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(less Serenity Wellness Center, LLC
and the State of Nevada, Department of Taxation)

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREENMART OF NEVADA NLV LLC, a Nevada Limited Liability Company; NEVADA ORGANIC REMEDIES, LLC; and LONE MOUNTAIN PARTNERS, LLC, a Nevada limited liability company,

Appellants,

vs.

SERENITY WELLNESS CENTER, LLC, a Nevada limited liability company, TGIG, LLC, a Nevada limited liability company, NULEAF INCLINE DISPENSARY, LLC, a Nevada limited liability company, NEVADA HOLISTIC MEDICINE, LLC, a Nevada limited liability company, TRYKE COMPANIES SO NV, LLC a Nevada limited liability company, TRYKE COMPANIES RENO, LLC, a Nevada limited liability company, PARADISE WELLNESS CENTER, LLC, a Nevada limited liability company, GBS NEVADA PARTNERS, LLC, a Nevada limited liability company, FIDELIS HOLDINGS, LLC, a Nevada limited liability company, GRAVITAS NEVADA, LLC, a Nevada limited liability company, NEVADA PURE, LLC, a Nevada limited liability company, MEDIFARM, LLC, a Nevada limited liability company; MEDIFARM, IV LLC, a Nevada limited liability company; and THE STATE OF NEVADA, DEPARTMENT OF TAXATION,

Respondents.

Supreme Court Case No.: **79668**

District Court Case No.: A-19-786962-B

MOTION TO DISMISS APPEAL

Respondents (less Serenity Wellness Center, LLC and the State of Nevada, Department of Taxation[1]), by and through their attorneys, hereby submit this Motion to Dismiss Appeal. This Motion is made and based upon the following points and authorities and the papers and pleadings on file.

POINTS & AUTHORITIES

I.
INTRODUCTION & REQUESTED RELIEF

This appeal (i.e., case no. 79668) challenges and seeks to set aside or reverse the district court's entry of a preliminary injunction. As the Court may remember, all requests for stays of the district court proceedings were denied following the appeal. The district court recently held a trial and has now entered a permanent injunction. See **Exhibit A**, copy of Findings of Fact, Conclusions of Law, and Permanent Injunction filed September 3, 2020 ("Permanent Injunction"). With the district court's entry of the Permanent Injunction, this appeal challenging the district court's entry of the Preliminary Injunction, becomes moot. This appeal should, therefore, be dismissed.

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[1]PARADISE WELLNESS CENTER, LLC, a Nevada limited liability company ("PWC"), is listed in the caption as a Respondent. However, at a hearing on July 2, 2019, in case number A-19-786962-B, in connection with the underlying Plaintiffs' motion for leave to file a first amended complaint, the district court granted PWC leave to withdraw as a Plaintiff.

II.
DISCUSSION

This Motion is brought pursuant to Nevada Rules of Appellate Procedure ("NRAP") 27(a)(1). The purpose of the NRAP is "to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court." NRAP 1(c). Moreover, this Court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment. NCAA v. University of Nevada, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

The question of mootness is one of justiciability. Thus, a controversy must be present through all stages of the proceeding, see Arizonans for Official English v. Arizona, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997); Lewis v. Continental Bank Corp., 494 U.S. 472, 476–78, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990), and even though a case may present a live controversy at its beginning, subsequent events may render the case moot. University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004); Wedekind v. Bell, 26 Nev. 395, 413–15, 69 P. 612, 613–14 (1902).

Here, subsequent events have rendered this appeal moot. Namely, this case's appeal from the district court's granting of a preliminary injunction became moot when the district court entered its permanent injunction, because the former merges into the latter. In Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund,

Inc., 527 U.S. 308 (1999), the United States Supreme Court addressed a situation where, while the appeal of a preliminary injunction was pending, the district court permissibly decided the merits and entered a permanent injunction. Id. at 313. The plaintiff argued that the permanent injunction mooted the preliminary-injunction appeal. Id. at 313. The Court reiterated that "[g]enerally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter." Id. at 314. This analysis applies here with equal vigor.

Further, dismissal of this appeal (i.e., Case No. 79668) due to it being moot because of the issuance of the district court's Permanent Injunction is still warranted even if an appeal is taken from the Permanent Injunction because an appellant in such an appeal may raise any argument in opposition to the Preliminary Injunction in the appeal from the final judgment imposing the Permanent Injunction. See Keresey v. Rudiak, 422 P.3d 1270 (Table), 2018 WL 3689425 (Nev. 2018) (unpublished disposition) (citing NRAP 3A(b)(1); Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 971 P.2d 1251 (1998) (stating that interlocutory orders entered prior to final judgment may be heard on appeal from final judgment)). Accordingly, dismissal of the current appeal is appropriate and warranted.

III.
CONCLUSION

Wherefore, it is respectfully requested that the Court grant this Motion and dismiss this appeal of the district court's preliminary injunction as moot due to the district court's entry of its Permanent Injunction (see **Exhibit A**).

Respectfully submitted this 14th day of September, 2020.

CLARK HILL, PLLC

By: /s/ John A. Hunt, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that pursuant to NRAP 25(1)(d) on the 14th day of September. 2020, I served a true and correct copy of the foregoing **MOTION TO DISMISS APPEAL** via the appellate CM/ECF electronic filing system to all parties currently on the electronic service list.

/s/ Tanya Bain
An employee of Clark Hill PLLC

EXHIBIT A

EXHIBIT A

Electronically Filed
9/3/2020 11:54 AM
Steven D. Grierson
CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

In Re: D.O.T. Litigation	**Case No.** A-19-787004-B **Consolidated with:** A-18-785818-W A-18-786357-W A-19-786962-B A-19-787035-C A-19-787540-W A-19-787726-C A-19-801416-B **Dept. No.** XI

FINDINGS OF FACT, CONCLUSION OF LAW AND PERMANENT INJUNCTION

This matter having come before the Court for a non-jury trial on Phase 2 pursuant to the Trial Protocol[1] beginning on July 17, 2020[2], and occurring day to day thereafter until its completion on August 18, 2020. The following counsel and party representatives participated in this Phase of the Trial:[3]

The Plaintiffs

Dominic P. Gentile, Esq., John A. Hunt, Esq., Mark S. Dzarnoski, Esq. and Ross J. Miller, Esq., of the law firm Clark Hill, appeared on behalf of TGIG, LLC; Nevada Holistic Medicine, LLC; GBS

[1] Phase 2 as outlined in the Trial protocol includes:

Legality of the 2018 recreational marijuana application process (claims for Equal Protection, Due Process, Declaratory Relief, Intentional Interference with Prospective Economic Advantage, Intentional Interference with Contractual Relations, and Permanent Injunction).

[2] Prior to the commencement of trial the Court commenced an evidentiary hearing relief to Nevada Wellness motion for case terminating sanctions filed 6/26/2020. The decision in 136 NAO 42 raised issues which caused the Court to suspend that hearing and consolidate it with the merits of the trial. As a result of the evidence presented during trial the motion is granted in part.

[3] Given the social distancing requirements many representatives attended telephonically for at least a portion of the proceedings.

