IN THE SUPREME COURT OF THE STATE OF NEVADA

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GREENMART OF NEVADA NLV LLC, A NEVADA LIMITED LIABILITY COMPANY; NEVADA ORGANIC REMEDIES, LLC,

Appellants,

vs.

ETW MANAGEMENT GROUP LLC, A NEVADA LIMITED LIABILITY COMPANY; GLOBAL HARMONY LLC, A NEVADA LIMITED LIABILITY COMPANY; GREEN LEAF FARMS HOLDINGS LLC, A NEVADA LIMITED LIABILITY COMPANY; HERBAL CHOICE INC., A NEVADA LIMITED LIABILITY COMPANY; JUST QUALITY, LLC, A NEVADA LIMITED LIABILITY COMPANY; LIBRA WELLNESS CENTER, LLC, A NEVADA LIMITED LIABILITY COMPANY; MOTHER HERB, INC., A NEVADA LIMITED LIABILITY COMPANY; GBS NEVADA PARTNERS, LLC, A NEVADA LIMITED LIABILITY COMPANY; NEVCANN LLC, A NEVADA LIMITED LIABILITY COMPANY; RED EARTH LLC, A NEVADA LIMITED LIABILITY COMPANY; THC NEVADA LLC, A NEVADA LIMITED LIABILITY COMPANY; ZION GARDENS LLC, A NEVADA LIMITED LIABILITY COMPANY; and STATE OF NEVADA, DEPARTMENT OF TAXATION,[1]

Respondents.

ETW MANAGEMENT GROUP LLC, a Nevada limited liability company;

SUPREME COURT CASE NO. 79669

CASE NO.: A-19-787004-B
DEPT NO.: XI

RESPONDENTS' APPENDIX VOLUME IX

[1] Appellants' caption failed to include GREEN THERAPEUTICS LLC, ROMBOUGH REAL ESTATE INC. dba MOTHER HERB, and MMOF VEGAS RETAIL, INC. and incorrectly named MOTHER HERB, INC. and GBS NEVADA PARTNERS.

GLOBAL HARMONY LLC, a Nevada limited liability company; GREEN LEAF FARMS HOLDINGS LLC, a Nevada limited liability company; GREEN THERAPEUTICS LLC, a Nevada limited liability company; HERBAL CHOICE INC., a Nevada corporation; JUST QUALITY, LLC, a Nevada limited liability company; LIBRA WELLNESS CENTER, LLC, a Nevada limited liability company; ROMBOUGH REAL ESTATE INC. dba MOTHER HERB, a Nevada corporation; NEVCANN LLC, a Nevada limited liability company; RED EARTH LLC, a Nevada limited liability company; THC NEVADA LLC, a Nevada limited liability company; ZION GARDENS LLC, a Nevada limited liability company; and MMOF VEGAS RETAIL, INC., a Nevada corporation,

Respondent/Cross-Appellants,

v.

STATE OF NEVADA, DEPARTMENT OF TAXATION, a Nevada administrative agency.

Respondent.

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RESPONDENTS' APPENDIX
VOLUME IX

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RESPONDENTS' APPENDIX (ALPHABETICAL)

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Document Description	Volume
Amended Application for Mandamus to Compel State of Nevada, Department of Taxation to Move Nevada Organic Remedies into "Tier 2" of Successful Conditional License Applicants (November 11, 2019)	Volume XI RA2002 – 2056
E-mail from Mr. Shevorski (August 21, 2019)	Volume X RA1902 – 1904
ETW Plaintiffs' Complaint (January 4, 2019)	Volume I RA0179 – 250
ETW Plaintiffs' Complaint – Continued (January 4, 2019)	Volume II RA0251 – 493
ETW Plaintiffs' Second Amended Complaint (May 21, 2019)	Volume III RA0494 – 743
ETW Plaintiffs' Second Amended Complaint – Continued (May 21, 2019)	Volume IV RA0744 – 814
Evidentiary Hearing – Day 4 Transcript (May 30, 2019)	Volume V RA0815 – 1057
Evidentiary Hearing – Day 6 Transcript (June 10, 2019)	Volume VI RA1058 – 1282
Evidentiary Hearing – Day 7 Transcript (June 11, 2019)	Volume VIII RA1350 – 1600

Evidentiary Hearing – Day 7 Transcript – Continued (June 11, 2019)	Volume IX RA1601 – 1602
Evidentiary Hearing – Day 17 Transcript (August 13, 2019)	Volume IX RA1603 – 1694
Evidentiary Hearing – Day 20 Transcript (August 16, 2019)	Volume X RA1735 – 1901
Findings of Fact and Conclusion of Law Granting Preliminary Injunction (August 23, 2019)	Volume X RA1905 – 1928
Google Maps Photo (June 11, 2019)	Volume VII RA1344 – 1346
Governor's Task Force on the Implementation of Question 2: The Regulation and Taxation of Marijuana Act (May 30, 2017)	Volume I RA0001 – 162
GreenMart of Nevada NLV's Trial Memorandum (August 15, 2019)	Volume IX RA1714 – 1723
Hearing on Objections to State's Response, Nevada Wellness Center's Motion Re Compliance Re Physical Address, and Bound Amount Setting (August 29, 2019)	Volume XI RA1929 – 2001
Nevada Organic Remedies' Organizational Chart (2018)	Volume I RA0163 – 178
Nevada Organic Remedies' Pocket Brief Regarding the Interpretation of NRS 435D.200(6) and the Mandate to Conduct Background Checks of Each Owner of an Applicant for a Recreational Marijuana License (August 14, 2019)	Volume IX RA1695 – 1713
Notice of Entry of Order Denying Amended Application for Writ of Mandamus to Compel State of Nevada, Department of Taxation to Move Nevada Organic Remedies into "Tier 2" of Successful Conditional License Applicants (January 14, 2020)	Volume XI RA2057 – 2062
State of Nevada Pocket Brief Regarding the Meaning of the Phrase "All Regulations Necessary or Convenient to Carry Out the Provisions of" (June 10, 2019)	Volume VII RA1283 – 1343
The Essence Entities' Bench Brief (Corrected) (August 15, 2019)	Volume IX RA1724 – 1734
UPS Store Address (June 11, 2019)	Volume VII RA1347 - 1349

DATED this 19th day of June, 2020.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **RESPONDENTS' APPENDIX VOLUME IX** was filed electronically with the Nevada Supreme Court on the 19th day of June, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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* * *				
DEFENDANTS' WITNESSES				
Andrew Jolley		5/87	43	69/75/89
* * *				

EXHIBITS

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PLAINTIFFS' EXHIBIT NO.	
70	46
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DEFENDANTS' EXHIBIT NO.	
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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

6/14/19

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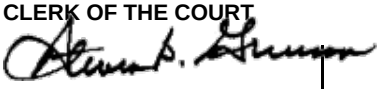

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

SERENITY WELLNESS CENTER LLC, et al. Plaintiffs vs. STATE OF NEVADA DEPARTMENT OF TAXATION Defendant	CASE NO. A-19-786962-B DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

EVIDENTIARY HEARING - DAY 17
VOLUME II

TUESDAY, AUGUST 13, 2019

COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFFS:	DOMINIC P. GENTILE, ESQ. MICHAEL CRISTALLI, ESQ. ROSS MILLER, ESQ. WILLIAM KEMP, ESQ. NATHANIEL RULIS, ESQ. ADAM BULT, ESQ. MAXIMILIEN FETAZ, ESQ. THEODORE PARKER, ESQ.
FOR THE DEFENDANTS:	KETAN BHIRUD, ESQ. STEVE SHEVORSKI, ESQ. RUSTY GRAF, ESQ. BRIGID HIGGINS, ESQ. ERIC HONE, ESQ. BRODY WIGHT, ESQ. ALINA SHELL, ESQ. JARED KAHN, ESQ. JOSEPH GUTIERREZ, ESQ. TODD BICE, ESQ. DENNIS PRINCE, ESQ.

LAS VEGAS, NEVADA, TUESDAY, AUGUST 13, 2019, 1:09 P.M.

(Court was called to order)

THE COURT: So, Mr. Shevorski, before we get started I'm going to ask you a question, and it's going to be for you to answer prior to closing arguments. And I don't know how we're going to do it.

MR. SHEVORSKI: Okay.

THE COURT: In comparing 5 and 5A I note that they both have the same version number from the Department of 5.4. So I'm going to need you to go through and give me some more explanation as to that change.

MR. SHEVORSKI: Right.

THE COURT: Because with the change that's testified to and without any other indication on the forms besides the language that was removed, I'm trying to figure out if I have correct versions of 5 and 5A.

MR. SHEVORSKI: Got ya.

MR. PARKER: Your Honor, I have four documents that I've given to Steve.

THE COURT: This is housekeeping, Mr. Parker.

MR. PARKER: It is.

THE COURT: Yeah. Okay.

MR. PARKER: He's looking at those now. These may be the only ones I want to get in that have not been admitted. And they're from the most recent production from the State.

THE COURT: Okay.

MR. PARKER: And if he stipulates, I won't need to have a witness come on. If he doesn't, then we'll have to deal with that in rebuttal.

THE COURT: Okay.

MR. GENTILE: Any chance the Court has had time to sign off on that other order?

THE COURT: I gave it to Mr. Cristalli.

MR. GENTILE: Oh. You did? I'm talking about [inaudible].

THE COURT: I did. I gave it to Mr. Cristalli.

MR. GENTILE: Thank you, Judge.

THE COURT: Mr. Gentile, I said I would have it to you before lunch, and I did. I just didn't give it to you. I gave it to Mr. Cristalli, because you lost the other one.

MR. GENTILE: Your Honor, that was very wise on your part, actually.

(Pause in the proceedings)

THE COURT: Mr. Parker --

MR. PARKER: We can stipulate to these four.

THE COURT: -- can you give me the numbers.

MR. PARKER: Oh. Right. We'll have to get new numbers from Dulce.

THE COURT: Then come give them new numbers.

(Pause in the proceedings)

THE COURT: Mr. Parker, have you shown 308 through 311 to other people to look at?

MR. PARKER: Only to the State. I thought enough copies -- I brought some more copies.

THE COURT: Is anyone else interested in looking at Proposed 308 through 311? Ms. Shell raised her hand. So, Mr. Parker, you need to move that way, and Mr. Graf is following you.

MS. SHELL: If Mr. Graf can get me one, that would be handy, because I'm pinned in.

THE COURT: We're going to have a grappling contest up here, apparently?

Mr. Shevorski, Proposed 308 through 311 you have no objection to?

MR. SHEVORSKI: State stipulates, Your Honor.

THE COURT: All right. Thank you.

So, Ms. Shell and Mr. Graf, the two who -- and Mr. Bice and Mr. Gutierrez and Mr. Prince?

MS. SHELL: All of that haven't seen it.

(Pause in the proceedings)

THE COURT: Okay. Now that everybody's had a chance to look at Proposed 308 to 311, are there any objections?

MR. PRINCE: Yes.

THE COURT: Mr. Prince.

MR. PRINCE: Your Honor, on behalf of the Thrive entities we are objecting to 308 through 311 both on relevancy and hearsay and foundational grounds.

THE COURT: Okay.

MR. BICE: Same objection.

THE COURT: Okay. So, Mr. Parker, you're going to have to call a witness.

MR. PRINCE: And then Essence has the same objection.

THE COURT: It doesn't matter. All I needed was one. I only needed on objection for Mr. Parker to have to call a witness.

MR. PARKER: So we'll call Mr. Pupo in our rebuttal.

THE COURT: Okay. So when can Mr. Pupo join us?

MR. SHEVORSKI: I have no idea.

THE COURT: Well, I need to know the answer to that, because I would really like to finish today or tomorrow.

MR. SHEVORSKI: Understood, Your Honor.

THE COURT: Okay. And Mr. Bhirud did confirm to me that 5 and 5A both include the same footer even though they are the different exhibits that have been testified to. So we do not have the same exhibit twice incorrectly.

All right. Were there some additional exhibits, Mr. Cristalli, before I get to Mr. Terry's testimony?

MR. CRISTALLI: So, Your Honor, we have 11 items

that have not been admitted that we asked the intervenors and the State to agree to its admission. They are not prepared to do that at this time. Not that they won't, but they want an opportunity to look at what they are. Most of them have been produced by the State in their training -- for training purposes.

THE COURT: Can you give me the numbers.

MR. CRISTALLI: Yes. 219, 227, 232 through 234, 242 through 244, 247 --

THE COURT: Hold on.

MR. CRISTALLI: Sorry. 247 through 249.

THE COURT: Okay. Thank you.

And so the State doesn't object to those, but other defendants in intervention have issues?

MR. SHEVORSKI: No objection from the State, Your Honor.

THE COURT: And do you believe you've already laid a foundation and that there are simply other objections that are being made at this point?

MR. CRISTALLI: I do, Your Honor.

THE COURT: Okay. So we'll talk about that after the conclusion of Mr. Terry's testimony.

MR. CRISTALLI: Yes.

THE COURT: Before Mr. Terry comes up, did you all work out the issue related to the application related to Mr.

Terry?

MR. GUTIERREZ: Yes, we did, Your Honor. We got to meet during the lunch break to review the redacted -- or the unredacted portions of the applications for A, B, and C, and I think come to an agreement as far as -- what we were going to do is produce it after his testimony, and Mr. Cristalli said he didn't need it for his cross.

Is that --

MR. CRISTALLI: Your Honor, we haven't had adequate time to review the applications. There are 16 of them. There's the unidentified and identified portion. Pursuant to the Court's previous order, we would anticipate redactions of portions of those applications. For the purposes of this examination we're prepared to go forward with cross-examination. However, we would like those produced to us. We'd also like -- and I think there's been a proffer to this point that all of the information provided in the unidentified portion of the application is the same.

THE COURT: For all 16 applications?

MR. CRISTALLI: Correct.

THE COURT: Okay. I'm sure somebody can ask Mr. Terry that.

Anything else? Okay. With that assumption, it sounds like people have had an opportunity to review the redacted version of the applications so that they can in an

informed manner conduct an examination or cross of Mr. Terry. Anything else before I have Mr. Terry come up?

Mr. Terry, if you'd come on up, please. And I'm sorry, Mr. Terry. I thought you were still involved in NuVeda until yesterday, so --

MR. TERRY: Thankfully, it's moved on from there.

SHANE TERRY, DEFENDANTS' WITNESS, SWORN

THE CLERK: Thank you. Please be seated. Please state and spell your name for the record.

THE WITNESS: Shane Terry. That's S-H-A-N-E, and Terry, T-E-R-R-Y.

