IN THE SUPREME COURT OF THE STATE OF NEVADA

DEPARTMENT OF HEALTH AND HUMAN SERVICES, NEVADA DIVISION OF PUBLIC AND BEHAVIORAL HEALTH, MEDICAL MARIJUANA ESTABLISHMENT PROGRAM,

Appellant,

vs.

SAMANTHA, INC. d/b/a SAMANTHA'S REMEDIES, a domestic corporation,

Respondent.

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District Court Case No.:
A-14-710874-J
Dept. No.: VIII

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Samantha, Inc. d/b/a Samantha's Remedies has no parent corporation and there is no publicly held corporation that owns 10% or more of Samantha, Inc. d/b/a Samantha's Remedies stock.

Samantha, Inc. d/b/a Samantha's Remedies is represented in District Court and in this Court by Kimberly Maxson-Rushton, Esq. of the law firm Cooper Levenson, Attorneys at Law.

Respectfully sumitted this 22nd day of November, 2016.

COOPER LEVENSON, P.A.

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JURISDICTIONAL STATEMENT

Respondent Samantha, Inc. d/b/a Samantha's Remedies (hereinafter "Samantha" or "Respondent") does not dispute the Jurisdictional Statement propounded by Appellant Department of Health and Human Services, Nevada Division of Public and Behavioral Health, Medical Marijuana Establishment Program (hereinafter the "Division" or "Appellant"). This matter focuses on the application of Samantha's (hereinafter "Application"), for a Certificate of Registration to operate a Medical Marijuana Establishment (hereinafter "MME")-Dispensary in the City of Las Vegas, and the Division's arbitrary and capricious evaluation of said Application.

The appeal arises as a result of the Eighth Judicial District Court's (i) Order denying the Division's Motion to Dismiss Samantha's Petition for Judicial Review, and (ii) Order remanding Samantha's Application to the Division for re-scoring based on the District Court's conclusion that Appellant's evaluation of the Application was arbitrary and capricious and not supported by the evidence. Appellant's Appendix ("App.") p. 33, 137. This appeal is proper and permitted pursuant to Nevada Rules of Appellate Procedure Rules 3 and 3A.

ROUTING STATEMENT

Samantha adopts the Division's propounded Routing Statement and agrees that this matter is properly before the Supreme Court as the issues presented herein

are matters of first impression in the State of Nevada.

STATEMENT OF THE ISSUES

1. A Petition for Judicial Review is proper when an administrative agency's final decision violates one of the standards set forth in NRS 233B.135(3).

2. The District Court did not err when it found that Appellant arbitrarily and capriciously evaluated Samantha's application for a Medical Marijuana Dispensary Certificate of Registration.

3. Having found the Division's actions to be arbitrary and capricious the District Court did not err when it set aside the application score and remanded the matter back to the Division.

STATEMENT OF THE CASE

Pursuant to NRS 453A.320 the Division is responsible for registering MME's with an eye towards ensuring the protection of the public health and safety and the general welfare of patients in this State. Accordingly, under the provisions contained in NRS 453A.322-328, applicants seeking a Certificate of Registration (e.g. license) are required to meet certain specified statutory criteria. Thereafter, upon verification that an applicant meets said statutory criteria the Division shall issue Certificates of Registration authorizing the operation of a MME-Dispensary, MME-Cultivation Facility, MME-Production Facility or MME-Independent Testing Laboratory. NRS 453A.328. This case raises unique issues relative to the

Division's review and ranking of MME-Dispensary applications and, in particular, it's evaluation of Samantha's Application.

On May 30, 2014, the Division published its MME Registration Certificate Request for Applications ("Request for Applications"), which set forth for prospective applicants details about the application process and the corresponding statutory requirements. Respondent's Appendix ("Resp. App.") p. 1. The Request for Applications required MME applicants to submit their applications in two distinct and divided portions: the Identified Criteria Response ("ICR") and the Non-Identified Criteria Response ("NICR"). *Id*. at 10. The ICR required an applicant to include all "identifying" information in the response, including names of people and places, dates of birth, addresses, etc.; whereas, the NICR – in an effort to preserve a degree of anonymity and negate any bias – required that such information be omitted. *Id*. at 5, 7. In addition to the Request for Applications requiring that MME applications be fragmented into the ICR and NICR sections, it further clarified that each of the respective sections be broken into separate tabs. The ICR was divided into tabs I-XIII and NICR into tabs I-VII. *Id.* at 12-18.