Case Number: A-19-787004-B

Nevada Partners, LLC; Fidelis Holdings, LLC; Gravitas Nevada, LLC; Nevada Pure, LLC; Medifarm, LLC; and Medifarm IV, LLC; (Case No. A786962-B) (the "TGIG Plaintiffs") Demetri Kouretas appeared as the representative for TGIG, LLC; Scott Sibley appeared as the representative for Nevada Holistic Medicine, LLC; Michael Viellion appeared as the representative for GBS Nevada Partners, LLC; Michael Sullivan appeared as the representative for Gravitas Nevada, LLC; David Thomas appeared as the representative for Nevada Pure, LLC; and, Mike Nahass appeared as the representative for Medifarm, LLC and Medifarm IV, LLC;

Adam K. Bult, Esq., and Maximilien D. Fetaz, Esq., of the law firm Brownstein Hyatt Farber Schreck, LLP, appeared on behalf of ETW Management Group, LLC; Global Harmony, LLC; Just Quality, LLC; Libra Wellness Center, LLC; Rombough Real Estate Inc. dba Mother Herb; and Zion Gardens, LLC; (Case No. A787004-B) (the "ETW Plaintiffs") Paul Thomas appeared as the representative for ETW Management Group, LLC; John Heishman appeared as the representative for Global Harmony, LLC; Ronald Memo appeared as the representative for Just Quality, LLC; Erik Nord appeared as the representative for Libra Wellness Center, LLC; Craig Rombough appeared as the representative for Rombough Real Estate Inc. dba Mother Herb; and, Judah Zakalik appeared as the representative for Zion Gardens, LLC;

William S. Kemp, Esq., and Nathaniel R. Rulis, Esq., of the law firm Kemp, Jones & Coulthard, LLP, appeared on behalf of MM Development Company, Inc. and LivFree Wellness, LLC; (Case No. A785818-W) (the "MM Plaintiffs"); Leighton Koehler appeared as the representative for MM Development Company, Inc.; and Tim Harris appeared as the representative for LivFree Wellness, LLC;

Theodore Parker III, Esq., and Mahogany A. Turfley, Esq., of the law firm Parker Nelson & Associates, appeared on behalf of Nevada Wellness Center (Case No. A787540-W) and Frank Hawkins appeared as the representative for Nevada Wellness Center;

Peter S. Christiansen, Esq., and Whitney Barrett, Esq., of the law firm Christiansen Law Offices, appeared on behalf of Qualcan LLC and Lorenzo Barracco appeared as the representative for Qualcan LLC;

James W. Puzey, Esq., of the law firm Holley, Driggs, Walch, Fine, Puzey, Stein & Thompson, appeared on behalf of High Sierra Holistics, LLC and Russ Ernst appeared as the representative for High Sierra Holistics, LLC;

Amy L. Sugden, Esq., of Sugden Law, appeared on behalf of THC Nevada, LLC and Allen Puliz appeared as the representative for THC Nevada, LLC;

Sigal Chattah, Esq., of the law firm Chattah Law Group, appeared on behalf of Herbal Choice, Inc. and Ron Doumani appeared as the representative for Herbal Choice, Inc.;

Nicolas R. Donath, Esq., of the law firm N.R. Donath & Associates, PLLC, appeared on behalf of Green Leaf Farms Holdings, LLC; Green Therapeutics, LLC; NevCann, LLC; and Red Earth, LLC and Mark Bradley appeared as the representative for Green Leaf Farms Holdings, LLC; Green Therapeutics, LLC; NevCann, LLC; and Red Earth, LLC;

Stephanie J. Smith, Esq., of Bendavid Law, appeared on behalf of Natural Medicine, LLC and Endalkachew "Andy" Mersha appeared as the representative for Natural Medicine, LLC;

Craig D. Slater, Esq., of the law firm Luh & Associates, appeared on behalf of Clark Natural Medicinal Solutions, LLC; NYE Natural Medicinal Solutions, LLC; Clark NMSD, LLC; and Inyo Fine Cannabis Dispensary, LLC; Pejman Bady appeared as the representative for Clark Natural Medicinal Solutions, LLC; NYE Natural Medicinal Solutions, LLC; and Clark NMSD, LLC; and David Goldwater appeared as the representative Inyo Fine Cannabis Dispensary, LLC;[4]

[4] Although Rural Remedies, LLC claims were severed for this phase, Clarence E. Gamble, Esq., of the law firm Ramos Law participated on its behalf by phone.

The State

Diane L. Welch, Esq. of the law firm McDonald Carano, LLP, appeared on behalf of Jorge Pupo ("Pupo");

Steven G. Shevorski, Esq., and Akke Levin, Esq., of the Office of the Nevada Attorney General, appeared on behalf of the State of Nevada, Department of Taxation ("DoT") and Cannabis Compliance Board[5] ("CCB") (collectively "the State") and Karalin Cronkhite appeared as the representative for the DoT and CCB;

The Industry Defendants

David R. Koch, Esq., and Brody Wight, Esq., of the law firm Koch & Scow, LLC, appeared on behalf of Nevada Organic Remedies, LLC ("NOR") and Kent Kiffner appeared as the representative for Nevada Organic Remedies, LLC;

Brigid M. Higgins, Esq. and Rusty Graf, Esq., of the law firm Black & Lobello, appeared on behalf of Clear River, LLC and Tisha Black appeared as the representative for Clear River, LLC;

Eric D. Hone, Esq., and Joel Schwarz, Esq., of the law firm H1 Law Group, appeared on behalf of Lone Mountain Partners, LLC;

Alina M. Shell, Esq., Cayla Witty, Esq., and Leo Wolpert, Esq., of the law firm McLetchie Law, appeared on behalf of GreenMart of Nevada NLV LLC;

Jared Kahn, Esq., of the law firm JK Legal & Consulting, LLC, appeared on behalf of Helping Hands Wellness Center, Inc. and Alfred Terteryan appeared as the representative for Helping Hands Wellness Center, Inc.;

Rick R. Hsu, Esq., of the law firm Maupin, Cox & LeGoy, appeared on behalf of Pure Tonic Concentrates, LLC;

[5] The CCB was added based upon motion practice as a result of the transfer of responsibility for the Marijuana Enforcement Division effective on July 1, 2020.

Jennifer Braster, Esq., and Andrew J. Sharples, Esq., of the law firm Naylor & Braster, appeared on behalf of Circle S Farms, LLC;

Christopher Rose, Esq., and Kirill Mikhaylov, Esq., of the law firm Howard and Howard, appeared on behalf of Wellness Connection of Nevada, LLC and Matt McClure appeared as the representative for Wellness Connection of Nevada, LLC;

Richard D. Williamson, Esq., and Anthony G. Arger, Esq., of the law firm Robertson, Johnson, Miller & Williamson, appeared on behalf of Deep Roots Medical, LLC and Keith Capurro appeared as the representative for Deep Roots Medical, LLC;

Joseph A. Gutierrez, Esq., of the law firm Maier Gutierrez & Associates, and Dennis Prince, Esq., of the Prince Law Group, appeared on behalf of CPCM Holdings, LLC d/b/a Thrive Cannabis Marketplace; Commerce Park Medical, LLC; and Cheyenne Medical, LLC ("Thrive") and Phil Peckman appeared as the representative for on behalf of CPCM Holdings, LLC d/b/a Thrive Cannabis Marketplace; Commerce Park Medical, LLC; and Cheyenne Medical, LLC ("Thrive");

Todd L. Bice, Esq., and Jordan T. Smith, Esq., of the law firm Pisanelli Bice, appeared on behalf of Integral Associates, LLC d/b/a Essence Cannabis Dispensaries; Essence Tropicana, LLC; Essence Henderson, LLC; ("Essence") (collectively the "Industry Defendants").