THE COURT: And, sir, you may remember there's a pitcher of water there for you, there are M&Ms in the dispenser, there are a ton of exhibits, and you have the statute book in case counsel asks you about it.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. You may proceed.

MR. SHEVORSKI: Judge, Mr. Pupo's coming.

THE COURT: What?

MR. SHEVORSKI: Mr. Pupo's coming right now.

THE COURT: Lovely. Thank him for me.

You may proceed.

DIRECT EXAMINATION

BY MR. GUTIERREZ:

Q Mr. Terry, what's your current employment position?

A I'm the owner and CEO of TapRoot Holdings.

Q What is TapRoot Holdings?

A We are a Nevada-based Cannabis operator. We're vertically integrated. We now have seven of the provisional licenses. Previous to that we were cultivation and production only. And then we also have operations in Latin America and Europe for cultivation, production, and distribution.

Q Tell us about those operations in Latin America. What type of operations are those?

A We've got a grow and production for -- down in Colombia, and they classify that as psychoactive and nonpsychoactive, so the nonpsychoactive being in the hemp space, and then the psychoactive being marijuana. So we were cultivating under both those licenses and then have, thankfully, federally legal global import-export to a couple distributer partners in Europe.

Q And did TapRoot Holdings operate dispensaries prior to the 2018 licensing process?

A No, we did not.

Q Just cultivation and production licenses?

A Correct.

Q Okay. Tell us how you got involved with TapRoot Holdings.

A I've been in the industry since 2014, and I was with a company previously called NuVeda, and left that company or

separated from that company one way or another, and then did some consulting for the industry in the interim. And then eventually decided to start TapRoot, and been running that operation just predominantly focused on our U.S. operations until now.

Q Can you give us an overview of your educational background and work experience prior to getting involved in the cannabis industry.

A Of course. So I don't have much relevant cannabis history, so I did 17 years in the military. I started at the United States Air Force Academy, went to college through them. After that I did 14 years of -- thirteen and a half years of active duty. I was a F-16 pilot, I was a commander of Air Force Top Gun, and then I went on to teach at Top Gun here at Nellis Air Force Base, and that's what brought me to Nevada.

Q And when you were in the military did you serve and have combat missions in Afghanistan and Pakistan?

A Yes, I did.

Q What brought you to Las Vegas?

A When I was originally selected to attend Air Force Top Gun that's here at Nellis, that's what brought me here. Then I spent -- went through the class there, went to another squadron that was based locally here at Nellis, then was asked to come back to be an instructor at Top Gun. And when I finished that I became the commander of the F-16 Division of

Top Gun and at that point commanded about 137,000 troops throughout the United States.

Q And how did you transition into the cannabis industry?

A Through a company called NuVeda with my previous business partners who were friends at the time. And I co-founded NuVeda. We won two verticals in the 2014 process under the medical market, and, unfortunately, like many companies, had a partnership dispute, which led to my separation. And then I remained active in the industry doing strategy consulting for cannabis companies, early-stage companies throughout -- mainly on the East Coast and California. And then when the time was right I was able to acquire some licenses off a secondary market here and start TapRoot.

Q And at some point were you president of the Nevada Dispensary Association?

A Yes, I was.

Q When was that?

A It was roughly mid 2015 to early 2016, I believe.

Q And do you recall what type of issues that you were dealing with as president of the Nevada Dispensary Association lobbying efforts?

A Absolutely. So during that time that was the early stages where we were first starting to get the inputs from the

community. That would eventually hopefully influence the ballot initiative. So, you know, I think during -- if you all remember during the early stages of the industry there was actually a lot of -- it was in a fractured state with some of the previous dispensary awards and the stay date and everything that happened there. So I think we were just kind of recovering from that one. It was still a medical market at the time, and then I left, you know, the NDA prior to the ballot initiative, before the voters -- I guess before November of '16. And I've stayed close to the organization since then, mainly just receiving information that would hop our business going forward.

Q You're also a member of the Minority Cannabis Business Association. Could you tell us what that is.

A That's correct. Anybody that's familiar with the other trade organizations like the NCIA, it's basically a U.S.-based trade organization mainly comprised to represent the interests of, you know, minority cannabis folks, whether it's operators, employees, business owners.

Q And were you involved with the 2018 application process?

A Yes, I was.

Q Okay. And who was that on behalf of?

A We put in the application under my company, TRNVP098 LLC. There's a -- that one's owned by TapRoot Holdings Nevada

LLC. And I drafted a -- you know, we kind of looked at a couple of multistate operators that we felt could help us, had the expertise that we needed on the dispensary side, and I co-drafted the application with one of them.

Q And prior to that application process were you involved at all with the -- giving testimony or giving any input on the adoption of the permanent regulations?

A Yes. I think in the same sense that any business owner or party of interest had the ability to be able to submit information to the State. So through some of the discussions that were led by the NDA there were a couple of different local organizations that were trying to collect inputs from the community from other business owners, and, you know, I submitted my inputs along with that.

Q And we talked about this a little today, but are you aware that there's a 5 percent threshold for the definition of "owners" in the regulations that were adopted in 2018?

A Yes. In the NAC, I believe.

Q Okay. Are you aware whether that's similar to what was in the medical provisions for the regulations then?

A Yes, it was.

Q When it comes to your company, TapRoot Holdings, tell us about the ownership structure.

A It's pretty easy. I'm the only owner.

Q So just you?

A Correct.

Q And then tell us -- so when you applied for the application in 2018 who were the officers and board members in addition to yourself that were in the application?

A Sure. I brought on a mentor and friend of minute, Alan Karcher. I brought him on as a board member for the application. And we also were exploring a relationship with a company called Grass Roots out of Illinois. So I brought them on as officers, proposed officers and proposed board members if we had won licenses.

Q And tell us about that relationship with Grass Roots.

A It was a company that I've known and worked with in other markets for probably the last four or five years, so one of the companies I just grew to respect over time, and I knew that they were very successful in winning licenses in other states. So we looked at -- the structure of our relationship was, of course, back then we had no idea how many licenses we were going to win. We would have been pretty happy with anything just being a stand-alone cultivator and producer. But the structure that we put forth was a debt financing structure based on the number of licenses that we were going to win. And we also submitted an LOI that said, if we win licenses then we will negotiate a longer-term agreement that eventually would hopefully turn into a joint venture.

Q As the only owner of Tap Root Holdings did you have your background checked as part of the 2018 application process?

A Yes, I did.

Q And did the other officers and board have their backgrounds checked for that process, as well?

A Yes. We specifically had the backgrounds checked of every officer or board member in addition to myself as an owner. You mentioned the 5 percent rule, and we did have some -- some of the gentlemen were below the 5 percent threshold, but we did submit them forward for background checks, as well.

Q When you're talking about in this case the use of diversity as a scoring criteria, do you believe that diversity should be used as a scoring criteria for the application and the application process for medical marijuana?

A Absolutely. I agree with the intent behind it.

Q And can you tell us the reason why diversity is important for the operation of a marijuana establishment?

A I think simply from a -- from the public and community perspective it's -- we want to make sure that we understand the needs of the communities that we're serving, the, you know, patients or customers, depending if you're talking about medical or rec. And obviously in order to do that you have to have representation, you have to understand the needs of the people that you're serving. So a diverse

board that would reflect the -- you know, have the same interests or align interests between the communities and people you serve seemed definitely a good intention behind it.

Q One of the other issues they've been talked about is the proposed location requirement in the ballot initiative. Are you familiar with that provision?

A Yes, I am.

Q Okay. Were you under the impression as an applicant that you had to acquire and secure property before you applied in the 2018 process?

A No.

Q Explain why.

A Like I mentioned, when I was -- when I became the president of the NDA we were still working through some of those issues. And just to kind of go back in time, originally what happened was the local jurisdictions created a competitive application process on their own ahead of the State application. So there were certain selectees or applicants that won on the local level and not the State level. When the State after the 2014 applications released the winners there were some discrepancies or differences between what the locals had picked and what the State had picked. So I felt that obviously that ended up in a long litigation that fractured the industry, and so it seemed like with this attempt that was what the State was trying to avoid.

So in order to make it as unbiased as possible and push the selection process purely to the State level they did not require any zoning or any sort of scoring when it came to properties.

Q And for you specifically, you applied in many of the rural jurisdictions across Nevada; is that fair to say?

A That's correct.

Q And how would this acquisition of property requirement prior to applying affected you when you're applying in a county like Lander County or White Pine?

A I think just from a financial perspective you could argue that would have been cost prohibitive, but obviously that would be up to us and with strategy. But I think what made it particularly challenging was some of the local jurisdictions that have since 2014, where they had moratoriums, have now opted in or are open to developing cannabis regulations. But at the time the application came out a lot of them just hadn't progressed through having any sort of formal adoption or regulation. There were no zoning requirements. So we did the best that we could by looking at State regulations, by looking at other jurisdictions, and what we expected would be adopted by the locals. But at the time of applying there were no set regulations in some of the jurisdictions we were in that would have allowed us to pick the perfect property.

Q You would have been -- there's no way you would have been able to get a lease in some of these jurisdictions for a dispensary; is that correct?

A Correct. Or a business license, a secure property, or anything like that.

Q How many licenses has TapRoot Holdings applied for in the 2018 round?

A I believe it was 14, 14 or 15 total.

Q And how many licenses did TapRoot Holdings win?

A Seven.

Q And do you know which jurisdictions those are?

A I do.

Q Can you tell us.

A Let's see. We had Lyon, Lander, White Pine, Storey, Mineral, Humboldt, and Pershing.

Q And why did you decide to apply in some of the more remote jurisdictions in Nevada?

A I think kind of going back into the original reason why I got involved in the industry to begin with is I was excited about the impact that it could have on communities. I felt that it could -- you know, the right business with the right people behind it could have an extremely positive effect to bring cannabis to areas where it didn't exist. And so for us when we looked at the competitive nature of Southern Nevada compared to the rurals, a captured market, defined market

share to be one of the only licensees and bring cannabis into a community where it didn't exist was I guess maybe more on the philanthropic side, as well, but it was a pretty exciting opportunity for me and my company.

Q Okay. And did your company do any type of forecasting on how its dispensaries would do in those locations?

A Yes, we did. We admittedly didn't do them for every specific jurisdiction that we applied in, but we looked at, you know, the known quantities in the south here, and then we also ran numbers and did forecasts for, you know, just a kind of the -- what we would have considered the average representation of a rural county. So there were a few that we got more into the details with and did them specific to those known populations. But, again, to kind of address the early challenges is there are some counties that have moratoriums, but then you have the local jurisdictions that are for it, and that for us would be a pathway to get licensed. And so based on that uncertainty and not really knowing where in the county we'd be able to place the license, we were pretty much left just doing our best guess on the forecasting and how that would translate based on where it would ultimately end up.

Q What were the results from the forecasting?

A As far as like revenue projections?

Q Correct.

A I think we anticipated that -- you know, again, in the rurals there's obviously a lower population, but you have a captured market share. So we expected on average it'd be about 5 million in revenue per dispensary.

Q And after you were awarded the licenses in December of 2018 can you tell us what steps TapRoot Holdings took to get open in these jurisdictions.

A Absolutely. So the first would just be obviously paying our licensing fees and make sure that we checked that square. Other than that, I've had multiple meetings with -- well, I have to take a step back. Out of our seven counties two of them are -- I would say are free and clear and currently have regulation. All the rest are either under moratoriums and developing regulations. And that's where I put the majority of our efforts, was we secured -- we secured the properties that we were looking for in the two jurisdictions that did have regulation, and then I've gone to all the different rural counties, I've met with the county commissioners, I've met with -- where there was an incorporated city I met with law enforcement, I've briefed city councils, and we've tried to be able to give our inputs and help craft the regulation that hopefully is upcoming.

Q How much did you pay for the licensing fees?

A They were the standard everybody else -- 20,000 per license, so it was 140,000 that we had to put up.

Q You said you secured locations in two of the jurisdictions without moratoriums. Which jurisdictions were those?

A It'd be in Mineral and Lyon.

Q And you actually signed a lease or letter of intent?

A We are under LOI for both of them, and finishing the negotiations of the lease in one and a purchase agreement in the other.

Q Mr. Terry, can you tell us what the harm would be to your company, TapRoot Holdings, if an injunction is issued by the Court.

A I think obviously for us what we found in the rurals is that a lot of the -- a lot of the local municipalities are waiting to see what happened here in the south. So they have shown -- you know, some of them have shown an indication that they're open to developing regulations and creating the right structure, but they want to wait and see, you know, what happens with this -- you know, with this injunction before they move forward. I think those that are aren't following the proceedings all that closely are concerned that potentially licenses will be pulled back.

I think what makes it interesting in the rurals compared to what we're seeing here in the south is it's a different consideration for the community. So although a lot of the rural jurisdictions might be against cannabis, I found

that things that we take for granted here are really important to law enforcement. So one, for example, would be the exclusion of home grows. So law enforcement wants these licenses to show up in the local communities because, if you guys remember, that plants a 25-mile flag around a dispensary that prohibits home grows. So with the thriving black market that currently exists, meaning that these home grows are supplying product into the local communities, even the towns that are against cannabis overall see this as a risk mitigation method in order to be able to provide compliant legal cannabis to the people that they know -- that they're aware of and to be able to just eliminate some of the black market competition.

Q Mr. Terry, are you aware if there are any dispensary licenses currently for sale?

A Yes.

Q And how do you know that?

A Personally I've been approached multiple times to sell my license, even in the rurals, even with the ones that are under moratoriums. I currently -- you know, we have our cultivation for sale, and that's -- we've got an LOI that's being negotiated. The big interest is because we have dispensaries and the potential buyer sees a pathway to shelf space. Then I would say -- you know, like I said, I've been approached multiple times, and when we've been trying to do

production deals and the people we're talking to have, you know, tried to buy our licenses or asked if I'm open to it. And then, you know, just from being active in the industry I see a lot of licenses that are getting floated around for sale right now.

Q And you had offers to buy your licenses after the 2018 round; correct?

A Within about 12 hours of realizing we won licenses, yes.

Q Okay. Now, Mr. Terry, can you -- do you believe there's tax revenue actively being lost because of this litigation?

A Absolutely. I think in two part. One would just be the black market -- the black market product that's out there. So that means that you could argue that certainly even in the rurals where no dispensaries exist they would have the opportunity to drive to Reno or the closest major city and buy from a dispensary there. But the reality is how many people are going to drive three, four hours to get to one of the legal dispensaries. So that means that they're taking revenue away from those dispensaries to purchase off the black market.