The Request for Applications also set forth the timing of the MME application process. Pursuant to the Request for Applications, every proposed MME had to submit its application within a "10 Day Window for Receipt of Applications" between August 5-18, 2014. *Id.* at 9. Thereafter, all MME

applications were reviewed and scored during a 90-day period[1]. Once all applications were evaluated and scored they were ranked and Provisional Certificates of Registration were issued to the top-ranked dispensaries based on jurisdictional maximums for each local jurisdiction. *See*, NRS 453A.324. Consistent with the statutory guidelines, only 12 MME dispensary applicants were authorized to operate in the City of Las Vegas. *Id*.

Samantha's Application was meticulously compiled and timely filed, in fact it was the third MME-Dispensary application filed in Nevada. Resp. App. p. 633. The Application was evaluated consistent with the statutory timeline(s). On or about November 3, 2014, Samantha's was notified that it had not been granted a Provisional Certificate of Registration to operate a MME-Dispensary because it's score wasn't ranked high enough to be within the top 12 applicants in the City of Las Vegas.

After multiple verbal and written requests by Samantha's to obtain the score of its application as well as the methodology utilized by the Division, Samantha's was ultimately authorized to see a breakdown of the score as it pertained to each

[1]Pursuant to NRS 453A.322(3), "not later than 90 days after receiving an application to operate a [MME], the Division shall register the [MME] and issue a [MME] certificate of registration." However, the Division has no obligation to simultaneously process all MME applications; instead, the agency has full discretionary authority to notice and review applications (for different MME disciplines or based on geographic location) consistent with the Division's resources and ability to adequately perform said review.

"scoring" section criterion of the application, without any additional explanation for the respective scores. *Id.*

Noting multiple scores (for the various sections of the application) were inconsistent and/or puzzling based on the information/documentation they had submitted, Samantha's requested reconsideration of its Application and, where necessary, that additional points be awarded. On November 18, 2014, Appellant notified Samantha's that no further consideration of the Application would be granted, thus making the administrative agency's decision final.

Pursuant to NRS 233B, Samantha's filed its Petition for judicial Review on December 8, 2014. App. p. 1. Immediately thereafter the Division filed a Motion to Dismiss, which was denied by the District Court. *Id.* at 33. Following the denial of said Motion, on February 18, 2015, the Division filed a Petition for Writ of Mandamus or in the Alternative Writ of Prohibition with the Nevada Supreme Court. The Division argued in the Writ that judicial review was not available in this instance because the MME licensing process was not a "contested case." Oral arguments were heard on October 6, 2015. On January 22, 2016, the Writ was denied and the subject Petition for Judicial Review was remanded back to the District Court.

After finally being re-vested with authority to consider Samantha's Petition, the District Court proceeded consistent with NRS 233B.130(2)-(6). The

Application was provided to the District Court by the Division in two distinct portions and identified as the "Record on Review" (hereinafter "ROR"). Resp. App. p. 46-903. Included as part of the ROR were blueprints, diagrams, and drawings of the proposed MME-Dispensary location, which were submitted as part of Samantha's Application.

Also included was the Division's Scoring/Evaluation Tool (hereinafter the "TOOL"). *Id*. at 904. The TOOL is approximately 125 pages and contains the respective scores and comments of the Division's evaluators responsible for reviewing Samantha's Application. The TOOL is the methodology used by the Division to score and rank Samantha's Application. The TOOL is broken out into seven (7) categories, loosely tied to the statutory criteria found in NRS 453A.322-328. Said factors include: Financial Plan; Organizational Structure; Convenient to Serve the Needs; Likely Impact on the Community; Taxes Paid and Beneficial Contributions; Adequacy of Size and Construction Plans; and Care, Quality, Safekeeping. Resp. App. p. 904, 919, 931, 940, 950, 961, 1016.

Following a comprehensive review of the record and oral arguments, the District Court issued its Order finding that the Division's score of Samantha's Application was **not based on substantial evidence of the whole record**, ***and*** the Division's handling of the application process and in particular, Samantha's Application **was arbitrary and capricious**. App. p. 137 (emphasis added). The

District Court set aside the original score and remanded the Application back to the Division. *Id*. at 142. The District Court further ordered that if the new evaluation resulted in a score which ranked within the top 12 MME-Dispensary applications in the City of Las Vegas, the Division shall issue Samantha's a Certificate of Registration. *Id*. at 143. The Division raises this Appeal in response to the District Court's Order granting the Petition for Judicial Review and to further clarify whether the District Court had authority to grant the relief requested by Samantha's. availability.