Having read and considered the pleadings filed by the parties, having reviewed the evidence admitted during this phase of the trial[6], and having heard and carefully considered the testimony of the witnesses called to testify, having considered the oral and written arguments of counsel, and with the intent of deciding the remaining issues [7] related to Legality of the 2018 recreational marijuana application process only[8], the Court makes the following findings of fact and conclusions of law:

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[6] Due to the limited amount of discovery conducted prior to the Preliminary Injunction hearing and the large volume of evidence admitted during that 20-day evidentiary hearing, the Court required parties to reoffer evidence previously utilized during that hearing.

[7] The Court granted partial summary judgment on the sole issue previously enjoined. The order entered 8/17/2020 states:

PROCEDURAL POSTURE

Plaintiffs are a group of unrelated commercial entities who applied for, but did not receive, licenses to operate retail recreational marijuana establishments in various local jurisdictions throughout the state. Defendant is the DoT, which was the administrative agency responsible for issuing the licenses at the times subject to these complaints. Some successful applicants for licensure intervened as Defendants.

The Attorney General's Office was forced to deal with a significant impediment at the early stages of the litigation. This inability to disclose certain information was outside of its control because of confidentiality requirements that have now been slightly modified by SB 32. Although the parties stipulated to a protective order on May 24, 2019, many documents produced in preparation for the trial and for discovery purposes were heavily redacted or produced as attorney's eyes only because of the highly competitive nature of the industry and sensitive financial and commercial information involved. Many admitted exhibits are heavily redacted and were not provided to the Court in unredacted form.

After Judge Bailus issued the preservation order in A785818 on December 13, 2018, the Attorney General's Office sent a preservation letter to the DoT. Pupo, Deputy Director of the DoT, testified he was not told to preserve his personal cellular phone heavily utilized for work purposes. He not only deleted text messages from the phone after the date of the preservation order but also was unable to produce his phone for a forensic examination and extraction of discoverable materials. The Court finds evidence has been irretrievably lost as a result of his actions.

While case terminating sanctions and/or an irrebuttable presumption were requested, after evaluation of the Ribiero factors, given the production of certain text messages with Pupo by some

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> [T]he DoT acted beyond the scope of its authority by replacing the requirement for a background check of each prospective owner with the 5 percent or greater standard in NAC 453D.255(1).

The entry of these findings will convert the preliminary injunction on this issue to a permanent injunction.

[8] While several plaintiffs have reached a resolution of their claims with the State and certain Industry Defendants, the claims of the remaining plaintiffs remain virtually the same. At the time of the issuance of this decision, the following plaintiffs have advised the Court they have reached a resolution with the State and certain Industry Defendants:

ETW Management Group, LLC; Libra Wellness Center, LLC; Rombough Real Estate, Inc. dba Mother Herb; Just Quality, LLC; Zion Gardens, LLC; Global Harmony, LLC; MM Development, LLC; LivFree Wellness, LLC; Nevada Wellness Center, LLC; Qualcan, LLC; High Sierra Holistics, LLC; Natural Medicine, LLC.

Industry Defendants and their attorney Amanda Connor, the impact of the loss of evidence was limited. As a result, the Court imposes an evidentiary sanction in connection with the Sanctions ruling that the evidence on Pupo's phone, if produced, would have been adverse to the DoT.[9]

PRELIMINARY STATEMENT

All parties agree that the language of an initiative takes precedence over any regulation that is in conflict and that an administrative agency has some discretion in determining how to implement the initiative. The Court gives deference to the agency in establishing those regulations and creating the framework required to implement those provisions in conformity with the initiative.

The initiative to legalize recreational marijuana, Ballot Question 2 ("BQ2"), went to the voters in 2016. The language of BQ2 is independent of any regulations that were adopted by the DoT. The Court must balance the mandatory provisions of BQ2 (which the DoT did not have discretion to modify[10]), those provisions with which the DoT was granted some discretion in implementation[11], and

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[9] Given the text messages produced by certain Industry Defendants and Amanda Connor, any presumption is superfluous given the substance of the messages produced.

[10] Article 19, Section 2(3) provides the touchstone for the mandatory provisions:

> . . . . An initiative measure so approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the Legislature within 3 years from the date it takes effect.

[11] NRS 453D.200(1) required the adoption of regulations for the licensure and oversight of recreational marijuana cultivation, manufacturing/production, sales and distribution, but provides the DoT discretion in exactly what those regulations would include:

> . . . the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter. The regulations must not prohibit the operation of marijuana establishments, either expressly or through regulations that make their operation unreasonably impracticable. The regulations shall include:
>
> (a) Procedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment;
>
> (b) Qualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment;
>
> (c) Requirements for the security of marijuana establishments;
>
> (d) Requirements to prevent the sale or diversion of marijuana and marijuana products to persons under 21 years of age;
>
> (e) Requirements for the packaging of marijuana and marijuana products, including requirements for child-resistant packaging;
>
> (f) Requirements for the testing and labeling of marijuana and marijuana products sold by marijuana establishments including a numerical indication of potency based on the ratio of THC to the weight of a product intended for oral consumption;
>
> (g) Requirements for record keeping by marijuana establishments;
>
> (h) Reasonable restrictions on signage, marketing, display, and advertising;
>
> (i) Procedures for the collection of taxes, fees, and penalties imposed by this chapter;
>
> (j) Procedures and requirements to enable the transfer of a license for a marijuana establishment to another qualified person and to enable a licensee to move the location of its establishment to another suitable location;

the inherent discretion of an administrative agency to implement regulations to carry out its statutory duties. The Court must give great deference to those activities that fall within the discretionary functions of the agency. Deference is not given where the actions of the DoT were in violation of BQ2 or were arbitrary and capricious.

FINDINGS OF FACT

1. Nevada allows voters to amend its Constitution or enact legislation through the initiative process. Nevada Constitution, Article 19, Section 2.

2. In 2000, the voters amended Nevada's Constitution to allow for the possession and use of marijuana to treat various medical conditions. Nevada Constitution, Article 4, Section 38(1)(a). The initiative left it to the Legislature to create laws "[a]uthoriz[ing] appropriate methods for supply of the plant to patients authorized to use it." Nevada Constitution, Article 4, Section 38(1)(e).

3. For several years prior to the enactment of BQ2, the regulation of medical marijuana dispensaries had not been taken up by the Legislature. Some have argued in these proceedings that the delay led to the framework of BQ2.

4. In 2013, Nevada's legislature enacted NRS 453A, which allows for the cultivation and sale of medical marijuana. The Legislature described the requirements for the application to open a medical marijuana establishment. NRS 453A.322. The Nevada Legislature then charged the Division of Public and Behavioral Health with evaluating the applications. NRS 453A.328.