And then I think the other aspect, we've seen a lot of increased activity, especially in the rurals, from some of the Indian reservations. And really in some of these communities it's a speed to market. So the local

jurisdictions and local towns, city councils know that if the Indian reservation pops up in their backyard and they're going to be there first, then that's market share that's going to be taken away from the other -- the other licensees. And that just means tax revenue that's not going to the locals, not going to the State, job creation that's potentially kept on the reservation versus going out into the local communities.

Q So do you believe that one of the harms that's potential for the State is the issue of Indian reservations and their market share?

A I believe both for the State and the locals, and in addition for us, if some of these communities -- if the reservations are able to get a dispensary up and running before us, we will never be able to gain back portions of that market share.

MR. GUTIERREZ: Pass the witness. Thank you.

THE COURT: Any of the additional defendants wish to ask any questions?

Mr. Cristalli.

MR. CRISTALLI: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. CRISTALLI:

Q Good afternoon, Mr. Terry.

A 'Afternoon.

Q We had an opportunity to talk a little bit outside

in regard to your application and that I haven't had a chance to look at it all yet. So I'm going to ask you some questions about it, not having the opportunity to look at it all.

You talked a little bit about you being the sole owner of the company, which is TapRoot; correct?

A Yes, sir.

Q All right. There's owners -- you're the owner. There's officers in that company, as well; true?

A That's correct.

Q Okay. Could you tell -- could you tell the Court who the officers in TapRoot.

A In TapRoot?

Q Yes.

A It's just be me. And to be clear, I guess what I meant, we don't have corporate officers as far as president, secretary, anything like that. They're officers as far as organizational, chief operating officer, chief compliance officer, chief executive officers filings.

Q Okay. So you put names of those individuals in the application; correct?

A As proposed officers, yes.

Q Who are they?

A It would have been Matthew Darin as chief financial officer from Grass Roots, would have been Steven Wiseman as chief compliance officer also from Grass Roots, and Mitch Kahn

as chief operations officer from Grass Roots.

Q Is that it?

A That is it.

Q I saw a name David Brown under the application portion for officers, board members. Who is that individual?

A The board members will be David Brown, Mark Gordon, and Alan Karcher.

Q And who is David Brown?

A He was a board member at Grass Roots.

Q Okay. And is he local to Nevada?

A No, he's not.

Q Okay. Where does he reside?

A Him and Mark Gordon are both in Illinois. At least Grass Roots is from Illinois. I don't know where they personally live.

Q Okay. You're familiar with the industry. You've been involved since 2014; correct?

A Absolutely.

Q There is another Grass Roots that was I believe acquired by Curaleaf. I'm assuming those are two different companies. Is that a fair --

A It is the same company.

Q It is the same company?

A Yes, it is.

Q So the Grass Roots that you're involved with is the

company that was acquired by Curaleaf?

A I don't know the status of their closing. I just -- I know it was announced to me the morning that it became public, so I don't think the deal is -- I know the deal hasn't closed yet. But I know that it is -- there is an acquisition in process.

Q Does Grass Roots -- is Grass Roots currently a licensee -- a cannabis licensee in the state of Nevada?

A Yes, they are.

Q Okay. And they are in the process of closing a deal with Curaleaf to be acquired?

A That is my understanding. And to be clear, they are a minority investor in another organization unrelated to us, and they have been since I believe 2014 or 2015.

Q Who is they?

A Grass Roots as an entity.

Q Okay. So what licenses does Grass Roots hold in the state of Nevada?

A Well, the seven provisional that we have, and I believe they are -- they own cultivation and production, but it's an unrelated entity to mine.

Q So Grass Roots does not own any retail dispensaries in the state?

A You're correct.

Q Okay.

A Not to my knowledge.
Q And so the acquisition or the process of the acquisition by Curaleaf of Grass Roots doesn't have any dispensaries involved in it?
A I can't speak to that.
Q Okay. Is Grass Roots a publicly traded company?
A No, they are not.
Q Okay. You are also on the board of directors of GB Science?
A That's correct.
Q Okay. GB Science is a publicly traded company?
A Yes, it is.
Q GB Science is based in the state of Nevada?
A Yes, it is.
Q And it is a marijuana licensee; correct?
A That is correct.
Q And it holds licenses in cultivation and production; right?
A Correct.
Q Okay. Does it hold any licenses in retail?
A No.
Q Okay. So you have a relationship with Grass Roots, who is a licensee in the state of Nevada; correct?
A Correct.
Q Okay. Independent of their involvement with

TapRoot; right?

A Correct.

Q You have a relationship with GB Science as a board of directors member; correct?

A Correct.

Q GB Science does not have any membership interest in TapRoot?

A No, it does not.

Q Does anybody from GB Science -- is anybody from GB Science on your board of directors?

A No.

Q Officer?

A Nope.

Q Okay. And you are involved as a board of director and a consultant for GB Science?

A Technically not doing any active consulting, but just on the board.

Q Okay. There's another entity you're involved with that you did not mention in direct examination called Folium Global. Can you tell me what Folium Global is.

A Correct. They are our international company that's -- they're the ones that actually hold the license, or they're the investment owner that owns a license in Colombia and has managed some of our European operations.

Q Does Folium Global -- well, who is a part of Folium

Global?

A Myself through options and warrants and my partner. His name is Oliver Zugel.

Q So options and warrants suggests that Folium Global is a publicly traded company.

A No, it is not.

Q Okay. Could you tell me what the corporate structure is of Folium Global?

A It is -- should be a C corp. Delaware C corp. at this time.

Q Okay. And it operates out of where?

A The license -- it invests in a local subsidiary called Folium Colombia or Folium Med Colombia, and it also has interests in Spain and Germany.

Q And what does it do again?

A It's a holding -- Folium's technically a holding company.

Q And what operations does it conduct, if any?

A From the holding company level, company management, corporate management. We, you know, provide advisory services, IP, all that stuff to the local companies in Colombia and Europe.

Q What companies are under Folium Global as subsidiaries?

A Should be, let's see, TapRoot Holdings, Inc., and

then the Folium Med is the Colombian operation.

Q So Folium Global, then, as a parent company, and TapRoot as a subsidiary, then, would have an interest in TapRoot as a licensee in the state of Nevada?

A No. It's -- the names are confusing, but they're two distinctly separate entities. To provide a little bit of background on that, TapRoot Holdings, Inc., was a company that I structured to navigate some of the complications with 280D. We ended up not using that as a shell company. Folium is the -- at this time the sole owner of that company, and we are dissolving that entity.

Q So --

A But there is no direct ownership between Folium or TapRoot Holdings, Inc., with TapRoot Holdings Nevada LLC.

Q Okay. Anybody from Folium Global as the parent company involved with TapRoot in -- as TapRoot the licensee in Nevada?

A On the cultivation side, yes.

Q Okay. Who is that?

A Oliver Zugel.

Q Okay. And he is not involved in the applications in the 2018 process?

A No, he's not.

Q Okay. On your Website it suggests, and so was your direct examination, that you are vertically integrated;

correct?

A Correct.

Q Okay. You're vertically integrated based on the conditional licenses that you received in 2018?

A Correct. I think, you know, keeping in mind the Website is as much for branding as it is for, you know, representation of our company. So I guess technically there are companies that say you're vertically integrated if you own multiple areas of the supply chain. I think that our industry defines -- or I wouldn't say -- assumes that the definition of vertical integration is distribution through cultivation.

Q So production, cultivation, and dispensary; correct?

A That's the assumption, yes.

Q And your representation that you're vertically is based on the conditional licenses that you received in 2019 -- '18. I'm sorry.

A No. The Website was actually structured well before that. By then we were talking about vertically integrated as just having multiple areas of the supply chain.

Q So you testified in direct examination that you were vertically integrated. Does that mean, sir, that vertical integration in the state of Nevada includes the conditional licenses?

A I don't think there is a definition of it that I'm aware of. But as far as if you're looking for my

interpretation of it, I think it depends on who you ask.

Q So in your direct examination here today when you said you're vertically integrated what does that mean?

A For purposes I think that can include dispensaries. So dispensary, cultivation, production. I don't think that we're technically incorrect when our global message a few years ago was that we were vertically integrated, just having different portions of the supply chain.

Q Let me ask it again. In your testimony on direct examination you said you're vertically integrated. Does that include your conclusion -- your -- I'm sorry. Your testimony that you're vertically integrated, does that include the conditional licenses that would give you a retail license?

A Yes, I would assume it does.

Q So it's based on you receiving those conditional licenses, or should I say those conditional licenses becoming permanent; correct?

A Correct.

Q Okay. You applied for you said 16 licenses?

A Plus or minus one.

Q Okay. We've had an opportunity to look at some exhibits -- well, first of all, before we do that the licenses you applied and you testified to which licenses you received, which licenses didn't you receive and in what jurisdictions?

A I can't recall off the top of my head which

jurisdictions, but, I mean, we did cast a pretty wide net. So, you know, I know we applied in all the jurisdictions down here in the south. We had two in the city of Las Vegas, you know, up in Reno, up in Carson.

Q So did you apply in Unincorporated Clark County?

A I believe so, yes.

Q And the City of Las Vegas?

A Twice. Correct.

Q So you applied twice in the City of Las Vegas?

A Correct.

Q Did you apply in the City of Las Vegas under different entities?

A Same entity, different locations.

Q Okay. So you didn't use multiple LLCs to apply in the same jurisdiction under the same ownership structure; correct?

A It was just a single TRNVP098.

Q Okay. Henderson?

A I believe so.

Q And did you testify that you applied in Reno, as well? I'm sorry. I didn't hear that.

A I believe Reno and Carson City, as well.

Q Okay. And the licenses -- the conditional licenses that you received were in Humboldt, Lander, Lyon, Mineral, Pershing, Storey, and White Pine; correct?

A Correct.
Q All rural counties; right?
A Yes, sir.
Q Certainly substantially different than Clark County; right?
A Absolutely.
Q Proportionately different in terms of demographics and population; correct?
A Correct.
Q And that would be consistent for all of those counties as it relates to Unincorporated Clark County; right?
A In comparison, yes.
Q It'd be consistent also being disproportionate with the population and demographics of Henderson; right?
A That's a fair assumption.
Q And probably even Reno; right?
A Probably.
Q Okay. Community is much different in those jurisdictions than --
A Absolutely.
Q -- okay, than they would be in, for example, Clark County; correct?
A Correct.
Q Okay. And you said you applied in all 16 jurisdictions; right?

A I believe so.
Q Okay.
A I said plus or minus. I don't know the exact number, but pretty close.
Q And you were involved in the preparation and submission of the 2018 application for TapRoot; correct?
A That's correct.
Q Okay. And so you were aware of the content of the application; right?
A Yes.
Q Okay. You were involved with filling out the identified portion versus the unidentified portion; correct?
A That's correct.
MR. CRISTALLI: All right. Shane or Brian, can we have 220.
BY MR. CRISTALLI:
Q I am going to represent, just because we've had evidence that TRNVP098 LLC is actually RD -- identified as RD-661 through 676. Does that seem --
A Sounds close. It's familiar.
Q You have Exhibit 220 in front of you. I think you can look on your screen, as well. Do you see that?
A It's blank, actually. Or it says "out of range."
THE COURT: Hold on. So turn the power on and off. If not, I've lost Ramsey, so --

And, Counsel, for a reminder, I have to break in four minutes for fifteen minutes.

MR. CRISTALLI: Okay, Your Honor.

(Pause in the proceedings)

THE COURT: Can you see it now, sir?

BY MR. CRISTALLI:

Q Do you have it in front of you, Mr. Terry?

A Yes, I do. Thank you.

Q Okay. So this is the unidentified tally sheet as it relates to your applications RD-661 through RD-676, which is TRNVP098 LLC, which is the applicant that you filed under; correct?

A Yes, that is correct.

Q Okay. And this particular -- and if you look up in the top right corner, where it says, "MEID," you'll see that the RDs, or the RD number is grouped. It's grouped from 661 through 676; correct?

A Correct.

Q So they scored all of the 16 applications together; isn't that true?

A Looks like it, yeah.

Q Okay. For example, if you look at the first section, it talks a little bit about building construction; right?

A That's correct.

Q And there's an allocation of 20 points for that section; right?

A Correct.

Q And you received 16.33 points for that section; right?

A Yep. Looks like what it says.

Q And you received that for each one of the 16 applications for each of the jurisdictions that you applied in; correct?

A This is the first time I'm looking at this, so it seems to be what it infers.

Q It's grouped together. There's one score. The assumption is --

A Is that right?

Q -- they're giving one score for all of the applications; correct?

A Sounds right.

Q Okay. In the first section of that it talks about building plans and details; right?

A Correct.

Q Second section talks about building plan, regulatory compliance; right?

A Correct.

Q Okay And then we go down to care, quality, safekeeping, which is there's an allocation of 90 points for

that; right?

A Correct.

Q And for all of the applications for each jurisdiction that you applied in you received 83.83 points; right?

A Looks right.

Q Okay. And so it talks -- in that section it talks about building security, product security, it references a detailed budget, it talks about operational manuals; correct? Would you agree with me to that?

A Yes, I would.

Q And there's point allocations for all of that; right?

A Yes, sir.

Q And there's the same score for each of the jurisdictions for all 16 applications that you applied in; right?

A I don't see that breakdown, but I think that's what you were saying, is that this applies for all of them equally.

Q Yes.

A Correct.

Q And then finally, under the community impact, which there's an allocation of 15 points, we look at the likely impact on the community and the manner in which the MME meets the patient needs; right?

A Yep.
Q There's a score for that; correct?
A Yep.
Q And that score is for all 16 locations, for all 16 applications that you submitted; right?
A Looks correct to me.
Q Okay. And we are already in agreement that the rural counties are in a much different demographic and population difference than say Clark County; correct?
A Correct.
Q Different communities; right?
A Yep.
Q For example, I think the total population for all of those counties which you received licenses for is 99,848. I'm not saying you should agree with me, but it's small compared to what's in Clark County; correct?
A I would agree that it's smaller than Clark County.
Q Okay. And Henderson and Reno, so on and so forth; correct?
A Yes.
THE COURT: Mr. Cristalli, is this a lovely place to take our 15-minute recess?
MR. CRISTALLI: Yes, Your Honor.
THE COURT: Great. Mr. Terry, we'll back to you in 15 minutes. This is not a requested recess under Coyote

Springs-BrightSource.

(Court recessed at 1:59 p.m., until 2:11 p.m.)

THE COURT: Mr. Pupo, thank you for rejoining us. Thank you for coming back. We're not quite ready for you, but thank you for coming back.

MR. PUPO: You're welcome, Your Honor.

THE COURT: All right. Can we get Mr. Terry done.

Okay. Mr. Cristalli.

MR. CRISTALLI: Thank you, Your Honor.