STANDARD OF REVIEW

On appeal from orders deciding petitions for judicial review, this Honorable Court reviews the administrative decision in the same manner as the district court. *Nassiri v. Chiropractic Physicians'bd.*, 130 Nev. Adv. Rep. 27, 327 P. 3d 487, 489 (2014); *Elizondo v. Hood Mach., Inc.*, 129 Nev. Adv. Rep. 84, 312 P.3d 479, 482 (2013) (citing *City of N. Las Vegas v. Warburton*, 127 Nev. Adv. Rep. 62, 262 P.3d 715, 718 (2011)). Specifically, factual determinations of administrative agencies are reviewed for clear error "in view of the reliable, probative and substantial evidence on the whole record" or for an "abuse of discretion." NRS 233B.135(3). Only those factual findings not supported by substantial evidence will be overturned. NRS 233B.135. "Substantial evidence" is evidence that a reasonable mind could accept as adequately supporting the agency's conclusions. *Elizondo* 129

312 P.3d at 482. "A de novo standard of review is applied when this Court addresses a question of law, `including the administrative construction of statutes.'" *Id.* (quoting *Holiday Ret. Corp. v. State, Div. of Indus. Relations,*128 Nev. Adv. Rep. 13, 274 P.3d 759, 761 (2012)). Accordingly, this Court will decide purely legal issues without deference to the agency's legal conclusions. *Nassiri* 130 Nev. Adv. Rep. 27 at 5, 327 P. 3d at 489.

ARGUMENT

I. A PETITION FOR JUDICIAL REVIEW IS PROPER WHEN AN ADMINISTRATIVE AGENCY'S FINAL DECISION VIOLATES NRS 233B.135(3)

Whether the lower court exceeded its statutory and judicial authority over the Division is a question that involves the balance of power between the judiciary and executive administrative agencies. Said balance of power is governed by an established area of administrative law, which deals with the scope of judicial review over varying types of administrative actions. In the instant matter, this Honorable Court is asked to consider whether the standards of judicial review apply to the Division's "final" decision in a licensing matter pertaining to a MME-Dispensary. Accordingly, the Court's ultimate consideration must involve "a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 909 (1976).

Logically, courts owe a high standard of deference to an agency's legal conclusions and/or factual findings. Yet, when an agency's exercise of discretion is arbitrary and capricious or found to be in violation of constitutional or statutory provisions the court must intervene. As any person who suffers a legal wrong or is adversely affected by an administrative agency's action should have the authority to seek judicial review except where a statute specifically precludes it.

The threshold question for this Court is whether the "contested case" language contained in NRS 233B limits the ability of an aggrieved party to seek judicial review or, does it simply tie together the threshold requirements for ensuring a fair hearing and the corresponding judicial review process? Whether and to what extent a particular statute precludes judicial review is not determined solely by its express language but also from the structure of the statutory scheme, its objectives, legislative history and the nature of the administrative action involved. *Block v. Community Nutrition Inst*. 467 U.S. 340, 104 S.Ct. 2450 (1984).

Starting with the express language of NRS 233B.127, as amended by the 2015 Nevada Legislature[2], Appellant argues that it evidences a legislative intent "to ***only*** provide a right to judicial review for 'contested cases' when the state

[2] The legislative history for Assembly Bill 53, *2015 Nevada Legislature*, offers no reliable evidence that the amendments to NRS 233B.127 signal a legislative intent to preclude judicial review of matters which do not include the right to a hearing or, are identified as a "contested case."

agency provides notice and hearing before denying an application." *See*, Appellant's Opening Brief, pg 10. This argument rests on the question-begging premise that the relevant difference between a licensing decision *that does not require a hearing* and *one which does* is that only the latter is subject to judicial review. Furthermore, it fails to consider three critical factors: first, the structure of the statutory scheme and legislative intent behind Nevada's Administrative Procedures Act (hereinafter "APA"), and in particular NRS 233B.135; second, the objectives of NRS 453A; and, lastly, the specific actions of the Division in this case, and the necessity of judicial review to avoid an injustice.

A. Nevada Administrative Procedures Act

Nevada's APA was enacted to "establish minimum procedural requirements for the regulation-making and adjudication procedure of ***all*** agencies of the Executive Department of the State Government ***and for judicial review of both functions***, except those agencies expressly exempted pursuant to the provisions of this chapter.[3]" NRS 233B.020 (emphasis added). The statutes most applicable to judicial review are NRS 233B.130-233B.135, which by and large set forth non-discretionary procedural standards. In addition to the procedural obligations, NRS 233B.135(3) provides statutory authority for Respondent's position - that judicial review of administrative decisions is the rule and non-reviewability an exception.

3 The Department of Health and Human Services, Division of Public and Behavior Health is not an exempted agency under NRS 233B.039.

See, Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832 (1970). "In the absence of express statutory language prohibiting judicial review, a legislative intent to prohibit judicial review must be established by specific legislative history or other reliable evidence of intent." *Texas Dept. of Protective and Regulatory Services v. Mega Child Care, Inc.* 145 S.W.3d 170,199, 47 Tex. Sup.Ct. J. 116 (Tex 2004). To find otherwise would create an imbalance in the judicial system whereby only certain decisions (as determined solely by the administrative agency) would be subject to judicial review. *Cheung v. Dist. Ct.*, 121 Nev. 867, 124 P. 3d 550 (2005).

Clearly, Appellant disagrees with this position, arguing that the plain language of NRS 233B.127 coupled with this Court's holding in *Private Investigator's Licensing Bd. v. Atherley*, 98 Nev. 514, 654 P.2d 1019 (1982) support the position that sans a contested case judicial review will not lie. However, in determining whether there is clear legislative intent to preclude judicial review, courts should look for evidence such as "'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible in the detail of the legislative scheme.'" *Traynor v. Turnage*, 485 U.S. 535, 628, 108 S. Ct. 1372, 1378 (1989), citing, *Bowen v. Michigan Academy of Family Physicians,*475 U.S. 667, 673 (1986) (quoting *Block v. Community Nutrition Institute,* 467 U.S. 340, 349, 351 (1984)). Neither the text nor scant legislative

history can provide the requisite "clear and convincing" evidence of a legislative intent to foreclose judicial review. *Johnson v. Robison*, 415 U.S. 361, 367, 94 S.Ct. 1160 (1974)).

As this Court has previously opined, the legal process due in an administrative forum should be flexible and call for such procedural protections as the particular situation demands. *Minton v. Board of Med. Exam'rs*, 110 Nev. 1060, 881 P.2d 1339 (1994) (overruled in part on different grounds). Pursuant to NRS 233B.135(3), courts have the wide latitude to act when a "final" decision of an agency violates constitutional or statutory provisions; is made in excess of the agency's statutory authority; is made upon unlawful procedure or error of law; is clearly erroneous in view of the substantial evidence on the whole record; or is arbitrary and capricious or characterized by abuse of discretion. This language coupled with the APA's presumption in favor of judicial review is "a repudiation of the principle that efficiency of regulation conquers all." *Sackett v. EPA*, 566 U.S. 120, 133; 132 S. Ct. 1367, 1374 (2012).

"[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability….it would not be much of a presumption at all." *United States Army Corps of Eng'rs v. Hawkes Co.,* 136 S. Ct. 1807, 195 L. Ed. 2d 77 (2016). "On the federal level there is a reasonably developed doctrine that unless a statute

affirmatively precludes judicial review, there is a common law right of judicial review of administrative action." *The Revised Model State Administrative Procedure Act – Reform or Retrogression?* Harold Bloomenthal, 1963 Duke L.J. 593 at 622-23.

In addition, to the express language, the legislative history and the objective behind Nevada's APA this Court must also consider the nature of this case – specifically, the Division's egregious actions in evaluating Samantha's Application. As evidence by the District Court's Order, the Division's decision was not supported by substantial evidence and the Division acted arbitrarily and capricious in its evaluation of Samantha's Application. App. p. 137. Without question, judicial intervention in this instance is warranted.

B. NRS Chapter 453A

NRS 453A.320, states that "[t]he purpose for registering medical marijuana establishments and medical marijuana establishment agents is to protect the public health and safety and the general welfare of the people of this State." In furtherance of this declaration of purpose, the Legislature went to laudable care to establish licensing criteria that ensure that only the most qualified applicants are authorized to dispense medical marijuana. Despite the overarching obligation to protect the safety and general welfare of patients, the Division failed, on at least three (3) occasions, to follow the law. Specifically, during the 2014 application

process the Division issued two (2) Certificates of Registration to applicants who failed to demonstrate compliance with local zoning requirements[4]. *See,* NRS 453A.322(5) and NRS 453A.350. In both instances, the Division's actions were found to be in violation of the law and, pursuant to judicial order, Appellant was ordered to rescind said licenses.

Equally alarming is the Division's intentional failure to adopt regulations allowing for a review of its actions. Even though NRS 453A.370 directs the Division to ***adopt regulations which are necessary or advisable to carry out the provisions of NRS Chapter 453A***. (emphasis added) by not doing so Appellant has attempted to prevent judicial scrutiny of its actions. Fortunately, there is a long standing presumption in federal law that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by [an] agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511 (1967). *See also, United States Army Corps of Eng'rs v. Hawkes Co.,* 136 S. Ct. 1807, 195 L. Ed. 2d 77 (2016). By failing to enact regulations which would allow for review of its actions, Appellant suggests that the legislature intended it to police itself. That standard would require that we accept the Division's word that it followed the law