5. The materials circulated to voters in 2016 for BQ2 described its purpose as the amendment of the Nevada Revised Statutes as follows:

> Shall the *Nevada Revised Statutes* be amended to allow a person, 21 years old or older, to purchase, cultivate, possess, or consume a certain amount of marijuana or concentrated marijuana, as well as manufacture, possess, use, transport, purchase, distribute, or sell marijuana paraphernalia; impose a 15 percent excise tax on wholesale sales of marijuana; require the

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(k) Procedures and requirements to enable a dual licensee to operate medical marijuana establishments and marijuana establishments at the same location;
(l) Procedures to establish the fair market value at wholesale of marijuana; and
(m) Civil penalties for the failure to comply with any regulation adopted pursuant to this section or for any violation of the provisions of NRS 453D.300.

regulation and licensing of marijuana cultivators, testing facilities, distributors, suppliers, and retailers; and provide for certain criminal penalties?

6. BQ2 was enacted by the Nevada Legislature and is codified at NRS 453D.[12]

7. BQ2 specifically identified regulatory and public safety concerns:

> The People of the State of Nevada proclaim that marijuana should be regulated in a manner similar to alcohol so that:
> (a) Marijuana may only be purchased from a business that is licensed by the State of Nevada;
> (b) Business owners are subject to a review by the State of Nevada to confirm that the business owners and the business location are suitable to produce or sell marijuana;
> (c) Cultivating, manufacturing, testing, transporting and selling marijuana will be strictly controlled through State licensing and regulation;
> (d) Selling or giving marijuana to persons under 21 years of age shall remain illegal;
> (e) Individuals will have to be 21 years of age or older to purchase marijuana;
> (f) Driving under the influence of marijuana will remain illegal; and
> (g) Marijuana sold in the State will be tested and labeled.

NRS 453D.020(3).

8. BQ2 mandated the DoT to "conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." NRS 453D.200(6).

9. On November 8, 2016, by Executive Order 2017-02, Governor Brian Sandoval established a Task Force composed of 19 members to offer suggestions and proposals for legislative, regulatory, and executive actions to be taken in implementing BQ2.

10. The Nevada Tax Commission adopted temporary regulations allowing the state to issue recreational marijuana licenses by July 1, 2017 (the "Early Start Program"). Only medical marijuana establishments that were already in operation could apply to function as recreational retailers during the early start period. The establishments were required to be in good standing and were required to pay a one-time, nonrefundable application fee as well as a specific licensing fee. The establishment also was required to provide written confirmation of compliance with their municipality's zoning and location requirements.

[12] As the provisions of BQ2 and the sections of NRS 453D in effect at the time of the application process (with the exception of NRS 453D.205) are identical, for ease of reference the Court cites to BQ2 as enacted by the Nevada Legislature during the 2017 session in NRS 453D.

11. The Task Force's findings, issued on May 30, 2017, referenced the 2014 licensing process for issuing Medical Marijuana Establishment Registration Certificates under NRS 453A. The Task Force recommended that "the qualifications for licensure of a marijuana establishment and the impartial numerically scored bidding process for retail marijuana stores be maintained as in the medical marijuana program except for a change in how local jurisdictions participate in selection of locations."

12. During the 2017 legislative session, Assembly Bill 422 transferred responsibility for the registration, licensing, and regulation of marijuana establishments from the State of Nevada Division of Public and Behavioral Health to the DoT.[13]

13. On February 27, 2018, the DoT adopted regulations governing the issuance, suspension, or revocation of retail recreational marijuana licenses in LCB File No. R092-17, which were codified in NAC 453D (the "Regulations").

14. The Regulations for licensing were to be "directly and demonstrably related to the operation of a marijuana establishment." NRS 453D.200(1)(b). The phrase "directly and demonstrably related to the operation of a marijuana establishment" is subject to more than one interpretation.

15. Each of the Plaintiffs were issued marijuana establishment licenses involving the cultivation, production and/or sale of medicinal marijuana in or about 2014.

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[13] Those provisions (a portion of which became NRS 453D.205) are consistent with BQ2:

> 1. When conducting a background check pursuant to subsection 6 of NRS 453D.200, the Department may require each prospective owner, officer and board member of a marijuana establishment license applicant to submit a complete set of fingerprints and written permission authorizing the Department to forward the fingerprints to the Central Repository for Nevada Records of Criminal History for submission to the Federal Bureau of Investigation for its report.
> 2. When determining the criminal history of a person pursuant to paragraph (c) of subsection 1 of NRS 453D.300, a marijuana establishment may require the person to submit to the Department a complete set of fingerprints and written permission authorizing the Department to forward the fingerprints to the Central Repository for Nevada Records of Criminal History for submission to the Federal Bureau of Investigation for its report.

16. A person holding a medical marijuana establishment registration certificate could apply for one or more recreational marijuana establishment licenses within the time set forth by the DoT in the manner described in the application. NAC 453D.268.[14]

[14] Relevant portions of that provision require that application be made

. . . .by submitting an application in response to a request for applications issued pursuant to NAC 453D.260 which must include:
***
2. An application on a form prescribed by the Department. The application must include, without limitation:
(a) Whether the applicant is applying for a license for a marijuana establishment for a marijuana cultivation facility, a marijuana distributor, a marijuana product manufacturing facility, a marijuana testing facility or a retail marijuana store;
(b) The name of the proposed marijuana establishment, as reflected in both the medical marijuana establishment registration certificate held by the applicant, if applicable, and the articles of incorporation or other documents filed with the Secretary of State;
(c) The type of business organization of the applicant, such as individual, corporation, partnership, limited-liability company, association or cooperative, joint venture or any other business organization;
(d) Confirmation that the applicant has registered with the Secretary of State as the appropriate type of business, and the articles of incorporation, articles of organization or partnership or joint venture documents of the applicant;
(e) The physical address where the proposed marijuana establishment will be located and the physical address of any co-owned or otherwise affiliated marijuana establishments;
(f) The mailing address of the applicant;
(g) The telephone number of the applicant;
(h) The electronic mail address of the applicant;
(i) A signed copy of the Request and Consent to Release Application Form for Marijuana Establishment License prescribed by the Department;
(j) If the applicant is applying for a license for a retail marijuana store, the proposed hours of operation during which the retail marijuana store plans to be available to sell marijuana to consumers;
(k) An attestation that the information provided to the Department to apply for the license for a marijuana establishment is true and correct according to the information known by the affiant at the time of signing; and
(l) The signature of a natural person for the proposed marijuana establishment as described in subsection 1 of NAC 453D.250 and the date on which the person signed the application.
3. Evidence of the amount of taxes paid, or other beneficial financial contributions made, to this State or its political subdivisions within the last 5 years by the applicant or the persons who are proposed to be owners, officers or board members of the proposed marijuana establishment.
4. A description of the proposed organizational structure of the proposed marijuana establishment, including, without limitation:
(a) An organizational chart showing all owners, officers and board members of the proposed marijuana establishment;
(b) A list of all owners, officers and board members of the proposed marijuana establishment that contains the following information for each person:
(1) The title of the person;
(2) The race, ethnicity and gender of the person;
(3) A short description of the role in which the person will serve for the organization and his or her responsibilities;
(4) Whether the person will be designated by the proposed marijuana establishment to provide written notice to the Department when a marijuana establishment agent is employed by, volunteers at or provides labor as a marijuana establishment agent at the proposed marijuana establishment;
(5) Whether the person has served or is currently serving as an owner, officer or board member for another medical marijuana establishment or marijuana establishment;
(6) Whether the person has served as an owner, officer or board member for a medical marijuana establishment or marijuana establishment that has had its medical marijuana establishment registration certificate or license, as applicable, revoked;

NRS 453D.210(6) mandated the DoT to use "an impartial and numerically scored competitive bidding process" to determine successful applicants where competing applications were submitted.