BY MR. CRISTALLI:

Q Mr. Terry, I'm going to direct your attention again to Exhibit 20. That is the unidentified portion of your application which has been now identified as RD-661 through 676. If you -- and we've already I think agreed that you submitted a total of 16 applications; correct?

A Yes, sir.

Q Okay. And we talked a little bit about the different information in those applications as it relates to building size, building security, product security, and budgets and different plans; correct?

A Correct.

Q Okay. So quite a bit of information as it relates to that area; correct?

A Correct.

Q If you look at the bottom portion of that tally

sheet, it references total time. Do you see that?

A Yes, I do.

Q Okay. And, you know, through the course of the testimony in this hearing we know that there were three examiners looking at this particular portion of the application. And if you look at, for example, the first line under the total time, it references building construction. You see that?

A Yes, I do.

Q And it looks like somebody -- that particular examiner spent 25 minutes on that application. Can that be consistent?

A Yeah.

Q Okay.

A Yeah. Looks that way.

Q And then going down, care, quality, an hour and 50, and then community impact 25 minutes; right?

A Correct.

Q Okay. And then if you go under the total time spent in terms of hours and minutes on all three examiners for all 16 applications, it shows that there was a total time of 6 hours and 15 minutes spent on the review of that unidentified portion of the application; correct?

A That seems correct, yes.

MR. CRISTALLI: Okay. Thank you.

Your Honor, if there's no objection, I'd like to have the application of TRNVP098 LLC admitted into evidence under the -- you know, the restriction in terms of the privileged information both on the unidentified and identified portion of the application.

THE COURT: You mean the redacted version?

MR. CRISTALLI: Thank you. Sorry.

THE COURT: Do you have a redacted version?

MR. CRISTALLI: I don't have anything.

THE COURT: Oh.

MR. CRISTALLI: So that's the problem.

THE COURT: All right.

MR. CRISTALLI: I haven't received it yet. So once received --

THE COURT: Mr. Terry, if the application is redacted consistent with the discussions you had with counsel earlier this afternoon, would you have any objection to it being admitted for purposes of these proceedings?

THE WITNESS: No, not in general. I would like the opportunity to go through and say which sections I would want redacted. Specifically, those are going to relate to just personal finances, taxes, and intellectual property.

THE COURT: Okay. That would be consistent with what we've been trying to redact.

Anyone else have an objection?

Then with that proviso, you have a provisional acceptance of that future exhibit that you might mark some day if you have a paper copy in a redacted form.

MR. CRISTALLI: We can only hope. Thank you, Your Honor.

THE COURT: Any more questions for Mr. Terry?

MR. CRISTALLI: Just a few concluding questions, Your Honor.

BY MR. CRISTALLI:

Q Mr. Terry, in reference to the locations that you received licenses in in the rural counties you said you spent a considerable amount of time up there; right?

A Correct.

Q You got to know the locals a little bit?

A Correct.

Q Talked to the municipalities?

A Correct.

Q And it's important for you to talk to the municipalities because out of the seven conditional licenses you received four of those are under a moratorium; correct?

A Technically five.

Q Okay. So five. Five are under a moratorium.

A Correct.

Q Two, which are Mineral and Lyon, are not under a moratorium.

A That's correct.

Q Okay. So you have some work to do with regard to getting the local municipalities to lift that moratorium.

A Yes, we do.

Q And you said that the local municipalities are looking towards this hearing to determine whether or not they will lift the moratorium; correct?

A I wouldn't limit that specifically just the injunction, but the overall case, yes.

Q So you've had specific conversations to political figures in those municipalities who have told you specifically that a consideration for them in terms of lifting the moratorium is what happens in this preliminary injunction hearing?

A I would say -- I'd say that's generally accurate. I think what was passed on to us was basically the sentiment of, we are open to it, we're going to wait and see what happens in court.

Q Okay. I would assume there's also other factors that those municipalities would take into consideration determining whether or not to open up the licenses, as well; right?

A Of course.

Q In fact, prior to the 2018 licensing period I don't think any of those counties had any recreational licenses, did

they?

A No. You're correct.

Q Okay. And I think that there were moratoriums in place at that time; right?

A And I guess to be specific there were existing recreational cultivation and production licenses. But obviously the application window hadn't opened up to them for dispensaries yet.

Q But the local municipalities were not in agreement at that point despite not knowing anything about the 2018 application process whether or not they were going to open up licensing in those municipalities.

A What do you mean? As far as at which point?

Q So prior to the 2018 application process there were retail dispensaries throughout the state of Nevada; correct?

A Correct.

Q Okay. Including allocation for licenses in those rural counties; right?

A From the 2014?

Q Correct.

A I believe in 2014 these were the ones that a lot of these -- you know, I think this is probably -- the State could fill in more of the blanks here, but I believe this is where some of the State licenses that got reshuffled down to Clark County came from, were from some of the rural jurisdictions,

where in 2014 they weren't interested in doing anything for marijuana, which obviously then was just medical applications anyway.

Q Right. So the point I'm trying to get to, prior to the 2018 application process those local rural municipalities had an issue with regard to allowing retail marijuana; correct?

A I wouldn't say they had an issue. Not all of them. Some were slow to adopt. So, for example, when the rural counties had the opportunity to license cultivation and production, then, yes, they adopted that. There was no mechanism at the time for them to adopt retail applications. But some of them did start that process, and that's why places like Lyon and Mineral have their regulations in place.

Q All right. The point being, though, there were considerations over and above what this Court does with regard to the preliminary injunction; right?

A Yeah. I think that's a safe assessment.

Q Okay. And as we talked a little bit about, those demographics in those rural counties are different; right?

A Correct.

Q You spent some time out there. Did you get an idea as to how many people in those communities consume marijuana?

A Yeah, we do -- we would get decent turnouts at town hall meetings and from talking to law enforcement. I think

obviously just when it comes to law enforcement their opinion is based on how much they're confiscating or busting on the black market. So they have a pulse of what's going on in the communities.

Q And we talked about the black market. I mean, black market issues exist everywhere, don't they?

A They do.

Q In Clark County, in the state of Nevada, in the major popular assess we're having difficulties with black market issues; right?

A Difficulties, but I think it's -- time has shown that it has been decreased with the presence of legal marijuana, especially, you know, there are people that are using the home rule or the home grow rule. where down here obviously legally those can no longer exist anywhere near the Greater Las Vegas area.

Q Well, aren't we dealing with a little bit more than that? Aren't we dealing with, you know, product coming in from California and other states into the jurisdiction?

A I'm sure that still exists. I would think that -- or I think statistically it has shown that it's decreased since the legalization. But, yes, it still exists.

Q And that's pretty much -- that's a lot more problematic than somebody, you know, growing their own marijuana in their garage for self use. Wouldn't you agree

with me on that?

A No, not really. Because I think what we've seen in the rurals is that those that are growing, technically they're growing a legal limit. But when you look at where that product is actually ending up, you know, I think one that was -- it wouldn't have been my recommended tactic, but there was a local citizen in Winnemucca that showed up to the City Council one day and put a giant bag of marijuana on the table and said, this is how much I'm legally allowed to grow and do you think I could possibly consume this much in a year. And, you know, trying to show to law enforcement that a lot of this is grown in excess of what people can personally consume.

Q But if it's not within a 25-mile radius, an individual is allowed to grow a certain amount of marijuana; correct?

A That is correct, yes.

Q For their own personal use; right?

A Correct.

Q Okay. Do you know what the demographics look like with regard to age in those rural locations? Are they under 21, are they older than 21? What have you found out? I mean, to make a calculated determination that these strategically are good places to go you must have done some analysis with regard to that.

A We did. And I think where they make as potentially

interesting licenses are, one, if you've been to the rurals, what they don't want to see is a big flashy dispensary right on Main Street. So it means it doesn't take a lot of capital to get these things up and running. You have a captivated audience. They're not going to drive two, 300 miles to the next dispensary because, you know, they don't have the -- you know, the product that they're looking for. And as long as you can provide a good-quality product at the right price, I think you have a pretty focused consumer base.

So when we looked, to answer your question about the demographics, I think it does depend on which county you're in. We found that some of the counties have 21 and up, yes. But you could call it a younger population that is very focused. workers in the mining industry to places where mining isn't that prevalent. And it could be an older demographic. I think it really depends on which city you're talking about.

Q And to have licenses, whether or not they're rural or more urban, in the portfolio of TapRoot is important to your company's profile, I would assume; correct?

A Yes, it is.

Q Okay. So a number of licenses, whether or not it's in a rural location or urban location, is good for your company; correct?

A That's correct, yes, sir.

Q It helps you in raising money; right?

A Absolutely.

Q And it helps you for potential sale; right?

A Yeah. Absolutely.

Q You talked a little bit about locations in direct examination. You said, well, you know, it wasn't required, locations weren't required, correct, in the jurisdictions that you were applying in?

A I guess in hindsight technically yes, it was required. Was it weighted in the same sense that it had in 2014? No. So proof of zoning was not required, if I remember right, in the application. But you did have to list an address, and you -- obviously they needed to know which jurisdiction you were applying.

Q Okay. And you listed an address?

A That's correct.

Q Okay. You are aware, though, that the initiative and the regulations require specific information with regard to location, zoning, and building plans, specifications? You're aware as somebody who was the former president of the NDA of those regulations, are you not?

A Certainly aware of the differences between 2014 and the 2018 application. As far as the specific requirements, I'd probably have to brush up by looking at the application again and knowing what was required to be submitted. But, yes, in general there are -- there are scoring criteria and

everything for aspects of property.

Q Would you agree with me, though, being the one who filled out the application, understanding the regulations from the initiative, that there was a serious differentiation between the requirements for locations in the application compared to those requirements in the regulations?

A I'm not sure I understand that question.

Q Regulations required specific information with regard to location, where the application did not.

A I would have to look back at the regulations and see exactly what they meant.

MR. CRISTALLI: Okay. No further questions, Your Honor.

THE COURT: Anyone else from the plaintiffs wish to ask any questions of Mr. Terry? Any other defendants in intervention?

Anything else, Mr. Gutierrez?

MR. GUTIERREZ: No further questions, Your Honor.

THE COURT: Thank you, Mr. Terry. I appreciate your time. Have a very nice afternoon.

THE WITNESS: Thank you, Your Honor.

THE COURT: Are there any other witnesses that are wished to be called by any of the defendants or defendants in intervention?

You need a break?

MR. PRINCE: No.

THE COURT: Oh.

MR. KAHN: Your Honor, we were able to secure our client's ability to testify tomorrow if you'd like to add them on for tomorrow.

THE COURT: Okay. So is it okay with you if I call the rebuttal witness, Mr. Pupo, out of order, since he was so kind to come, since we didn't know your client was coming?

MR. KAHN: Of course, Your Honor.

THE COURT: All right. Mr. Parker, you're up with Mr. Pupo.

Mr. Pupo, if you'd come back up to the stand. Since it's a new day, we're re-swearing you. It's actually a new month, I think.

JORGE PUPO, PLAINTIFFS' WITNESS, SWORN

THE CLERK: Thank you. Please be seated. Please state and spell your name for the record.

THE WITNESS: Jorge Pupo. J-O-R-G-E P-U-P-O.

THE COURT: Mr. Parker, you're up.

Mr. Pupo, you know where everything is; right?

THE WITNESS: Yes, ma'am.

THE COURT: Okay.

MR. PARKER: Your Honor, may I approach the witness and give him all four of these copies?

THE COURT: You may. And by all four of these

you're referring to Proposed 308 through 311.

MR. PARKER: I am, Your Honor. Thank you so much.

THE COURT: To which Mr. Prince made a very specific objection.

MR. PARKER: He did. He saved up for those objections. Gave them to me all at once.

THE COURT: Well, Mr. got one sustained today.

MR. PARKER: I knew that one was coming.

(Pause in the proceedings)

THE COURT: Mr. Pupo, take as much time as you need to look at those exhibits. They were new to most of us earlier today.

(Pause in the proceedings)

THE WITNESS: Okay, Your Honor.

THE COURT: Mr. Parker, you may continue.

MR. PARKER: Thank you.

DIRECT EXAMINATION

BY MR. PARKER:

Q Mr. Pupo, do you recognize any of these documents?

A Recognize a couple of them. I don't recall a couple of them.

Q Okay. These were produced recently by the State as coming from your emails, all right. So we'll take them in order. 308, Proposed Exhibit 308, do you -- it's dated December 19, 2016, and it speaks of background checks. Have

you seen that document before?

A I don't recall the document.

Q Do you recall there being an issue in terms of how background checks would be done from the medical marijuana to the recreational marijuana?

A Yeah, I remember discussions regarding processes.

Q All right. And was there discussions concerning how the process applied in the context of the medical marijuana could be replicated in terms of the recreational marijuana process?

A Yes, there were discussions.

Q All right. And was that process similar? Was it adopted by the Department of Taxation for purposes of the recreational marijuana process taken from the medical?

A Yes. They're similar.

Q All right. Does this document reflect that approach?

A Yes, it does.

MR. PARKER: All right. Your Honor, I move for the admission of Exhibit 308.

THE COURT: Mr. Prince, your objection?

MR. PRINCE: Your Honor, number one, it's a hearsay document that he's purporting to offer for the truth of the matters asserted in there. He's doesn't know who authored the document. He doesn't know how it was authored or the

circumstances, so there's no way he can lay an adequate foundation for its admissibility or even establish its relevance. What he had a discussion about --

THE COURT: Well, I think the relevance is established given the prior 15 days of the hearing or 16 days of the hearing.

MR. PRINCE: But he hasn't even talked about the document. If he talked about relevancy of --

THE COURT: Well, wait. Can I stop a second.

Mr. Pupo, since I don't have the document, can you tell me if you were either the recipient or the sender of the document?

THE WITNESS: Well, nothing on the document indicates I'm the recipient, but I believe these were documents that came out of my emails that were turned over to my attorneys.

THE COURT: So, Mr. Shevorski, these documents were documents that were produced after his last testimony that come from his email account?

MR. BHIRUD: That's correct.

THE COURT: Mr. Bhirud. Thank you very much.

MR. SHEVORSKI: Mr. Bhirud handled that, Your Honor.

THE COURT: Well, I had to look past you, because you're wider, wider than Mr. Bhirud.

Okay. Next, Mr. Prince?

MR. PRINCE: Well, he didn't identify -- he may have produced them as part of his emails, but he did not generate the document, didn't create it, and he was not a recipient to the document. Therefore, he can't lay the foundation for the document. Just because he had it in his possession at some point in time, he may have been tasked with collecting documents. So therefore there's no foundation.