[4] *See*, *Nuleaf Clv Dispensary, LLC vs. State, Dep't. of Health and Human Serv.'s*, Case No. 69909 (Eighth Judicial District Court Case No. A-14-710597-C) and *Desert Aire Wellness, LLC. vs. GB Sciences Nevada, LLC.* Case No. 70462 (Eighth Judicial District Court Case No.A-15-728448-C).

and did not act arbitrary and capricious, whereas the very aim of judicial review is to verify that the Division based its review of Samantha's Application on substantial evidence and did not abuse its discretion. *See*, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 575 US __, 191 L. Ed. 2d 607 (2015). "We need only know—and know that Congress knows—that legal lapses and violations occur, and specially so when they have no consequence. That is why this Court has so long applied a strong presumption favoring judicial review of administrative action." *Id.* at 1653; *See also, United States v. Zucca*, 351 U.S. 91, 76 S. Ct. 671 (1956).

Appellant further argues that NRS 453A (*Medical Marijuana)* does not provide for judicial review in matters pertaining to the licensure of MME'S. In fact it does. For example, each patient holding a medical marijuana prescription must apply for a patient identification card in order to be able to obtain and use medical marijuana in the State of Nevada. Pursuant to NRS 453A.210(6), in the event a patient is denied a patient card, the individual may seek judicial review as the denial is deemed to be a "final decision." Additionally, in order to qualify for participation in the medical marijuana program an individual must be affected by one of several identified illnesses. Pursuant to Division Regulation NAC 453A.200, an individual may petition for the addition of an illness to the list of approved conditions in order to be eligible for participation in the program. If the Chief Medical Officer denies the petition it is deemed a "final decision" for

purposes of judicial review. *See* NAC 453A.240. In both instances, there is no hearing thus, the matters are not "contested cases;" yet, the denied petitions are (by regulation) afforded the right to seek judicial review. *Id*. "The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." *Abbott*, 387 U. S., at 141; See also *Sackett*, 566 U.S. 120, 132 S. Ct. 1367 (2012). Furthermore, Legislative intent cannot be based on the consideration of only one section of a statute but instead must be gathered from considerations of the entire statutory scheme. *Minor Girl v. Clark County Juvenile Court Servs.*, 87 Nev. 544, 490 P.2d 1248, (1971) citing *Carson City v. Red Arrow Garage*, 47 Nev. 473, 225 P. 487 (1924). There is no reliable evidence to substantiate that the statutes applicable to MME licensing were uniquely designed to allow the Division the authority to arbitrarily and capriciously abuse its legislative responsibilities or enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review.

C. Nature of this Matter

Although deference is afforded to administrative agencies in their performance of discretionary functions, the Division's actions in this case far exceed the discretionary function authority and as such warrant judicial scrutiny. Without question, in an industry as specialized as medical marijuana – which requires heightened standards of security over the product (marijuana) and the

operators – the obligation to ensure the safety and protection of patients cannot be ignored. As such, abuses and errors such as those committed by the Division in this case demand further procedural protections, including the right to judicial review. If left unbridled not only will aggrieved parties, like Respondent be prejudiced but so will Nevada's patients. Discretionary acts by an agency should be undertaken with a view for what is right and equitable under the subject facts and law.

Based on the argument set forth herein no preclusion of judicial review can be gleaned from either NRS 233B or NRS 453A, nor should it when the agency's actions cannot be supported by the record and are arbitrary and capricious.

II. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT APPELLANT ARBITRARILY AND CAPRICIOUSLY EVALUATED SAMANTHA'S APPLICATION FOR A MEDICAL MARIJUANA DISPENSARY CERTIFICATE OF REGISTRATION

Appellant argues that the sole basis for Samantha's Petition was because its Application did not score in the top 12 dispensaries for the City of Las Vegas. While this statement is not factually inaccurate, it is disingenuous. As previously noted, any person who suffers a legal wrong or is adversely affected by an administrative agency's action should have the authority to seek judicial review.

Samantha's pursued this course of action because Petition for Judicial Review is the most applicable process of review relative to administrative

decisions. It also felt compelled to do so in response to the obvious, glaring incongruences between its Application and the corresponding score issued by the Division. Respondent knew that the score was not reflective of the information they submitted and that the Division had failed to review Samantha's whole Application.

Consistent with the claims set forth in the Petition for Judicial Review, following a review of the ROR, the District Court properly found that Samantha's had in fact been prejudiced by the Division's "final" decision. NRS 233B.135(3).