17. NAC 453D.272(1) provides the procedure for when the DoT receives more than one "complete" application for a single county. Under this provision the DoT will determine if the

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(7) Whether the person has previously had a medical marijuana establishment agent registration card or marijuana establishment agent registration card revoked;
(8) Whether the person is an attending provider of health care currently providing written documentation for the issuance of registry identification cards or letters of approval;
(9) Whether the person is a law enforcement officer;
(10) Whether the person is currently an employee or contractor of the Department; and
(11) Whether the person has an ownership or financial investment interest in any other medical marijuana establishment or marijuana establishment.
5. For each owner, officer and board member of the proposed marijuana establishment:
(a) An attestation signed and dated by the owner, officer or board member that he or she has not been convicted of an excluded felony offense, and that the information provided to support the application for a license for a marijuana establishment is true and correct;
(b) A narrative description, not to exceed 750 words, demonstrating:
(1) Past experience working with governmental agencies and highlighting past experience in giving back to the community through civic or philanthropic involvement;
(2) Any previous experience at operating other businesses or nonprofit organizations; and
(3) Any demonstrated knowledge, business experience or expertise with respect to marijuana; and
(c) A resume.
6. Documentation concerning the size of the proposed marijuana establishment, including, without limitation, building and general floor plans with supporting details.
7. The integrated plan of the proposed marijuana establishment for the care, quality and safekeeping of marijuana from seed to sale, including, without limitation, a plan for testing and verifying marijuana, a transportation or delivery plan and procedures to ensure adequate security measures, including, without limitation, building security and product security.
8. A plan for the business which includes, without limitation, a description of the inventory control system of the proposed marijuana establishment to satisfy the requirements of NRS 453D.300 and NAC 453D.426.
9. A financial plan which includes, without limitation:
(a) Financial statements showing the resources of the applicant;
(b) If the applicant is relying on money from an owner, officer or board member, evidence that the person has unconditionally committed such money to the use of the applicant in the event the Department awards a license to the applicant and the applicant obtains the necessary approvals from the locality to operate the proposed marijuana establishment; and
(c) Proof that the applicant has adequate money to cover all expenses and costs of the first year of operation.
10. Evidence that the applicant has a plan to staff, educate and manage the proposed marijuana establishment on a daily basis, which must include, without limitation:
(a) A detailed budget for the proposed marijuana establishment, including pre-opening, construction and first-year operating expenses;
(b) An operations manual that demonstrates compliance with this chapter;
(c) An education plan which must include, without limitation, providing educational materials to the staff of the proposed marijuana establishment; and
(d) A plan to minimize the environmental impact of the proposed marijuana establishment.
11. If the application is submitted on or before November 15, 2018, for a license for a marijuana distributor, proof that the applicant holds a wholesale dealer license issued pursuant to Chapter 369 of NRS, unless the Department determines that an insufficient number of marijuana distributors will result from this limitation.
12. A response to and information which supports any other criteria the Department determines to be relevant, which will be specified and requested by the Department at the time the Department issues a request for applications which includes the point values that will be allocated to the applicable portions of the application pursuant to subsection 2 of NAC 453D.260.

"application is complete and in compliance with this chapter and Chapter 453D of NRS, the Department will rank the applications . . . in order from first to last based on the compliance with the provisions of this chapter and Chapter 453D of NRS and on the content of the applications relating to . . ." several enumerated factors. NAC 453D.272(1).

18. The factors set forth in NAC 453D.272(1) that are used to rank competing applications received for a single county (collectively, the "Factors") are:

> (a) Whether the owners, officers or board members have experience operating another kind of business that has given them experience which is applicable to the operation of a marijuana establishment;
> (b) The diversity of the owners, officers or board members of the proposed marijuana establishment;
> (c) The educational achievements of the owners, officers or board members of the proposed marijuana establishment;
> (d) The financial plan and resources of the applicant, both liquid and illiquid;
> (e) Whether the applicant has an adequate integrated plan for the care, quality and safekeeping of marijuana from seed to sale;
> (f) The amount of taxes paid and other beneficial financial contributions, including, without limitation, civic or philanthropic involvement with this State or its political subdivisions, by the applicant or the owners, officers or board members of the proposed marijuana establishment;
> (g) Whether the owners, officers or board members of the proposed marijuana establishment have direct experience with the operation of a medical marijuana establishment or marijuana establishment in this State and have demonstrated a record of operating such an establishment in compliance with the laws and regulations of this State for an adequate period of time to demonstrate success;
> (h) The (unspecified) experience of key personnel that the applicant intends to employ in operating the type of marijuana establishment for which the applicant seeks a license; and
> (i) Any other criteria that the Department determines to be relevant.

19. Each of the Factors is within the DoT's discretion in implementing the application process provided for in BQ2. The DoT had a good-faith basis for determining that each of the Factors is "directly and demonstrably related to the operation of a marijuana establishment."

20. Pupo met with several of the applicants' agent, Amanda Conner, Esq., numerous times for meals in the Las Vegas Valley. Pupo also met with representatives of several of the applicants in person. These meetings appeared to relate to regulatory, disciplinary and application issues.

21. The DoT posted the application on its website and released the application for recreational marijuana establishment licenses on July 6, 2018.[15]

22. The DoT used a Listserv[16] to communicate with prospective applicants.

23. While every medical marijuana certificate holder was required to have a contact person with information provided to the DoT for purposes of communication, not every marijuana establishment maintained a current email or checked their listed email address regularly, and some of the applicants contend that they were not aware of the revised application.

24. Applications were accepted from September 7, 2018 through September 20, 2018.

25. The DoT elected to utilize a bright line standard for evaluating the factor "operating such an establishment in compliance" of whether the applicant was suspended or revoked.[17] If an applicant was suspended or revoked they were not qualified to apply. This information was communicated in the cover letter with the application.[18] This decision was within the discretion of the DoT.

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[15] The DoT made a change to the application after circulating the first version of the application to delete the requirement of a physical location. The modification resulted in a different version of the application bearing the same "footer" with the original version remaining available on the DoT's website.

[16] According to Dictionary.com, the term "Listserv" is used to refer to online mailing list. When capitalized it refers to a proprietary software.

[17] The method by which certain disciplinary matters (self-reported or not) were resolved by the DoT would not affect the grading process.

[18] The cover letter reads in part:

> All applicants are required to be in compliance with the following:
> All licenses, certificates, and fees are current and paid;
> Applicant is not delinquent in the payment of any tax administered by the Department or is not in default on payment required pursuant to a written agreement with the Department; or is not otherwise liable to the Department for the payment of money;
> No citations for illegal activity or criminal conduct; and
> Plans of correction are complete and on time, or are in progress within the required 10 business days.

26. The DoT utilized a question and answer process through a generic email account at marijuana@tax.state.nv.us to allow applicants to ask questions and receive answers directly from the DoT, and that information was not further disseminated by the DoT to other applicants.[19]

27. The cover letter with the application advised potential applicants of the process for questions:

> Do not call the division seeking application clarification or guidance.
> Email questions to marijuana@tax.state.nv.us

28. No statutory or regulatory requirement for a single point of contact process required the DoT to adopt this procedure.

