day of March, 2017.

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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:

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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 28th day of March, 2017.

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CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2017, I served a copy of this **RESPONDENT/CROSS-APPELLANT GB SCIENCES NEVADA, LLC'S REPLY TO DESERT AIRE'S ANSWERING BRIEF ON CROSS-APPEAL** upon all counsel of record:

☐ By personally serving it upon him/her; or

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