THE COURT: So you missed the prior 16 days of the hearing. So --

MR. PRINCE: I knew that was --

THE COURT: And I appreciate you coming in at the last minute and trying to get up to speed, but the issues related to the emails were the subject of discussion during prior testimony. So to the extent that your objection is basesd upon the fact these are not emails relating to discussions that this witness is part of and therefore it's hearsay and he cannot be -- they cannot be admitted, I'm going to overrule that objection. He is here and able to be cross-examined and have his memory refreshed if anyone would like to examine him on the decisions made to change the information about background check. So that one's admitted. That's the first one.

(Plaintiffs' Exhibit 308 admitted)

BY MR. PARKER:

Q Let's go to 309. And are you familiar with Amanda

Connor?

A Yes, I am.

Q Okay. Do you recall receiving around June 25th, 2017, in or around that time period, documents, opinions prepared by her on behalf of the Nevada Cannabis Coalition?

A Again, yeah, this is one of them, but I don't recall receiving it.

Q All right. And this one deals with not only NRS 453A, but also NRS 453D; is that correct?

A Yes.

Q All right. And do you recall in particular -- again, this goes to the background checks -- the issue with regards to background checks on all owners, officers, and board members, which is reflected on page 2 of this document?

A Yes.

Q Do you recall that being a consideration for the development of the regulations related to recreational marijuana?

A Yes.

MR. PARKER: All right. Your Honor, I move for this document, also.

THE COURT: Any objection, Mr. Prince?

MR. PRINCE: Yes. Objecting again to foundation. It's hearsay, it's created by Amanda Connor, who's a private attorney. So it wasn't even generated by the State. At least

308 was a document generated by the Department. So therefore he potentially can argue he laid the foundation. But this document is something that was sent by someone else, and so it's hearsay by definition. He can't --

THE COURT: But it's sent to him.

MR. PRINCE: No. He says he didn't receive it.

MR. PARKER: Your Honor, this was in -- all of the documents --

THE COURT: Hold on a second.

Sir, were you a recipient of this email, whether you're a cc or a direct recipient?

MR. PRINCE: It's actually a memorandum. It's not an email.

THE COURT: Oh. Did you just pull attachments, Mr. Parker, without the emails that go with them?

MR. PARKER: Your Honor, I pulled this as a simple document from the email list. Now, there may have been something before or after, but this was a single document the way it was produced.

THE COURT: All right. So, Mr. Pupo, do you remember the document which is Proposed 309 as part of the discussions that you had with Amanda Connor related to the regulatory process?

THE WITNESS: So, Your Honor, I don't remember or recall this specific document, but we did have discussions in

the beginning regarding the items in this document.

THE COURT: And you previously on your prior visits to the court have testified about those discussions with Amanda Connor and some of the things that you did as a result. Is the information in Proposed 309 part of the information you relied upon in making the decisions you made to make changes in the process?

THE WITNESS: Well, yes. We reviewed -- this would be part of the documents I reviewed in our discussions in creating the regulations and things like that.

THE COURT: It will be admitted.

(Plaintiffs' Exhibit 309 admitted)

THE COURT: Okay. Next. So that takes me to 310.

BY MR. PARKER:

Q Now, I'm not going to take as long with 310, because 310 is to you and from you and is an email string.

MR. PARKER: Mr. Prince, any objection to this document?

MR. PRINCE: No. I think I'm going to withdraw the [inaudible].

THE COURT: 310 will be admitted.

(Plaintiffs' Exhibit 310 admitted)

THE COURT: Okay. Exhibit 311.

MR. PARKER: 311 is also an email to and from Mr. Pupo.

THE COURT: Mr. Pupo -- Mr. Prince, any objection to 311?

MR. PRINCE: I am objecting to it again on hearsay, because the bottom part of it -- his portion of it is very nominal. He received a email from a Kara Cronkhite from the County, and I think all of --

THE COURT: Kara Cronkhite's actually a State employee. She works directly under him.

MR. PRINCE: So she's a State employee? Oh. I'm sorry. I thought it was the City of -- I'm sorry.

And anyway, nevertheless, I object to just the content of it as being hearsay. So --

THE COURT: So Ms. Cronkhite --

MR. PRINCE: He was a recipient of the email.

THE COURT: And she's his direct report. She reports directly up -- there's like two layers between her and him. Okay. Any other objection, Mr. Prince?

MR. PRINCE: No.

THE COURT: Okay. It'll be admitted.

(Plaintiffs' Exhibit 311 admitted)

MR. PARKER: Thank you, Your Honor.

That's all I have, Mr. Pupo.

THE COURT: Did you have any more questions for Mr. Pupo, Mr. Parker?

MR. PARKER: No. I think he has laid the

foundation.

THE COURT: Mr. Pupo, I've got a couple of questions. And then I'm going to let Mr. Prince go, but I'm going to go first, because my questions are outside the scope of what Mr. Parker just asked, which may mean that somebody may want to follow up on mine. And rather than having you guys get up three times, I'll let you get up twice.

So, sir, when you gave direction to your staff to remove the portion of the application that required the actual proposed physical location what other changes to the application did you direct your staff to do?

THE WITNESS: Your Honor, I don't recall asking them to remove any aspect of the application. We had done some clarifications, as I testified earlier.

THE COURT: So when you gave direction to your staff that the actual physical location would no longer be required as part of the application process did you give them any other specific direction on changes to make to parts of the application?

THE WITNESS: I don't recall any specific ones. We -- the application went back and forth, you know, as things were being updated. And I don't remember any specific. I know there were some clarifications we did change, because I testified earlier that it said construction plans, and we had that changed to general floor plans to match the regulations.

And there were a couple items like that, Your Honor.

THE COURT: Okay. And you don't recall anything more specific being given as direction to your staff members?

THE WITNESS: No.

THE COURT: Okay. You were here for a few minutes when Mr. Terry was testifying at the end when Mr. Cristalli was examining him. I'm going to ask you one question about something he talked about.

The Exhibit 20 that Mr. Cristalli showed him was an example that we've seen in various days of the hearing about the grouping together of nonidentified applications for licensees for various different jurisdictions. Did you make the decision that the license applications for nonidentified would be evaluated as a group, rather than individually?

THE WITNESS: No, Your Honor.

THE COURT: Okay. When did you learn that that was the way it was done?

THE WITNESS: Probably -- I don't even recall ever really talking about it, unless it was after the applications, you know -- I don't want to be the one passing the buck, but Steve Gilbert was the one that handled all that with the evaluators and how they were going to process. So I don't -- I don't recall telling them how to do anything regarding that or even inquiring as to how it was -- if they were grouped or nongrouped. All I really knew is that there was an

unidentified section that was being evaluated and an identified section that was being evaluated.

THE COURT: All right. Thank you very much, sir.

Now, Mr. Parker, do you want to follow up on any of the questions that I just asked of Mr. Pupo before I turn it over to the rest of the folks?

MR. PARKER: I do.

THE COURT: Okay.

MR. PARKER: Thank you.

DIRECT EXAMINATION (Resumed)

BY MR. PARKER:

Q Mr. Pupo, in terms of the Judge's questions regarding changes to the application if you were to take a look at Exhibit 310 --

THE COURT: And it's now on the screen.

MR. PARKER: Which is perfect.

BY MR. PARKER:

Q If we go to the bottom of the -- of this document, Amanda Connor is saying to you, Jorge, she has questions about the property address being a necessary component of the application. Do you see that? I'm paraphrasing, of course.

A Yes, she discussed it.

Q She says at the bottom, "Can you please confirm that a location is not required and documentation about a location will not be considered." Do you see that?

A Yes.

Q And that's August 22nd, 2018; is that correct?

A Yes.

Q Now, Amanda Connor has spoken to you, she's gone to lunch with you, she's gone to dinner with you. You've had numerous conversations with Amanda Connor leading up to this point in time; is that correct?

A Yes.

Q Now, there was testimony earlier in this trial by I believe Andrew Jolley that said that this application was clear to anybody who was smart or intelligent or not dumb, something like that. I don't know if you were made aware of that testimony.

A No.

Q All right. So she's still asking questions after that ListServ went out in July; is that correct?

A Yes.

Q But your response is, "That is correct. If you have a lease or own property that puts those plans...." What did you mean by that, sir, property [unintelligible] put those plans? What did you mean to say?

A So, as I testified earlier, we had gotten calls, you know, well, what if I lease, if I have a lease or I own the property, you know, what do we do, where do I put it.

Q Right.

A So I think that was part of the change in the application where then it said, you know, lease -- if you lease, you know, put it here. So that -- and that's what I'm saying, is if you lease or whatever, then, you know, include that information.

Q Right. And it says if you don't, then tell us what will the floor plan be like, et cetera. That's what you --

A Right. A general floor plan.

Q Now, when the Judge asked the question regarding any additional changes did you consider at that point making it clear that the adequacy of size of the building -- because it doesn't mention a floor plan in the application; are you aware of that?

A I'm sorry. It does, or does not?

Q Does not. The word "floor plan" does not appear in the -- on the face of application. Were you aware of that?

A No. I thought we had made a change from -- are you sure in the application -- because it says construction -- it used to say construction. It was supposed to change to a general floor plan to meet the regulation.

Q No. See, that's -- that's why the Judge asked -- I think that's why the Judge asked that question. But it doesn't say that. And so when I saw here -- you indicate tell them what will the floor plan be like, that's not in the criteria for the scoring. It still says "adequacy of size of

building," and it does not mention "floor plan." It says "building." Did you intend to make additional changes to the application to reflect the use of a floor plan instead of a building or a address location?

A Not instead of. Like I said, the application from my understanding said "construction plans."

Q Okay.

A But the regulations had changed to say "general floor plans."

Q That's what you thought?

A The regulation was changed to that.

Q Well, so you believe that the regulation said "floor plan" and --

A Said "general floor plans."

Q Okay. So you believe that the regulation said "general floor plan," and you believe the application said "general floor plan"?

A Right.

Q Okay. Would you be surprised if neither of those are true?

A Yes.

Q Okay. Good enough.

Now, above that it says, and this is again the same day from Amanda Connor, it says that, "A person who has a lease or owns the property, they might get more points simply

for having the property secured"; correct? You see that?

A Yes.

Q All right. And your response is, "No. Location is not scored then." You were emphatic at that point.

A Yes.

Q All right. Would you agree with me after having spent as much time as you've spent with Ms. Connor, her writing opinions, explanations, that there was still some confusion in terms of address versus the use of floor plans?

A You know, when she called me about this -- you could see in the email below she says, "I know the regulations make it clear that land use or property will not be considered in the application." But she would call and say -- I'd say, how many times, you know, do we have to discuss this; and it's like, well, my client just wants confirmation, so I'm calling for my client."

Q All right. But then if you turn to the back page of Exhibit 310, it says, "Please note: the size or square footage of the proposed establishment should include the maximum size of the proposed operation, the lease, property owners, the startup plans, and potential expansion should be clearly stated...then to lead to misunderstandings and surrendering a certification." Do you see that?

A Yes.

Q All right. And right above that it says,

"Documentation concerning the adequacy of the size of the proposed recreational marijuana establishment to serve the needs of persons who are authorized to engage in the use of marijuana must be included in this tab. The content of this response must be in a identified format, include building --" again "-- building," and you've got here, "and general floor plans with all supporting details."

A Right. And that -- I'm sorry.

Q Now, what -- I'm sorry. This is her letter -- her email to you, but she's still including "building." Why is there not a formal change to the application to reflect, building not necessary, floor plan sufficient?

A I don't know. This is where we made the change that I was saying that says "general floor plans" where it used to say "construction plans."

Q And then again above that she says, "But there seems to be some inconsistency in the application." That is what she's saying. Do you see that? First page at the bottom, first sentence right after the comma it says, "But there seems to be --"

A Right.

Q "-- some inconsistency in the application."

A Yes. That's what she says, yes.

Q All right. So the question -- the last question that the Judge asked you about followup conversations after

the changes to the applications, was the inconsistency that Ms. Connor is speaking of ever addressed in any additional modifications or revisions to the application?

A No.

MR. PARKER: All right. Nothing further, Your Honor.

THE COURT: Thank you.

Now Mr. Prince.

MR. PRINCE: Thank you.

CROSS-EXAMINATION

BY MR. PRINCE:

Q Good afternoon, sir.

A Good afternoon.

Q You have Exhibit 310 in front of you? Very good.

Now, so we're clear, the location did not receive any scoring as part of the application process; correct?

A I believe that's correct, yes.

Q Similarly, a floor plan, a building plan, or even construction plans, that wouldn't have received any scoring, either; correct?

A Individually, no.

Q Right. That wasn't part of the scoring criteria; correct?

A I think it was evaluated under the building criteria.

Q Right. But in terms of the -- when you responded back to Amanda Connor on August 22nd, 2018, and you put in all caps "LOCATION IS NOT SCORED, DAMMIT," why did you use that language, all in caps, "DAMMIT," with an exclamation? Were you trying to make yourself clear to anybody who was receiving that email and who she may have disseminated it to that location was not going to be considered as part of the scoring criteria?

A Yeah. I mean --

Q But in the -- right? That's what you were trying to do; right?

A Right.

Q Because you made yourself available to anybody who wanted to call you. Any prospective applicant who had a question about whether or not location or floor plan was going to be considered, you were available to answer those questions; correct?

A Yes, I was available.

Q And so to Mr. Parker's client, had they chosen to call you, you would have answered the question in the identical same way; correct?

A Well, I don't know if the identical same way, but I would have --

Q Meaning clearly. [Inaudible], but you'd have been clear; right?

A Yes.

Q So if Mr. Hawkins, who's in back here, had called you on the telephone in August of 2018 and had a question about this issue, you'd have told him clearly, in clear words that location is not going to be part of the scoring criteria; correct?

A Yes.

Q All right. In fairness, Ms. Connor wasn't the only person who had been asking you questions in the summer of 2018 about the application process; correct?

A Correct.

Q You were receiving questions from dozens, if not many, more than a hundred prospective applicants; correct?

A I don't know how many, but, yeah, many.

Q Dozens; right?

A Yeah.

Q More than 50?

A I don't know.

Q Now, similarly, you were made aware of the NuLeaf decision by the Nevada Supreme Court; right?

A Yes.

Q And that was one of the reasons why not having an actual physical location was not disqualifying to an applicant; correct?

A I guess that was part of their case, yes.

Q Right. That is one reason why the Department clarified the issue in July of 2018 is in response to the NuLeaf decision, correct, about the requirement of a physical location on the application?

A I wouldn't say it was because of that decision.

Q It was a factor in it; wouldn't that be a fair statement?

A I don't recall it being a consideration.

Q And one of the other things that you were aware of is that while a prospective applicant may identify a location on an application, it's likely not until the license is issued and you go through the zoning and land use process that there's going to be an actual location identified and one approved for use; right?