29. As the individual responsible for answering the emailed questions stated:

> Jorge Pupo is the MED deputy Director. Steve Gilbert is program manager and reports to Jorge. I report to Steve. Steve prefers to not have the world know our structure. He likes industry folks knowing though and addressing them. He has all questions come to me. One's I can't answer, he fields and has me respond, then if he can't then Jorge gets them and Jorge has me respond. That's the goal anyway. ☺
>
> Ky Plaskon text to Rebecca Gaska 9/18/2018, Exhibit 1051.

30. Some applicants abided by this procedure.

31. The DoT did not post the questions and answers so that all potential applicants would be aware of the process

32. The DoT made no effort to ensure that the applicants received the same answers regardless of which employee of the DoT the applicant asked.

33. On July 9, 2018, at 4:06 pm, Amanda Connor sent a text to Pupo:

> List of things for us to talk about when you can call me:
> Attachment E
> Attachment I
> Requirement for a location or physical address
> Attachment F
> Requirement for initial licensing fee

[19] This single point of contact process had been used in the 2014 medical marijuana establishment application period. The questions and answers were posted to the department's website for all potential applicants to review and remain there to this day. Exhibit 2038.

Transfers of ownership

Exhibit 1588-052.

34. Although Pupo tried to direct Amanda Connor to Steve Gilbert, she texted him that she would wait rather than speak to someone else.

35. On the morning of July 11, 2018, Pupo and Amanda Connor spoke for twenty-nine minutes and forty-five seconds.[20]

36. Despite the single point of contact process being established, the DoT departed from this procedure. By allowing certain applicants and their representatives to personally contact the DoT employee about the application process, the DoT violated its own established procedures for the application process.

37. After the posting of the application on July 6, 2018, Pupo decided to eliminate the physical location requirement outlined in NRS 453D.210(5) and NAC 453D.265(b)(3).[21]

38. The DoT published a revised application on July 30, 2018. This revised application was sent to all participants via the DoT's Listserv. The revised application modified physical address requirements. For example, a sentence on Attachment A of the application, prior to this revision, the sentence had read, "Marijuana Establishment's proposed physical address (this must be a Nevada address and cannot be a P.O. Box)." The revised application on July 30, 2018, read: "Marijuana Establishment's proposed physical address if the applicant owns property or has secured a lease or other property agreement (this must be a Nevada address and not a P.O. Box). Otherwise, the applications are virtually identical.

[20] Exhibit 1809-054.

[21] It is unclear whether Pupo had communications similar to those with Amanda Connor with other potential applicants or their agents as Pupo did not preserve the data from his cell phone.

39. The DoT sent a copy of the revised application through the Listserv used by the DoT. Not all Plaintiffs' correct emails were included on this list.

40. The July 30, 2018, application, like its predecessor, described how applications were to be scored. The scoring criteria was divided into identified criteria and non-identified criteria. The maximum points that could be awarded to any applicant based on these criteria was 250 points.

41. The identified criteria consisted of organizational structure of the applicant (60 points); evidence of taxes paid to the State of Nevada by owners, officers, and board members of the applicant in the last 5 years (25 points); a financial plan (30 points); and documents from a financial institution showing unencumbered liquid assets of $250,000 per location for which an application is submitted.

42. The non-identified criteria[22] all consisted of documentation concerning the integrated plan of the proposed marijuana establishment for the care, quality and safekeeping of marijuana from seed to sale (40 points); evidence that the applicant has a plan to staff, educate and manage the proposed recreational marijuana establishment on a daily basis (30 points); a plan describing operating procedures for the electronic verification system of the proposed marijuana establishment and describing the proposed establishment's inventory control system (20 points); building plans showing the proposed establishment's adequacy to serve the needs of its customers (20 points); and a proposal explaining likely impact of the proposed marijuana establishment in the community and how it will meet customer needs (15 points).

43. An applicant was permitted to submit a single application for all jurisdictions in which it was applying, and the application would be scored at the same time.

[22] About two weeks into the grading process the Independent Contractors were advised by certain DoT employees that if an identifier was included in the nonidentified section points should be deducted. It is unclear from the testimony whether adjustments were made to the scores of those applications graded prior to this change in procedure being established.

44. Although the amended application changed the language related to a physical address, there was still confusion.[23]

45. Amanda Connor corresponded with Pupo by email requesting clarification on August 22, 2018. [24]

46. Although the DoT had used certain DoT personnel to grade applications for medical marijuana establishment applications in White Pine County shortly before the recreational applications were graded, the DoT made a decision for resource and staff reasons that non DoT employees hired on a temporary basis would be used to grade the recreational medical marijuana applications.

47. Prior to the close of the application evaluation process, Pupo discussed with a representative of the Essence Entities the timing of closing a deal involving the purchase of the entities by a publicly traded company.

48. By September 20, 2018, the DoT received a total of 462 applications.

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[23] One plaintiff was advised by counsel (not Amanda Conner) that, despite the information related to the change for physical address, the revised application appeared to conflict with the statute's physical address requirement and that therefore a physical address was required.

[24] The email thread reads:

On Aug 22 at 6:17 pm Amanda Connor wrote

Jorge –
I know the regulations make clear that land use or the property will not be considered in the application and having a location secured is not required, but there seems to be some inconsistency in the application. Can you please confirm that a location is not required and documentation about a location will not be considered or no points will be granted for having a location?

On Aug 22 at 8:15 pm Pupo wrote:

That is correct. If you have a lease or own property than (sic) put those plans. If you dont (sic) then tell us what will the floorplan be like etc etc

On Aug 22 at 8:24 pm Amanda Connor wrote

But a person who has a lease or owns the property will not get more points simply for having the property secured, correct?

On Aug 22 at 8:27 pm Pupo wrote:

Nope. LOCATION IS NOT SCORED DAMN IT!

Exhibit 2064.

49. In order to grade and rank the applications, the DoT posted notices that it was seeking to hire individuals with specified qualifications necessary to evaluate applications. Certain DoT employees also reached out to recent State retirees who might have relevant experience as part of their recruitment efforts. The DoT interviewed applicants and made decisions on individuals to hire for each position.

50. When decisions were made on who to hire, the individuals were notified that they would need to register with "Manpower" under a preexisting contract between the DoT and that company. Individuals would be paid through Manpower, as their application-grading work would be of a temporary nature.

51. The DoT identified, hired, and provided some training to eight individuals hired to grade the applications, including three to grade the identified portions of the applications, three to grade the non-identified portions of the applications, and one administrative assistant for each group of graders (collectively the "Independent Contractors").

52. Based upon the testimony at trial, it remains unclear how the DoT trained the Temporary Employees. While portions of the training materials from PowerPoint decks were introduced into evidence, it is unclear which slides from the PowerPoint decks were used. Testimony regarding the oral training based upon example applications and practice grading of prior medical marijuana establishment applications was insufficient for the Court to determine the nature and extent of the training of the Independent Contractors.

53. Based on the evidence adduced, the Court finds that the lack of training for the graders affected the graders' ability to evaluate the applications objectively and impartially.

54. NAC 453D.272(1) required the DoT to determine that an Application is "complete and in compliance" with the provisions of NAC 453D in order to properly apply the licensing criteria set forth therein and the provisions of the Ballot Initiative and the enabling statute.