A. Samantha's objection is with Appellant's arbitrary and capricious review of its Application

Pursuant to NRS 233B.135(3), a reviewing court shall hold unlawful and set aside an administrative action, its findings and conclusions, found to meet any one of the six separate standards contained therein. Without question, a final decision shall be set aside if the action was arbitrary and capricious. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814 (1971), citing 5 U.S.C. *§* 706. To make this determination a court must consider whether the decision was based on consideration of the relevant factors and whether there was a clear error of judgment. *Id.* In this case the District Court properly determined that Appellant's score of Samantha's Application was not based on relevant factors; similarly, it also correctly found that there was a clear error of judgement in the Division's

handling of the MME application process, and in particular it's evaluation of Samantha's Application. App. p. 137.

Recognizing that the ultimate standard of review is narrow, a court may not substitute its judgment for that of the agency. *Riverboat Hotel Casino v. Harold's Club*, 113 Nev. 1025, 1029; 944 P.2d 819 (1997). In this case, the Division's action/scoring was not supported by substantial evidence (specifically, the Division failed to review the whole application filed and it failed to review pertinent materials filed in support of specific sections of the Application). App. p. 142. Additionally, the "final" decision was found to be arbitrary and capricious. *Id*. at 141-142. The term "arbitrary and capricious" is often a catch all provision incorporating varying forms of administrative misconduct not otherwise covered by other more specific provisions. It also evidences a standard of such gross misapplication and mishandling of an administrative matter so as to warrant judicial review. *Association of Data Processing Services Organizations v. Board of Governors*, 745 F.2d 677 (D.C. Cir. 1984).

Through the District Court's review of Samantha's Application, numerous shortcomings of the Division's evaluation of the Application were revealed. Specifically, the Division did not review several pages of blueprints and architectural drawings submitted by Samantha's which detailed the construction plans and designs for the proposed MME-Dispensary. *Id*. at 141. Additionally,

judicial review uncovered that the TOOL erroneously called for points to be given in a certain section for information which the Request for Applications required to be in different areas. *Id*. Furthermore, the Division's process where evaluators were only allowed to view a portion of the Application at a time – instead of reviewing it as a whole – resulted in points not being awarded despite the Application properly containing the information in other tabs/sections. *Id*. at 143. These issues with the Division's review of Samantha's Application, among others, resulted in the Application not receiving the proper score, and not being ranked among the top 12 MME-Dispensaries in Las Vegas. As such, the District Court found that the Division's review was arbitrary and capricious, and not supported by the evidence. *Id*. at 142.

The Division argues that since Samantha's Application was relatively highly ranked it cannot argue that the evaluation process was flawed. This is another incongruous and shallow argument as there is *no evidence* that Samantha's benefitted from Appellant's evaluation. The focus of Samantha's petition for judicial review was to demonstrate that the Division's evaluation of the Application was done inconsistent with the standards contained NRS 233B.135(c). Irrespective of how high it ranked, it does not negate the Division's abuse of discretion, which resulted in Samantha's not being issued a Certificate of Registration.

B. Samantha's dispute with the scoring criteria is that it does not conform with NRS 453A

It is true that the Division ***attempted*** to evaluate MME applications based on the statutory language in NRS 453A.328. Admittedly, the statutory criteria is scattered throughout the Division's Request for Applications and the TOOL it used to evaluate MME applications. The issue, however, is that there were clear inconsistencies among the Request for Applications, the TOOL, and the scoring of Samantha's Application which resulted in Samantha not receiving full points despite meeting the statutory requirements.

An oversimplified explanation of the interaction of the Request for Applications, the TOOL, and the scoring of Samantha's Application, hereafter, will illustrate the shortcomings of the Division's evaluation process.

The Division published its Request for Applications in May 2014, several months before MME applications were accepted and reviewed by the Division. The Request for Applications provided instructions regarding the contents and style of an MME application, and applicants were to follow the provided instructions precisely. Resp. App. p. 10. The Request for Applications called for an application to be presented in two (2) main sections (ICR/NICR "responses") with each response divided into 13 and 7 tabs, respectively, for 20 tabs total. *Id*. at 12-18.

The Division then created, confidentially, the TOOL to evaluate the MME

applications with the corresponding 20 tabs. The TOOL was broken down into seven (7) sections which each evaluated one or more of the 20 tabs. *Id*. at 904.

Many of the problems with the Division's evaluation of Samantha's Application is that there are clear circumstances where a certain section of the TOOL requires the Division's evaluators to evaluate a limited number of the Application's tabs. Regrettably, the information which addresses the TOOL's scoring criteria is actually found in **different** tabs. As such, there are clear circumstances where an evaluator awarded fewer points because he was simply looking in the wrong tabs. The critical point is that the Request for Applications and the TOOL show clear inconsistencies between the scoring sections and application tabs which resulted in a lower score for Samantha's.