A That's correct.

Q The location could very well be temporary; correct?

A Yes.

Q And it very well may not come fruition; correct?

A Correct.

Q But one thing is for certain is that you're not going to issue a final certification in order to allow a licensee to open until all of that criteria is met and the Department has conducted a final inspection; correct?

A Say it again?

Q Meaning you're not going to issue a final -- allow a

licensee to open or start operating until all the land use requirements have been met and the Department conducts a final inspection; correct?

A That's correct.

Q All right. So not having floor plans or a physical location does not prohibit the Department from issuing a license, because it can be highly variable; correct?

A You mean not having floor plans -- it's all part of the building inspection.

Q You mean the final before you allow a licensee to open?

A Well, normally licenses will do the improvements, and then we'll do some sort of inspection. It could be a pre-opening inspection, a walk-through. Inspectors will take a look, look at the floor plan, and if changes need to be made, they make the recommendations and the licensee makes those changes.

Q Right. But that's after the license is issued, a site has been secured --

A That's even previous to a license being issued.

Q Right. And so -- but you're not going to do any inspection before the Department issues a license, are you?

A We do.

Q You issued the licenses on December the 5th, 2018.

A We issued a conditional license.

Q Right. All licenses are conditional until you conduct that final inspection; correct?

A Yes.

Q Right. Because a licensee, once they received the approval on December 5th, 2018, then they had to pay the $20,000; correct?

A Yes.

Q And after that each licensee was now subject to NRS 483D and all of its requirements; correct?

A 453D.

Q Excuse me. 453D and all of the requirements and the regulations; correct?

A Yes.

Q And after that then you'd have to go through -- if you wanted suspended or revoke, you'd have to then go -- thereafter go through the process outlined in 453D; correct?

A Yes.

Q And so you understand practically speaking that a prospective applicant is not going to enter into a lease and start making rent payments until they know they've actually received a license so they can make that type of investment; correct?

A It's a business decision.

Q You agree that that's a prudent thing to do; right?

A Yes.

Q And the Department clearly knew that; correct?
A Yes.
Q All right. And with respect to Amanda Connor's email of August 22nd, 2018, which is Exhibit Number 310, she says, "The regulations are clear"; correct?
A Regarding land use or property, yes.
Q Right. But she says there's some inconsistency in the application, the form; correct?
A Yes.
Q You agree that the application itself, that's not changing the requirements of NRS 453D or NAC 453D, the regulations; correct?
A Correct.
MR. PRINCE: Thank you, Judge. I don't have any further questions.
THE COURT: Thank you.
Any of the other defendants or defendants intervention? Thank you.
MR. WIGHT: Can we bring up Exhibit 308, the first one that was admitted today.
THE COURT: Thank you, Brian.
MR. WIGHT: Thank you.

CROSS-EXAMINATION

BY MR. WIGHT:
Q Mr. Pupo, my name is Brody Wight. I'm on behalf of

NOR. Dave Koch questioned you on behalf of NOR before. Just a few quick questions.

So you said you were not familiar with this memorandum, it doesn't come to mind. If you look where it says "Issues," issues in Number 1 it says, "Based on Public Law 92-544 the FBI has mandatory elements that a state statute must meet for a federal background check." Do you ever recall discussing Public Law 92-544 with anybody in the Department or anybody else in regards to background checks?

A I don't remember that PL number specifically.

Q Do you remember discussing any portion of the public law or FBI, any mandatory elements that FBI has in order to conduct background checks, anybody?

A Yes.

Q What do you remember discussing about that?

A Well, part of the issue was that DPBH would do the background checks when it was under the medical program, and when the program was put over to the Department of Taxation we didn't have a way to conduct the background checks. So we thought -- initially what happened was we were going to run the background checks under 453A, DPS, FBI, or DPS said, no, you can't do that, you have to have the authorization to do the background checks under 453D. Well, in order to do that it has to be legislatively mandated, so there has to be a statute giving the Department authority to conduct FBI

background checks. So then I think that session we worked on getting the language in so the Department could conduct the FBI checks.

Q And that was a -- if recall correctly, that was the -- ended up being the one statute -- I don't remember the exact number, but the only statute in 453D that was enacted after the initiative. Is that what you're talking about, the one that allows the Department to gather fingerprints to conduct a background check?

A Right. Yeah.

Q So is it your understanding that the FBI had mandatory elements that needed to be met in order to conduct these background checks and that one of the elements was that it had to be in the statute and could not be regulations?

A Correct.

Q Are you aware of any of the other elements that were mandatory that needed to occur for the FBI to conduct background checks?

A Yeah, I don't remember all of them. I mean, we had a -- going back, we had to create our own account with the FBI. They needed to know -- I think we had to give them certain information, like who was going to be background checked or what categories they fell in, things like that.

Q Do you recall if the FBI -- if it was mandatory that the authorization to conduct background checks not be overly

broad in its scope or that it must identify a specific category of applicants to be background checked? Do you recall if that was one of the mandatory elements or not?

A Yeah. That's what I was saying earlier. I don't remember exactly. I wasn't a direct participant in those conversations. But from what I remember from meetings and things, it was like they had to know certain categories of people that were going to require the background checks.

MR. WIGHT: Thank you. No further questions.

THE COURT: Any other defendant, defendant in intervention?

MR. PRINCE: I do.

THE COURT: Not yet, Mr. Prince. You already went.

MR. PRINCE: Oh. I'm sorry.

THE COURT: You don't get to go again. I need everybody to go once before you get --

Ms. Shell.

MS. SHELL: I just have a really quick series of questions. Very quick.

THE COURT: If Jill says she can hear you from there, you can stay there. Otherwise, come on up.

MS. SHELL: Oh. Then I'll stay back here.

Brian, can you put up Exhibit -- the page 13 of Exhibit 5 and page 13 of Exhibit 5A side by side.

//

CROSS-EXAMINATION

BY MS. SHELL:

Q I wanted to ask you, Mr. Pupo -- by the way, my name's Alina Shell. I don't think I had a chance to examine you during your many days here last time. So pleasure now. And I represent GreenMart of Nevada NLV.

So earlier Mr. Parker was asking you about why there weren't -- you know, we were talking about the requirements for the application, and he asked you why you didn't remove the building requirement from the newer version of the application. Do you recall that line of inquiry?

A Yes.

Q Okay. So I want to direct your attention to Exhibit 5 first.

MS. SHELL: And if you could highlight specifically Tab 5.3.3, the -- for Tab 3.

THE COURT: And, sir, if you want to look at these in the book, they're actually right next to each other under 5 and 5A.

THE WITNESS: Okay. Thank you.

BY MS. SHELL:

Q And you can see that okay, Mr. Pupo?

A Yes.

Q Okay. I just want to direct your attention to the last sentence. It says, and I'll read it, "The contents of

this response must be in a nonidentified format and include building and general floor plans with all supporting details."

A Yes.

Q That's in Exhibit 5. So that was --

MS. SHELL: Now if we could pull up 5A, that same tab, if you could highlight that.

BY MS. SHELL:

Q And in the last sentence it says, "The content of this response must be in a nonidentified format and include general floor plans with all supporting details." Would you agree that those two sentences between Exhibit 5 and 5A are different?

A Yes.

Q And what is the difference that you see?

A The word "building" is removed.

MS. SHELL: Okay. No further questions, Your Honor.

THE COURT: Thank you.

Anyone else from the defendants, defendants in intervention?

Anything from the State?

MR. SHEVORSKI: No, Your Honor.

THE COURT: Anyone from the plaintiffs?

MR. PARKER: Just one question, Your Honor.

THE COURT: Mr. Parker.

I'll come back to you, Mr. Prince.

MR. PRINCE: Okay.

THE COURT: Mr. Bice, did you want to ask some?

MR. BICE: Well, I was going to have Mr. Prince do it, but --

THE COURT: We'll let him do it in a minute.

MR. BICE: Thank you.

REDIRECT EXAMINATION

BY MR. PARKER:

Q Just one question. The application said "building and general floor plan"; is that correct?

A Yes.

MR. PARKER: That's all. Thank you.

THE COURT: Now, Mr. Prince, would you like to ask any more questions?

MR. PRINCE: I would.

RECROSS-EXAMINATION

BY MR. PRINCE:

Q Let me just ask a question about the background checks for a moment, okay.

A Yeah.

Q Any of the plaintiffs in this case, did any of them contact you at any point during the application process objecting to the background checks that the Department was going to do?

A No.

Q Okay. Did any of the plaintiffs object to the regulation that you were going to background anybody who had a 5 percent interest or greater in the entity?

A No.

Q Did anybody ask -- any of plaintiffs ever ask the Department to change the regulations or how it was going to conduct the background check at any time before December 5th, 2018?

A Not that I recall.

Q And did any plaintiff ever -- did you ever -- or the Department ever attempt to stop one of these plaintiffs from asserting their legal rights if the Department wasn't carrying out the background check requirement according to the ballot initiative?

A Go back. Try that one again.

Q At any point before December 5th, 2018, when the licenses were conditionally issued did any of the plaintiffs approach you or anybody at the Department, to your knowledge, to suggest or say that the background checks were not performed in accordance with the ballot initiative, to your recollection?

A No, not that I know of.

Q And in fact that issue on background checks, it's only arisen after this lawsuit; correct? To your knowledge.

A Yes.

Q All right. At no point during the summer months of 2018 was that even really an issue that you were dealing with; correct?

A Well, let me go back on that a little bit. That has been a topic of conversation occasionally during changes of -- transfer of ownership.

Q Okay. Other than ownership transfers, it was never an issue as part of the application process; correct?

A Correct.

MR. PRINCE: Thank you.

THE COURT: Mr. Parker, anything else?

MR. PARKER: Thank you, Your Honor. How did you know?

THE COURT: Because you get to go last.

MR. PARKER: Thank you.

FURTHER REDIRECT EXAMINATION

BY MR. PARKER:

Q Mr. Pupo, Mr. Prince was not here for the last 16 days of this hearing, so I want to make sure we --

THE COURT: He was here one time before.

MR. PARKER: By chance?

MR. PRINCE: Last week. A week ago.

MR. PARKER: Okay. Fifteen. I'm sorry. Fifteen days.

//

BY MR. PARKER:

Q Mr. Pupo, is it true, sir, that several of the applicants and including several of those who are now plaintiffs wanted to meet with the State and discuss the scoring prior to this lawsuit?

A I don't recall them wanting to meet. I think there were some comments regarding maybe the process during some public meetings and things like that.

Q As to scoring?

A Yes.

Q Ask for an evaluation or some type of debriefing on how the scoring was handled?

A Yes.

Q In fact had meetings that were set up with the State representatives, Ms. Cronkhite and Mr. Hernandez?

A Yes.

Q And in fact even tried to appeal the process?

A Yes.

Q All of those things -- the appeal was refused, is that correct, by the State?

A Correct.

Q And the meetings that were held did not allow for any meaningful exchange of information regarding the scoring other than, this is your score; is that a fair statement?

A Meaningful? I guess.

Q All right. And so in terms of trying to ferret out why a particular applicant had a particular score and what the criteria was I believe in your words you did not want to show them how the scoring would be done because that would be giving them the answers to the test. Isn't that what you said?

A I did say that, yes.

Q All right. And as a result, no one knew how the scoring would be done based upon the metrics, the scoring metrics that the State kept secret; is that correct?

A That's correct.

MR. PARKER: No further questions.

THE COURT: All right. Mr. Prince.

MR. PRINCE: Just one briefly.

FURTHER RECROSS-EXAMINATION

BY MR. PRINCE:

Q Don't you agree background checks was not part of the scoring; correct?

A Correct.

MR. PRINCE: Thank you.

THE COURT: Mr. Parker, anything else?

MR. PARKER: No. We don't.

THE COURT: Anyone else have any questions for Mr. Pupo? Because he's not coming back again.

THE COURT: Thank you so much, Mr. Pupo. Have a

lovely day. And I truly appreciate you coming down this afternoon, because I was hoping to finish the evidence today.

THE WITNESS: No problem, Your Honor. I have these exhibits.

THE COURT: Leave that there. Dulce will get them.

(Pause in the proceedings)

THE COURT: Okay. Next witness. So we're just to Mr. Kahn's witness, who's available tomorrow 10:00 o'clock, 9:00 o'clock? What time?

UNIDENTIFIED SPEAKER: 9:00 a.m. Whatever works for the Court.

MR. PARKER: 9:00 is fine with me, Your Honor.

THE COURT: Okay. Let's start at 9:30.

Okay. Anything else for today?

Then I've got some homework assignments for you to think about so tomorrow when we finish the evidence you can answer my questions.

First I will ask all of you if you rest individually, and hopefully everybody will say yes.

Mr. Prince has previously mentioned that some people may want to file motions or pocket briefs or something for my consideration prior to closing arguments. I appreciate the fact you want to do that. If you want to do it, I'd really like them by 3:00 o'clock on Wednesday so I can read them before the closing arguments on Thursday morning.

I have set aside the morning Thursday and Friday to do closing arguments in part because of Mr. Parker's obligations Thursday afternoon and Mr. Koch's trial that Judge Denton and I are trying to juggle between the two places.

Given the fact I've set aside those two mornings, does anyone have concerns as a group that we're not going to finish closing arguments?

MR. SHEVORSKI: God, I hope not.

THE COURT: Well, if anybody says yes, then I'm going to the time limits issue, which is the next one on my list.

MR. PARKER: Not me, Your Honor. I included all of my closing in my questions.

THE COURT: If no one thinks they're going to pull a Pisanelli on me --

All right. So you guys don't think you're going to have problems. You're going to split it among yourselves in a fair way, and I'm not going to get involved, and we'll assume that we get everything done. All right.

MR. CRISTALLI: Your Honor, can we just ask Mr. Kahn who we're expecting to testify tomorrow?

THE COURT: His client representative.

MR. KAHN: He's a representative from Helping Hands.

MR. GENTILE: Who?

MR. KAHN: It's not the trial by ambush. Yeah. We

had those issues before. But I'll tell you it's Alfred Terteryan.

THE COURT: Okay. Well, I know you have his application, because it was produced earlier, probably right around Memorial Day.

Anything else?

MR. PARKER: That's it, Your Honor.

THE COURT: Okay. I'll see you guys at 9:30.

(Court recessed at 3:07 a.m., until the following day, Wednesday, August 14, 2019, at 9:30 a.m.)

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EXHIBITS

* * *

DEFENDANTS' EXHIBIT NO.