55. In evaluating whether an application was "complete and in compliance," the DoT made no effort to verify owners, officers or board members (except for checking whether a transfer request was made and remained pending before the DoT).

56. For purposes of grading the applicant's organizational structure[25] and diversity, if an applicant's disclosure in its application of its owners, officers, and board members did not match the DoT's own records, the DoT did not penalize the applicant. Rather, the DoT permitted the grading, and in some cases, awarded a conditional license to an applicant under such circumstances and dealt with the issue by simply informing the winning applicant that its application would have to be brought into conformity with DoT records.

57. The DoT announced the award of conditional licenses in December 2018.

58. The DoT did not comply with BQ2 by requiring applicants to provide information for each prospective owner, officer and board member or verify the ownership of applicants applying for retail recreational marijuana licenses. Instead the DoT issued conditional licenses to applicants who did not identify each prospective owner, officer and board member.

59. Some of the Industry Defendants and their agent Ms. Connor, produced text messages forensically extracted from their cell phones revealing the extent of contact and substance of communications between them and Pupo. Additionally, phone records of Pupo identifying telephone numbers communicated with and length of communication (but not content) were obtained from Pupo's cellular service provider. This evidence reinforces the presumption related to Pupo's failure to preserve evidence and reflects the preferential access and treatment provided.[26]

[25] The use of Advisory Boards by many applicants who were LLCs has been criticized. The DoT provided no guidance to the potential applicants or the Temporary Employees of the manner by which these "Boards" should be evaluated. As this applied equally to all applicants, it is not a basis for relief.

[26] TGIG also was represented by Amanda Conner and had communications with Pupo. TGIG did not provide its communications with Pupo.

60. The DoT's late decision to delete the physical address requirement on some application forms while not modifying those portions of the application that were dependent on a physical location (i.e. floor plan, community impact, security plan, and the sink locations) after the repeated communications by an applicant's agent, not effectively communicating the revision, and leaving the original version of the application on the website is evidence of a lack of a fair process.

61. The DoT's departure from its stated single point of contact and the degree of direct personal contact outside the single point of contact process provided unequal, advantageous and supplemental information to some applicants and is evidence of a lack of a fair process.

62. Pursuant to NAC 453D.295, the winning applicants received a conditional license that would not be finalized unless within twelve months of December 5, 2018, the licensees receive a final inspection of their marijuana establishment.[27]

63. The DoT's lack of compliance with the established single point of contact and the pervasive communications, meetings with Pupo, and preferential information provided to certain applicants creates an uneven playing field because of the unequal information available to potential applicants. This conduct created an unfair process for which injunctive relief may be appropriate.

64. The only direct action attributed to Pupo during the evaluation and grading process related to the determination related to the monopolistic practices. Based upon the testimony adduced at trial, Pupo's reliance upon advice of counsel from Deputy Attorney General Werbicky in making this decision removes it from an arbitrary and capricious exercise of discretion.

65. Nothing in NRS 453D or NAC 453D provides for any right to an appeal or review of a decision denying an application for a retail recreational marijuana license.

66. In 2019, more than three years from the passage of Ballot Question 2, Nevada's legislature repealed NRS 453D.200. 2019 Statutes of Nevada, Page 3896.

[27] The DoT has agreed to extend this deadline due to these proceedings and the public health emergency. Some of the conditional licenses not enjoined under the preliminary injunction have now received final approval.

67. With its repeal, NRS 453D.200 was no longer effective as of July 1, 2020.

68. Nevada's legislature also enacted statutes setting forth general qualifications for licensure and registration of persons who have applied to receive marijuana establishment licenses. NRS 678B.200.

69. The CCB was formed by the legislature and is now the government entity that oversees and regulates the cannabis industry in the State of Nevada. By statute, the CCB now determines if the "person is qualified to receive a license…" NRS 678B.200(1).

70. There are an extremely limited number of licenses available for the sale of recreational marijuana.

71. The number of licenses available was set by BQ2 and is contained in NRS 453D.210(5)(d).

72. The secondary market for the transfer of licenses is limited.[28]

73. Although there has been little tourism demand for legal marijuana sales due to the public health emergency and as a result growth in legal marijuana sales has declined, the market is not currently saturated. With the anticipated return of tourism after the abatement of the current public health emergency, significant growth in legal marijuana sales is anticipated. Given the number of variables related to new licenses, the claim for loss of market share is too speculative for relief.

74. Since the Court does not have authority to order additional licenses in particular jurisdictions and because there are a limited number of licenses that are available in certain jurisdictions, injunctive relief may be necessary to permit the Plaintiffs, if successful in the NRS 453D.210(6) process, to actually obtain a license with respect to the issues on which partial summary judgment was granted.

[28] Multiple changes in ownership have occurred since the applications were filed. Given this testimony, simply updating the applications previously filed would not comply with BQ2.

75. The remaining Plaintiffs[29](excluding TGIG) (the "Untainted Plaintiffs") have not identified by a preponderance of the evidence, that if a single point of contact was followed by the DoT and equal information provided to all applicants, as was done for the medical marijuana application process, that there is a substantial likelihood they would have been successful in the ranking process.

76. After balancing the equities among the parties, the Court determines that the balance of equites does not weigh in favor of the Untainted Plaintiffs on the relief beyond that previously granted in conjunction with the partial summary judgment order entered on August 17, 2020.

77. If any findings of fact are properly conclusions of law, they shall be treated as if appropriately identified and designated.

CONCLUSIONS OF LAW

78. This Court has previously held that the 5 percent rule found in NAC 453D.255(1) was an impermissible deviation from the background check requirement of NRS 453D.200(6) as applied to that statute.

79. "Any person…whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." NRS 30.040.

80. A justiciable controversy is required to exist prior to an award of declaratory relief. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

81. The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination. . . ." *Sioux City Bridge Co. v. Dakota Cty., Neb.*, 260 U.S. 441, 445 (1923). If a suspect class or fundamental right is not implicated, then the law or regulation promulgated by the state will be upheld "so long as it bears

[29] TGIG's employment of Amanda Connor and direct contact with Pupo were of the same degree as the Industry Defendants who were clients of Amanda Connor.

a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). When the state or federal government arbitrarily and irrationally treats groups of citizens differently, such unequal treatment runs afoul the Equal Protection Clause. *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 601 (2008). Where an individual or group were treated differently but are not associated with any distinct class, Plaintiffs must show that they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

82. The Nevada Constitution also demands equal protection of the laws under Article 4, Section 21 of the Nevada Constitution. *See Doe v. State*, 133 Nev. 763, 767, 406 P.3d 482, 486 (2017).

83. NRS 33.010 governs cases in which an injunction may be granted. The applicant must show (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy.

84. Plaintiffs have the burden to demonstrate that the DoT's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy.

85. The Nevada Supreme Court has recognized that "[i]nitiative petitions must be kept substantively intact; otherwise, the people's voice would be obstructed. . . [I]nitiative legislation is not subject to judicial tampering. The substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed. For this reason, our constitution prevents the Legislature from changing or amending a proposed initiative petition that is under consideration." *Rogers v. Heller*, 117 Nev. 169, 178, 18 P.3d 1034,1039–40 (2001).