Finally, there are other clear examples from the TOOL and Samantha's Application which show that the evaluators simply did not look at or have access to parts of Samantha's Application which were on point and properly included – such as the large blueprints/drawings of the proposed MME-Dispensary. These points were clearly set forth in Samantha's District Court briefs. App. p. 125-127.

In sum, Samantha's asserts that inconsistencies in the Request for Application and TOOL, coupled with Appellant's failure to review the entire Application resulted in Samantha's not receiving credit for meeting the statutory requirements of NRS 453A, even though evidence of compliance with the statutes

was included in Samantha's Application as required by the Division.

As stated at the beginning of this section, the Division's Opening Brief clearly shows that its focus is not on the actual review performed by the District Court. Instead, it emphasizes that the District Court should never have undertaken the review to begin with. Furthermore, by failing to include the entire ROR from the District Court in its Appendix (including the Request for Applications and Samantha's Application, as well as the TOOL) Appellant cannot point this Court to the alleged errors of the District Court which would support a reversal of the District Court's Order. Considering these shortcomings of the Division's appeal of the District Court's Order, along with the specific fallacies and inconsistencies contained in Appellant's Opening Brief, Samantha's requests that this Court find that judicial review is available in this instance and that the District Court's Order was proper in finding that Appellant's review of Samantha's MME-Dispensary application was not supported by substantial evidence and was done in an arbitrary, and capricious manner. *See*, NRS 233B.135(3).

III. HAVING FOUND THE DIVISION'S ACTIONS TO BE ARBITRARY AND CAPRICIOUS THE DISTRICT COURT DID NOT ERR WHEN IT SET ASIDE THE APPLICATION SCORE AND REMANDED THE MATTER BACK TO THE DIVISION

In Nevada it has been a long standing, generally accepted rule for reviewing courts to afford deference to an administrative agency's interpretation and

application of the statutes it's charged with enforcing. However, in instances in which its determined that an agency's interpretation and application of a statute is either arbitrary, capricious or clearly erroneous or otherwise unauthorized by law, courts have board latitude in whether to set the matter aside in whole or in part or remand the matter back to the agency. NRS 233B.135(3). "The standard for judicial review of agency interpretation of law is the *independent* judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action." *Judicial Review of Agency Action* 27 Cal. Law Revision Com. Rep. 81 (Feb. 1997), (emphasis added). The standards for MME applicants to obtain licensure in Nevada were clearly set forth by the 2013 Nevada Legislature. NRS 453A.322 and NRS 453A.328. However, as demonstrated above, the Division's interpretation and application of these statutory provisions and the licensure process in 2014 were grossly infirm.

Unfortunately, lost in all of this procedure and the delays are Bill and Erminia Drobkin, the proposed co-owners of Samantha. Mr. and Mrs. Drobkin entered this MME application process to honor their daughter, Samantha, who died several years ago after a long and painful battle with cancer. Samantha endured her cancer and treatment before medical marijuana was available, and the Drobkins know that her life could have been made much less painful if she had access to these medications. The Drobkins wholeheartedly want to be involved in providing

this relief to the countless others who continue to struggle with cancer and other painful diseases. But the Drobkins did not rely on an emotional story to get them a license to operate their dispensary. The Drobkins individually and painstakingly completed their Application (which was in excess of 800 pages), carefully complying with each requirement from the Request for Applications. Resp. App. p. 46-904. While the Drobkins knew that this was a competitive process and a certificate was not a guarantee, they were shocked to see that their Application scored so poorly in certain criteria where they had spent hours compiling the necessary information to meet the Division's requirements. Their requests for clarification of their low scores began this long process that has brought the parties here today. After the dust has all settled, it has become readily apparent that the errors and shortcomings were not on the part of Samantha's and its Application, but on the Division and its evaluation process. The conundrum now is how to move forward. The only viable option is to consider the particular facts of the case in fashioning an appropriate remedy.

A. The Court Has Discretion When Devising a Remedy

There is persuasive authority from the Federal Courts that administrative agencies must fashion remedies on a case-by-case basis. ". . . the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but

rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives." *Niagara Mohawk Power Corp. v. Federal Power Commission*, 379 F.2d 153, 159 (D.C. Cir. 1967). "Discretion is particularly broad when an agency is concerned with fashioning remedies and setting enforcement policy." *Greater Boston Television Corporation v. Federal Communications Commission*, 444 F.2d 841, 857 (D.C. Cir. 1971), cert. den. 403 U.S. 923, 91 S. Ct. 2229, 29 L. Ed. 2d 701 (1971). The Court's discretion is not exercised by merely granting or denying a party's request. "The term 'discretion' imports action taken in the light of reason as applied to all the facts and with a view to the rights of all the parties to the action while having regard for what is right and equitable under the circumstances and the law." *Corrigan v. Department Of Envtl. Mgmt.*, 1993 R.I. Super. LEXIS 14, 1993 WL 853855 (R.I. Super. Ct. 1993) citing *Hartman v. Carter*, 121 R.I. 1, 4-5, 393 A.2d 1102, 1105 (1978). Moreover, "[t]he principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice. Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex

society without sacrifice of fundamental principles of fairness and justice." (Emphasis supplied.) *Niagara Mohawk Power Corp*. at 160.