None admitted in afternoon session

* * *

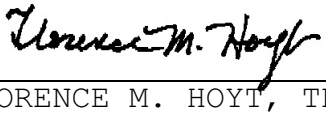
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146



FLORENCE M. HOYT, TRANSCRIBER

8/14/19

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SERENITY WELLNESS CENTER, LLC, et al., Plaintiffs, vs. STATE OF NEVADA, DEPARTMENT OF TAXATION; Defendant and NEVADA ORGANIC REMEDIES, LLC Defendant-Intervenor.	Case No. A-19-786962-B Dept. No. 11 **NEVADA ORGANIC REMEDIES, LLC'S POCKET BRIEF REGARDING THE INTERPRETATION OF NRS 453D.200(6) AND THE MANDATE TO CONDUCT BACKGROUND CHECKS OF EACH OWNER OF AN APPLICANT FOR A RECREATIONAL MARIJUANA LICENSE**

Defendant-Intervenor Nevada Organic Remedies, LLC ("NOR") hereby files this pocket brief regarding the interpretation of NRS 453d.200(6) and the mandate to conduct background checks of each owner of an applicant for a recreational marijuana license.

INTRODUCTION

One of the primary issues raised in the evidentiary hearing on the motion for a preliminary injunction concerns the Nevada Department of Taxation's (the "Department") decision to apply NAC 453D.255, which limits the requirement for background checks to be performed on proposed owners with an ownership interest of

5% or more. As NRS 453D.200(6) states that background checks shall be performed on each prospective owner, officer, and board member of a marijuana establishment license applicant, some have argued during the course of this hearing that NAC 453D.255 is an improper regulation under the statute and would somehow warrant a preliminary injunction.

There is no basis for a preliminary injunction relating to this provision for the following reasons: (1) adopting and applying NAC 453D.255 to the requirements of NRS 453D.200(6) is a reasonable and correct interpretation of the statute; (2) even if NAC 453D.255 were an improper interpretation of NRS 453D.200(6), it would not demonstrate that any Plaintiffs in the coordinated hearing are likely to succeed on the merits, and (3) Plaintiffs are estopped from raising the above issues in this action or have otherwise waived their ability to do so.

ARGUMENT

A. The Department's Decision to Conduct Background Checks on Owners of Applicants with an Ownership Interest of Five Percent or More is a Proper Interpretation of the Requirements of NRS 453D.200(6)

The Department has adopted and applied NAC 453D.255 to NRS 453D.200(6) effectively interpreting the statute, which states that a background check shall be performed on each prospective owner, officer, and board member of an applicant for a marijuana license, to apply only to owners with an ownership interest of 5% or more. The Department's interpretation is a proper interpretation of NRS 453D.200(6), because any interpretation that would require background checks of owners with less than a 5% interest would have been absurd, would have made it impossible for publicly traded companies to comply with the statute, and would have conflicted with other provisions of NRS 453D. Therefore, the Court must give deference to the Department and uphold their interpretation of the statute.

1. Deference to Agency Interpretation

Under what has become known as *Chevron* deference, agency regulations "promulgated pursuant to an express grant of statutory rulemaking authority" have been given broad deference, and Courts will hold that such regulations are valid "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996) (quoting *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). This is especially true when an agency interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" they are tasked with implementing. *Chevron*, 467 U.S. at 845.

In Nevada, "[a]n administrative construction which is within the language of a statute should not be lightly disturbed by the courts." *Oliver v. Spitz*, 348 P.2d 158, 161 (Nev. 1960). Nevada courts have further held that an agency's construction of a statute is of significant "persuasive force" in interpreting a statute. *Alper v. State*, 621 P.2d 492, 495 (Nev. 1980); *see also*, *Nevada Power Co. v. Pub. Serv. Commn. of Nevada*, 711 P.2d 867, 869 (Nev. 1986).

The role of the Department is no different here – where the statute in question was passed by voter initiative – than it would be if the statute were passed by the legislature. Although the Nevada Constitution places restrictions on *amendments* to voter initiatives, the Constitution does not alter the role of agencies in interpreting statutes. The wording of Section 1, Subsection 3 of Article 19 of the Nevada State Constitution states:

> If a majority of the voters voting upon the proposal submitted at such election votes approval of such statute . . . [such statute] shall not be amended, annulled, repealed, set aside, suspended or in any way made inoperative except by the direct vote of the people.

That provision does not state that a statute passed by a voter initiative should be treated any differently than a statute passed by the legislature. In regards to agency

construction, the language of the Nevada Constitution is no more restrictive than limits already present with respect to all statutes. It has long been understood that "[a] regulation may not serve to amend a statute . . . nor add to the statute 'something which is not there.'" *California Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) (quoting *United States v. Calamaro*, 354 U.S. 351, 359 (1957)). Agencies have never had the power to amend, annul, repeal, set aside, or suspend a statute. They have only had the power to *interpret* statute, and nothing in the Nevada Constitution or any Nevada case law suggests that an agency should have any less deference in interpreting an initiative than it does any other statute. Therefore, the Court should give the Department its due deference in evaluating its interpretation and construction of NRS 453D.200(6).

2. The Department's Interpretation of NRS 453D.200(6) is Reasonable

Although the language of NRS 453D.200(6) appears comprehensive on its face, a literal interpretation of the statute would lead to absurd results when applied to many entities – especially publicly traded companies – and there is no indication that this absurd result is what the voters intended in enacting Question 2. Therefore, the interpretation given by the Department, which interprets the statute reasonably and in harmony with surrounding statutes, must be upheld.

In Nevada, the "leading rule of statutory construction is to ascertain the intent of the legislature [or in this case the voters] in enacting the statute." *Dezzani v. Kern & Associates*, Ltd., 412 P.3d 56, 59 (Nev. 2018) (quoting *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986)). In ascertaining the legislative intent, courts should "first consider and give effect to the statute's plain meaning because that is the best indicator of the [voter's] intent." *Id.* However, as the U.S. Supreme Court has held, "Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with [the voters'] intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" *Pub.*

Citizen v. U.S. Dept. of J., 491 U.S. 440, 454–55 (1989) (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928)).

The *Pub. Citizen* Court was explicit in stating that statutes should not be interpreted literally when they would "compel an odd result." *Id.* The Court quotes Judge Learned Hand as stating:

> [E]ven though . . . 'the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing, . . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'

Id. (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). Even the Supreme Court's most famous textualist, Justice Scalia, agreed that it may be necessary for courts to give "unusual" meaning to words in statutes to avoid absurd results. *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting).

The Nevada Supreme Court has, on a multitude of occasions, agreed with the U.S. Supreme Court in holding that courts should not look beyond the plain meaning of a statute unless it is clear that the plain meaning was not intended. *See, e.g. Seput v. Lacayo*, 134 P.3d 733, 735 (Nev. 2006) ("When statutory language is clear and unambiguous, we do not look beyond its plain meaning, and we give effect to its apparent intent from the words used, **unless that meaning was clearly not intended**.") (emphasis added); *State v. Quinn*, 30 P.3d 1117, 1120 (Nev. 2001) ("If the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, **unless it is clear that this meaning was not intended**.") (emphasis added); *State v. State of Nevada Employees Ass'n, Inc.*, 720 P.2d 697, 699 (Nev. 1986) ("When a statute uses words which have a definite and plain meaning, the words

will retain that meaning **unless it clearly appears that such meaning was not so intended**.") (emphasis added).

The Nevada Supreme Court has specifically stated that the literal interpretation of a statute may not be intended when such an interpretation (1) would lead to unreasonable or absurd results, (2) does not harmonize with the broader statutory scheme, or (3) goes against public policy and the general spirit of the law.[1] Because a literal interpretation of NRS 453D.200(6) would lead to all of the above results, the Court should reject a literal interpretation and uphold the Department's interpretation.

i. A Literal Interpretation of NRS 453D.200(6) Leads to Absurd and Unreasonable Results

Perhaps no canon of statutory construction has been more prolifically advocated by Nevada courts than the rule that statutes should be interpreted to avoid unreasonable or absurd results **even if it means refusing to uphold the plain language of the statute**. *See*, *Newell v. State*, 364 P.3d 602, 603–04 (Nev. 2015) (quoting *State v. Friend,* 118 Nev. 115, 120 (2002) ("[W]hen the 'literal, plain meaning interpretation' leads to an unreasonable or absurd result, this court may look to other sources for the statute's meaning.")[2] In fact, at times the Court has gone so far as to state that statutory

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[1] *See*, *e.g. Dezzani*, 412 P.3d at 59 (quoting *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008) ("[I]t is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent."); *In re CityCenter Constr. & Lien Master Litig.*, 310 P.3d 574, 580 (Nev. 2013) (citations omitted) ("We interpret statutes to conform[ ] to reason and public policy. In so doing, we avoid interpretations that lead to absurd results. Whenever possible, [we] will interpret a rule or statute in harmony with other rules or statutes.")

[2] *See*, *also*, *Dezzani*, 412 P.3d at 59; *In re CityCenter*, 310 P.3d at 580; *Rural Tel. Co. v. Pub. Utilities Commn.*, 398 P.3d 909, 911 (Nev. 2017) (quoting *Orion Portfolio Servs. 2, LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397 (2010). ("[W]e must 'not render any part of the statute meaningless,' or read it **in a way that 'produce[s] absurd or unreasonable results**.'"); *Pub. Employees' Ret. System of Nevada v. Gitter*, 393 P.3d 673, 679 (Nev. 2017) (" [A] statute "should not be read to produce absurd or unreasonable results."); *State v. Harris*, 355 P.3d 791, 792 (Nev. 2015); *Great Basin Water Network v. State Eng'r*, 234 P.3d 912, 918 (Nev. 2010); *Fierle v. Perez*, 219 P.3d 906, 910–11 (Nev. 2009); *Eller Media Co. v. City of Reno*, 59 P.3d 437, 439 (Nev. 2002); *Hunt v. Warden, Nevada State Prison*, 903 P.2d 826, 827 (Nev. 1995).

construction should "**always** avoid absurd result[s]." *State v. White*, 330 P.3d 482, 484 (Nev. 2014) (emphasis added).

Interpreting statutes to avoid absurd results even if the interpretation runs contrary to the plain meaning of the statute is commonly known as the soft plain meaning rule and is known in the United Kingdom as "the golden rule." Courts should avoid absurd interpretations because, as Justice Stevens once stated, "If [the legislature or voters] had intended such an irrational result, surely it would have expressed it in straight forward English." *FMC Corp. v. Holliday*, 498 U.S. 52, 66 (1990) (J. Stevens, dissenting). However, the absurdity canon should not be used as a license to disregard unpopular constructions. It should only be used where it is "impossible" that the enactors of the legislation intended the literal result and "where the alleged absurdity is so clear as to be obvious to most anyone." *In re Hokulani Square, Inc.*, 776 F.3d 1083, 1088 (9th Cir. 2015) (quoting *Public Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 471, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (Kennedy, J., concurring)).

In this case, a literal interpretation of NRS 453D.200(6) as applied to publicly traded companies would be absurd to anyone. The statute states that a background check shall be performed on each "*prospective* owner, officer, and board member" of an applicant for a recreational license. Nobody could disagree that it was impossible that the voters intended the Department to conduct a background check on each *prospective* owner of a publicly traded company. Since prospective is defined as "relating to or effective in the future,"[3] and anybody could purchase stock in a publicly traded company, read literally, NRS 453D.200(6) would require the Department to conduct a background check on *everybody*. Such a result is so absurd that nobody would bat an eye on limiting the definition of prospective to avoid that result.

Even if the word prospective were removed entirely, however, the statute read literally would lead to obviously absurd results. As we have heard through the

[3] See, https://www.merriam-webster.com/dictionary/prospective

testimony of many witnesses (both from the defense and from Plaintiffs), it is **literally impossible** to conduct a background check on each actual owner of a publicly traded company as stocks trade hands by the minute without any way of systematically reviewing and conducting background checks of each owner. Nobody would assume the voters intended the mandate to conduct a background check on each owner would require the Department to conduct a background check each time a stock traded hands as such a result would be absurd and impossible. Therefore, no one would have issue with a nonliteral interpretation of "each owner."

The alternative Plaintiffs appear to suggest is that a background check of each owner of a publicly traded company should be conducted at single points in time, maybe once a year or once a month. But this interpretation is already a departure from the plain meaning of the statute and is already an admission that a literal reading of the statute is absurd. By admitting that a literal reading of the statute is absurd, Plaintiffs and the Court must then give due deference to the Department's non-literal interpretation even if the Department's interpretation is not as broad as Plaintiffs may like.

Moreover, even Plaintiffs' nonliteral but broad interpretation of the statute is absurd. The voters could not have intended a background check of each owner of a publicly traded company be completed even if the Department were to take a snapshot of ownership at an arbitrary point in time. It would have been prohibitively costly and time consuming to even obtain the names of each owner of a publicly traded company let alone conduct a background check of each owner. We have heard testimony from several sources that stock is often owned in names of brokers or "street names" and getting a hold of all the names of stock owners is quite literally impossible. Further, at least one applicant, a losing applicant, had an estimated 9,000 stockholders at the time of the application. Combined with the testimony from Steve Gilbert that background checks cost $30.00 to $40.00 each, conducting background checks on each of those owners, even if they could have been identified, would have cost $270,000.00 to

$360,000.00 all on an applicant that was not even successful and all within the 90-day window to evaluate licenses. Not to mention, obtaining fingerprints of each of the 9,000 owners would have been a logistical nightmare.

Since requiring background checks on all stockholders of a publicly traded company is absurd and unworkable, the Department's interpretation of statute to require background checks of ownership of 5% or more is reasonable. It is not even an arbitrary number. It is the same ownership threshold used in NRS 453A, which governs medical marijuana licensing. This same threshold applies in securities regulation, as the SEC requires shareholders who acquire more than 5% of the outstanding shares of a class of stock in a company to file owner reports, which "provid[e] investors and the company with information about accumulations of securities that may potentially change or influence company management and policies."[4] That threshold is one that affects stockholders who become easy to identify and may begin to have an impact on company policy, and the Department's 5% threshold here falls in line with the SEC requirements. The Department's interpretation is not arbitrary but is a reasonable interpretation of statute that requires background checks on all owners with any influence with the applicants and complies with the intentions of the voters passing NRS 453D.200(6).

ii. A Literal Interpretation of NRS 453D.200(6) is Not in Harmony with Other Rules and Statutes

When the legislature (and presumably voters) enact a statute, courts "presume[] that [they] do[] so 'with full knowledge of existing statutes relating to the same subject.'" *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 482, 486 (Nev. 2000) (quoting *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118–19 (1985)). Therefore, courts will interpret statutes and regulations harmoniously with one another. *See, State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 995 P.2d 482, 486 (Nev. 2000) ("Whenever possible, this

[4] https://www.sec.gov/smallbusiness/goingpublic/officersanddirectors

court will interpret a rule or statute in harmony with other rules or statutes."). Courts will do so even if it means departing from the plain language of a statute. *See*, *Seput v. Lacayo*, 134 P.3d 733, 735 (Nev. 2006). In fact, "[w]hen two statutes are clear and unambiguous but conflict with each other when applied to a specific factual situation, **an ambiguity is created"** and the interpreter of the statute must reconcile the two statutes. *Szydel v. Markman*, 121 Nev. 453, 457 (2005) (emphasis added). This canon of construction is also well founded in Nevada and stated in almost all of the cases cited on the absurdity canon.