86. BQ2 provides, "the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter." NRS 453D.200(1). This language does not confer upon the DoT unfettered or unbridled authority to do whatever it wishes without constraint. The DoT was not

delegated the power to legislate amendments because this is initiative legislation. The Legislature itself has no such authority with regard to NRS 453D until three years after its enactment under the prohibition of Article 19, Section 2 of the Constitution of the State of Nevada.

87. Where, as here, amendment of a voter-initiated law is temporally precluded from amendment for three years, the administrative agency may not modify the law.[30]

88. An agency's action in interpreting and executing a statute it is tasked with interpreting is entitled to deference "unless it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious." *Nuleaf CLV Dispensary, LLC v. State Dept. of Health and Human Services, Div. of Pub. and Behavioral Health*, 414 P.3d 305, 308 (Nev. 2018) (quoting *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 126, 127 P.3d 528, 532 (2006)).

89. NRS 453D.200(1) provides that "the Department shall adopt all regulations necessary or convenient to carry out the provisions of this chapter." The Court finds that the words "necessary or convenient" are susceptible to at least two reasonable interpretations. This limitation applies only to Regulations adopted by the DoT.

90. While the category of diversity is not specifically included in the language of BQ2, the evidence presented in the hearing demonstrates that a rational basis existed for the inclusion of this category in the Factors and the application.

91. The DoT's inclusion of the diversity category was implemented in a way that created a process which was partial and subject to manipulation by applicants.

92. NAC 453D.272 contains what is commonly referred to as the Regulations' "anti-monopoly" provision. It forbids the DoT from issuing to any person, group of persons, or entity, in a county whose population is 100,000 or more, the greater of one license to operate a retail marijuana store or more than 10 percent of the retail marijuana licenses allocable for the county.

[30] The Court notes that the Legislature has now modified certain provisions of BQ2. The Court relies on those statutes and regulations in effect at the time of the application process.

93. Although not required to use a single point of contact process for questions related to the application, once DoT adopted that process and published the appropriate process to all potential applicants, the DoT was bound to follow that process.

94. The DoT employees provided various applicants with different information as to diversity and what would be utilized from this category and whether it would be used merely as a tiebreaker or as a substantive category.

95. The DoT selectively discussed with applicants or their agents the modification of the application related to physical address as well as other information contained in the application.

96. The process was impacted by personal relationships in decisions related to the requirements of the application and the ownership structures of competing applicants.

97. The intentional and repeated violations of the single point of contact process in favor of only a select group of applicants was an arbitrary and capricious act and served to contaminate the process. These repeated violations adversely affected applicants who were not members of that select group. These violations are in and of themselves insufficient to void the process as urged by some of the Plaintiffs.

98. The DoT disseminated various versions of the 2018 Retail Marijuana Application, one of which was published on the DoT's website and required the applicant to provide an actual physical Nevada address for the proposed marijuana establishment, and not a P.O. Box, and an alternative version of the DoT's application form, which was distributed to some, but not all, of the potential applicants via a DoT Listserv, which deleted the requirement that applicants disclose an actual physical address for their proposed marijuana establishment.

99. The applicants were applying for conditional licensure, which would last for 1 year. NAC 453D.282. The license was conditional based on the applicant's gaining approval from local

authorities on zoning and land use, the issuance of a business license, and the Department of Taxation inspections of the marijuana establishment.

100. By selectively eliminating the requirement to disclose an actual physical address for each and every proposed retail recreational marijuana establishment, the DoT limited the ability of the Independent Contractors to adequately assess graded criteria such as (i) prohibited proximity to schools and certain other public facilities, (ii) impact on the community, (iii) security, (iv) building plans, and (v) other material considerations prescribed by the Regulations.

101. The hiring of Independent Contractors was well within the DoT's discretionary power.

102. The evidence establishes that the DoT failed to properly train the Independent Contractors. The DoT failed to establish any quality assurance or quality control of the grading done by Independent Contractors.[31] This is not an appropriate basis for the requested relief as the DoT treated all applicants the same in the grading process. The DoT's failures in training the Independent Contractors applied equally to all applicants.

103. The DoT made licensure conditional for one year based on the grant of power to create regulations that develop "[p]rocedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana establishment." NRS 453D.200(1)(a). This was within the DoT's discretion.

104. Certain of DoT's actions related to the licensing process were nondiscretionary modifications of BQ2's mandatory requirements.[32] The evidence establishes DoT's deviations constituted arbitrary and capricious conduct without any rational basis for the deviation.

105. The DoT's decision to not require disclosure on the application and to not conduct background checks of persons owning less than 5 percent prior to award of a conditional license is an

[31] The only QA/QC process was done by the Temporary Employees apparently with no oversight by the DoT.

[32] These are contained in the order entered August 17, 2020.

impermissible deviation from the mandatory language of BQ2, which mandated "a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." NRS 453D.200(6).

106. Under the circumstances presented here, the Court concludes that certain of the Regulations created by the DoT are unreasonable, inconsistent with BQ2, and outside of any discretion permitted to the DoT.

107. The DoT acted beyond its scope of authority when it arbitrarily and capriciously replaced the mandatory requirement of BQ2, for the background check of each prospective owner, officer and board member with the 5 percent or greater standard in NAC 453.255(1). This decision by the DoT was not one they were permitted to make as it resulted in a modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada Constitution.

108. The balance of equities weighs in favor of Plaintiffs on the issue for which partial summary judgment has been granted.[33]

109. The DoT stands to suffer no appreciable losses and will suffer only minimal harm as a result of an injunction related to the August 17, 2020, partial summary judgment.

110. The bond previously posted for the preliminary injunction is released to those parties who posted the bond.[34]

111. If any conclusions of law are properly findings of fact, they shall be treated as if appropriately identified and designated.

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[33] The order concludes:

> [A]s a matter of law, the DoT acted beyond the scope of its authority by replacing the requirement for a background check of each prospective owner with the 5 percent or greater standard in NAC 453D.255(1).

[34] Any objections to the release of the bond must be made within five judicial days of entry of this order. If no objections are made, the Court will sign an order submitted by Plaintiffs. If an objection is made, the Court will set a hearing for further argument on this issue.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

The claim for declaratory relief is granted. The Court declares:

The DoT acted beyond its scope of authority when it arbitrarily and capriciously replaced the mandatory requirement of BQ2, for the background check of each prospective owner, officer and board member with the 5 percent or greater standard in NAC 453.255(1). This decision by the DoT was not one they were permitted to make as it resulted in a modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada Constitution.

The claim for equal protection is granted in part:

With respect to the decision by the DoT to arbitrarily and capriciously replace the mandatory requirement of BQ2, for the background check of each prospective owner, officer and board member with the 5 percent or greater standard in NAC 453.255(1), the DoT created an unfair process. No monetary damages are awarded given the speculative nature of the potential loss of market share.

Injunctive relief under these claims is appropriate. The State is permanently enjoined from conducting a final inspection of any of the conditional licenses issued in or about December 2018 for an applicant who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6).

The Court declines to issue an extraordinary writ unless violation of the permanent injunction occurs.

All remaining claims for relief raised by the parties in this Phase are denied.

DATED this 3rd day of September 2020.

Elizabeth Gonzalez, District Court Judge

Certificate of Service

I hereby certify that on the date filed, these Findings of Fact, Conclusion of Law and Permanent Injunction were electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program.

/s/ Dan Kutinac

Dan Kutinac, JEA Dept XI