This Court is now in the position to clarify the regulations governing MME dispensaries by finding that a Petition for Judicial Review is the proper procedure to challenge the denial of an MME dispensary based on an arbitrary and capricious review by the Division. Furthermore, correct the Division's errors by affording Samantha's Application a fair and unbiased review. This Court's supervision in the process will ensure that the intent of NRS 453A is satisfied and that the best and most qualified applicants, such as Samantha's, are authorized to operate in the MME community in Clark County.

B. The Division should set aside Samantha's Score and Reevaluate the Application.

In determining whether to set aside the Division's score of Samantha's Application, the Court must also consider the effect of said action, balanced with any potential risk to the public. NRS 233B.140. In response, Appellant asserts that the balance weighs in favor of setting aside the prior score and remanding the Application back to the Division to review and re-score otherwise, the legislative intent to protect the public health and safety are at risk. (NRS 453A.320. "The purpose for registering medical marijuana establishments…..is to *protect the public health and safety and the general welfare of the people of this State*." (emphasis added)). If only the most qualified applicants are to be issued licenses to dispense

medical marijuana to patients in Nevada, then the law dictates that Samantha's Application be reconsidered and scored, and if warranted, issued a Certificate of Registration.

C. Principles of Equity Permit this Court to Issue a Certificate of Registration to Samantha's Remedies.

The Division disputes this Court's ability to afford finality in this matter. Specifically, Appellant argues that if Samantha's Application is re-scored and, as a result, said score/ranking qualifies as one of the top 12 applications in the City of Las Vegas the Division cannot award a Certificate of Registration authorizing Petitioner to operate. In support of this assertion Appellant states it cannot issue a Certificate of Registration outside of the application process, even though they have been ordered to do so by the District Court. But there is reputable authority for the proposition that administrative orders may be tempered by equitable considerations.

> *"*The principles of equity are not to be isolated as a special province of the courts. *They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law*. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice. Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society *without sacrifice of fundamental principles of fairness and justice."* (emphasis added)

Niagara Mohawk Power Corporation at 160.

The intent of NRS 453A is that the best and most qualified applicants, such as

Samantha's Remedies, are authorized to operate in the MME community in Clark County, but due to the egregious behavior by the Division, Samantha's was denied that opportunity. Then after the arbitrary and capricious review that denied Samantha's a Certificate of Registration, they have been dragged through an extended review process because the Division has failed to establish proper minimal procedural requirements for judicial review. This Court has authority to look at the facts of this case and issue a Certificate of Registration based on the egregious actions of the Division. Therefore, the only equitable solution is for the Court to order the Division to issues Samantha's a Certificate of Registration should the re-review of its Application warrant issuance. Accordingly, this Court has authority to decide the matter before it and, if warranted, grant the necessary relief based on the egregious actions of the Division.

CONCLUSION

Considering all of the foregoing, Samantha's respectfully requests that this Court affirm the actions of the District Court and in doing so hold that: Judicial Review is a proper means to ensure an administrative agency complies with its statutory obligations and in performing its discretionary functions it does not act in an arbitrary or capricious manner. Furthermore, based on the record this Court should find that the District Court properly carried out the judicial review process in determining that the Division's original scoring and ranking of Samantha's

Application was arbitrary, capricious and not supported by substantial evidence, Finally, Samantha's requests that this Court affirm the Court's Order requiring another evaluation and scoring of Samantha's Application by the Division, and the granting of a Certification of Registration if the evaluation results in Samantha's Application so meriting.

Respectfully sumitted this 21st day of November, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 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 Times New Roman and Microsoft Word 2010.

I further certify that this 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 is proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages.

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 NRAP 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.

Respectfully sumitted this 22nd day of November, 2016.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of COOPER LEVENSON, P.A. and that on this 22nd day of November, 2016, I electronically filed the foregoing, **RESPONDENT'S ANSWERING BRIEF,** with this Court's electronic filing system.

I further certify that I caused a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF,** to be mailed via United States Parcel Service, First Class, postage prepaid on November 22, 2016 fully addressed as follows:

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