Here, the requirements of NRS 453D.200(1) and NRS 453D.200(6) read literally would create a Catch-22 situation for the Department. Section 1 requires the Department to "adopt all regulations necessary or convenient to carry out the provisions of this chapter" that "must not prohibit the operation of marijuana establishments, either expressly *or through regulations that make their operation* ***unreasonably impracticable***." The literal reading of Section 6 then requires the Department to conduct background checks that make it unreasonably impracticable for publicly traded companies to even apply for a license. The term, "unreasonably impracticable" is defined as regulations that "require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson." NRS 453D.030(19). As described above, if publicly traded companies had to disclose all stockholders even those holding stocks in street names and then pay hundreds of thousands of dollars to conduct background checks on those stockholders as part of the licensing process, then applying for a license would be impossible and overly costly, making the process unreasonably impracticable.

Since the literal reading of multiple provisions of NRS 453D.200 cannot be read in harmony, the statute creates an ambiguity, and the Department is tasked with reconciling that ambiguity. The Department does so through defining "owner" as an owner having an interest of 5% or more. The Department's decision not only reconciles the various provisions of NRS 453D.200, but it also brings the recreational marijuana

requirements into harmony with those of NRS 453A and the medical marijuana registration requirements, requirements that the voters were assumed to have knowledge of when enacting NRS 453D.

iii. A Literal Interpretation of NRS 453D.200(6) is Against Public Policy and the Spirit of the Law

Similar to the canon that states that a statute's interpretation should harmonize with other statutes, Nevada recognizes that a statute should be interpreted in light of the spirit of the law and public policy even if such an interpretation violates the plain language of the statute. Nevada courts have held that if "a statute's language is clear and unambiguous, it must be given its plain meaning, **unless doing so violates the spirit of the act**." *Griffith v. Gonzales-Alpizar*, 373 P.3d 86, 87–88 (Nev. 2016) (quoting *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007)) (emphasis added); *see also City Plan Dev., Inc. v. Off. of Lab. Com'r*, 117 P.3d 182, 192 (Nev. 2005) ("When interpreting a statute, this court will look to the policy and spirit of the law."); *Desert Valley Water Co. v. State, Engineer*, 766 P.2d 886, 886–87 (Nev. 1988) ("The words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results."); *Alper v. State*, 621 P.2d 492, 494 (Nev. 1980) ("Statutes should be interpreted, so far as practicable, to carry out the purposes of the legislation and to effectuate the benefits intended to be obtained.").

In this case, the spirit of the law created by NRS 453D attempts to balance the goals of: (1) making recreational marijuana available to the public and regulated similar to other legal businesses, especially those involved in the sale of alcohol and (2) protecting the public's health and safety. *See*, NRS 453D.020. Clearly, the requirement to conduct background checks on owners of an applicant for a marijuana license is meant to forward the second goal by ensuring no owners hold licenses that have certain felonies or are otherwise prohibited from obtaining licenses. However, forcing the Department to conduct background checks on each owner of a publicly traded company

no matter how small of a share in the company they own would not forward the second goal of the statute but would actually interfere with both the first and second goal.

Owners with a less than 5% interest in a company are not making decisions on behalf of the company and do not have the ability to control the day-to-day business of the company. In effect, they have extremely minimal to no impact on public health and safety, and a background check on those owners is of virtually no practical value. On the other hand, requiring background checks on those individuals would chill publicly traded companies from applying for licenses. As a result, some of the best qualified candidates who would best protect the public interest may not even apply for a license, and if they did, they could not practically obtain one. Moreover, Nevada residents and guests would be unable to obtain recreational marijuana from those companies with assets sufficient to provide quality product at competitive prices. Marijuana would not be regulated similar to other legal businesses and businesses that fit into an entire category of corporate structure would be excluded from the market. Such a reading goes against the clear spirit of the statute and public policy. Therefore, the Department and the Court cannot read NRS 453D.200(6) literally, as it violates the spirit of the statute and, therefore, would violate the intentions of the voters who passed the statute.

B. If the Department Violated NRS 453D.200(6) by Failing to Conduct Background Checks on Each Prospective Owner, a Preliminary Injunction Is Still Improper

Even if the Court finds that the Department did violate the statute by failing to conduct the background checks on owners of applicants with less than a 5% interest in the company, that finding still would not justify a preliminary injunction in this matter. The primary question at issue in the preliminary injunction hearing is whether the plaintiffs are likely to succeed on the merits of their claims, and their claims revolve around an overall theory that they were unjustly deprived of a license by not scoring high enough in the application process. Whether or not the Department conducted proper background checks is, at best, incidental to whether or not Plaintiffs are likely to

succeed on the merits of their claims, and the Court should not grant a preliminary injunction on that basis.

First, the Department has not reached a deadline to conduct background checks and **can still conduct the background checks on the winning applicants** without violating statute. NRS 453D.200(6) only dictates that background checks shall be performed on license applicants; **it does not state *when* the background checks need to be performed**. Under NAC 453D.282, none of the applicants who were successful in the application process have a permanent license; they only have conditional licenses until they meet certain criteria in the future pertaining to the physical location of the dispensary. There is nothing in the statute that prevents the Department from conducting background checks on winning applicants during this time. In fact, it would be much more efficient to conduct background checks during the conditional license phase on successful applicants as the Department would not waste time and resources on conducting background checks on potentially thousands of owners who had no shot of obtaining a license in the first place.

Second, Plaintiffs have provided no evidence to suggest conducting background checks would change the results of the application process. NRS 453D.200(6) only mandates that the Department conducts background checks, it does not state what the Department must do with the background checks and does not state that the background checks must impact the application process in any way. Presumably, the background checks are designed to sift out owners, officers, and board members with excluded felonies or other qualities that exclude them from having an interest in a marijuana establishment. But even if the background checks rooted out minority owners of winning applicants that should be excluded from ownership, such a finding would not prevent the applicant from obtaining a license. NAC 453D.272(6) states that if a background check reveals that an applicant has an unqualified owner, officer, or board member, **the Department must give the applicant an opportunity to remove the unqualified person and amend their application**. Therefore, if the Department had

conducted background checks on owners winning applicants with an ownership interest of less than 5 percent and discovered that one of those owners was not qualified, then the applicant would simply need to remove that owner. The applicant's score and license would not be affected. Such a finding would not present an opportunity for the Plaintiffs to grab a license, and the failure to conduct a background check would not make the Plaintiffs likely to succeed on the merits.

The Court should keep in mind that a majority of the Plaintiffs were not even close to obtaining a license in this case. Most of the Plaintiffs were ranked far down the list and have no chance of obtaining a license. The two entities that were even close to succeeding in the application process, MM Development and Livfree, are public entities themselves and have the same theoretical background check issue as successful applicants who are publicly. The background check argument is a red-herring, and it is inconsequential to the present litigation, **which is why it was not mentioned in any of the Plaintiffs' complaints** and was only mentioned in passing in the introduction of the motion for preliminary injunction. Plaintiffs are now grasping onto the argument in hopes of burning the licensing process to the ground, even though the background check issue is ancillary to the scoring process. The Court should not entertain the argument and should not grant the motion for preliminary injunction based on the background check issue.

C. Plaintiffs Are Precluded from Challenging the Application of NAC 453D.255 by the Doctrines of Estoppel, Waiver, and Laches

Finally, the fact that Plaintiffs are only now challenging the Department's decision to conduct background checks only on owners of applicants with a 5 percent interest or more under NAC 453D.255 precludes them from making such a challenge under several equitable doctrines, and, on that basis alone, the Court should deny their challenge.

As NOR explained in its opposition to the motion for preliminary injunction, the doctrine of estoppel "functions to prevent the assertion of legal rights that in equity and

good conscience should not be available due to a party's conduct." *In re Harrison Living Tr.*, 112 P.3d 1058, 1061–62 (Nev. 2005). The doctrine is "grounded in principles of fairness," *Hermanson v. Hermanson*, 887 P.2d 1241, 1245 (Nev. 1994), and is "applied to prevent manifest injustice and hardship to an injured party." *Topaz Mut. Co., Inc. v. Marsh*, 839 P.2d 606, 611 (Nev. 1992).

Estoppel is typically used to prevent a party from repudiating "positions taken or assumed by him when there has been reliance thereon and prejudice would result to the other party," *Terrible v. Terrible*, 534 P.2d 919, 921 (Nev. 1975), and is similarly applied to waive a known remedy that is not timely asserted. *See*, *Adair v. City of N. Las Vegas*, 450 P.2d 144, 145–46 (Nev. 1969). This form of estoppel is typically known as estoppel by acquiescence.

The doctrine of estoppel by acquiescence "has its basis in **election, ratification, affirmance, acquiescence, or acceptance of benefits**, and the principle precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him." *Lueders v. Arp*, 321 F. Supp. 3d 968, 977 (D. Neb. 2018) (emphasis added). "It applies where it would be unconscionable to allow a person to maintain a position inconsistent with one in which he acquiesced, or of which he accepted a benefit." *Id.*, *See also*, *Lemon v. Hagood*, 545 S.W.3d 105, 121 (Tex. App.--El Paso 2017); *Sparks v. Trustguard Ins. Co.*, 389 S.W.3d 121, 127 (Ky. App. 2012)

Similarly**,** under the doctrine of waiver, a plaintiff may waive a known right "when [it] engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 152 P.3d 737, 740 (Nev. 2007). And the doctrine of laches prevents a party from bringing claims when the party's delay in bringing those claims "works to the disadvantage of the other [parties], causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Miller v. Burk*, 188 P.3d 1112, 1125 (Nev. 2008).

Here, the 5 percent rule found in NAC 453D.255 was on the books well before any applications in the licensing process were due. Recently, Jorge Pupo testified that he was unaware of anyone at any point prior to this litigation ever complained that NAC453D.255 violated the mandate found in NRS 453D.200(6). Plaintiffs each submitted applications and went through the entire grading process without even so much as hinting that they believed NAC453D.255 was invalid or inappropriate. Many of the Plaintiffs, including MM Development, Livfree, and Serenity Wellness actually benefitted from the 5 percent rule as they were not required to provide information on minority shareholders. In fact, **they are presently benefitting from the 5 percent rule as they are currently operating dispensaries without having background checks on minority shareholders**.

Plaintiffs' silence on the issue until after they filed their motion for preliminary injunction not only proves that their concern about background checks is insincere, it precludes them from now bringing the issue before the Court. Under the doctrines described above, Plaintiff cannot sit on their rights, they cannot use their challenges as a weapon that they are now pulling out only because they lost in the licensing process. NOR submitted its application in this case under the belief that no other party was going to challenge the background check rule. NOR provided all the information requested by the Department without any warning that one day Plaintiffs would challenge the regulations. It would have acted differently had it known about Plaintiffs' challenge. Now, it, and all other license winners will be unfairly prejudiced if this preliminary injunction is granted on the issue of background checks. For those reasons, the Court should deny the motion insofar as it relies on a challenge to the 5 percent rule.

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CONCLUSION

For the reasons set forth above, Plaintiffs are not likely to succeed under a theory that the Department violated NRS 453D.200(6) by conducting background checks only on applicant owners with a 5 percent interest or more, and the Court should deny the motion for preliminary injunction on that issue.

KOCH & SCOW, LLC

By: /s/ David R. Koch
David R. Koch
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. I certify that on August 14, 2019, I caused the foregoing document entitled: **NEVADA ORGANIC REMEDIES POCKET BRIEF REGARDING THE INTERPRETATION OF NRS 453D.200(6) AND THE MANDATE TO CONDUCT BACKGROUND CHECKS OF EACH OWNER OF AN APPLICANT FOR A RECREATIONAL MARIJUANA LICENSE** to be served as follows:

[X] Pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in in the mail; and/or;

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Henderson, Nevada; and/or

[ ] Pursuant to EDCR 7.26, to be sent via facsimile; and/or

[ ] hand-delivered to the attorney(s) listed below at the address indicated below;

[ ] to be delivered overnight via an overnight delivery service in lieu of delivery by mail to the addressee (s); and or:

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/s/ Andrea Eshenbaugh
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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

SERENITY WELLNESS CENTER, LLC, et al., Plaintiffs, vs. STATE OF NEVADA, DEPARTMENT OF TAXATION, Defendant, and NEVADA ORGANIC REMEDIES, LLC, a Nevada limited liability company; GREENMART OF NEVADA NLV LLC, a Nevada limited liability company, Defendants-Intervenors.	Case No.: A-19-786962-B Dept. No.: XI **DEFENDANT-INTERVENOR GREENMART OF NEVADA NLV, LLC'S TRIAL MEMORANDUM**

Defendant-Intervenor GreenMart of Nevada NLV LLC ("GreenMart"), by and through its undersigned counsel, hereby files this trial brief pursuant to EDCR 7.27. This brief is made and based upon the attached memorandum of points and authorities, all papers and pleadings on file in this matter, and any oral argument at the time of hearing.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs have requested that this Court issue a preliminary injunction to preclude the Nevada Department of Taxation (the "Department") from taking further action on the provisional recreational licenses it issued on December 5, 2018. Plaintiffs, however, are not entitled to this extraordinary relief. This brief addresses key reasons why this Court must deny Plaintiffs' request for a preliminary injunction. Despite the extensive and broad-ranging nature of the hearing this Court has conducted in the matter, Plaintiffs have not met their heavy burden in establishing entitlement to a preliminary injunction for multiple reasons. First, Plaintiffs lack standing to challenge the Department's denial of their applications for recreational licenses and granting relief would violate public policy and serve as a violation of the separation of powers doctrine. Second, Plaintiffs have not presented sufficient evidence demonstrate that the Department exceeded the scope of its powers or otherwise acted arbitrary and capricious in implementing the provisions of NRS Chapter 453D. In the absence of such evidence, Nevada Supreme Court precedent requires this Court to defer to the Department's interpretation of NRS Chapter 453D. Third, and finally, the Department did not exceed the scope of its powers or act arbitrarily or capriciously in its decision to award up to 20 points to applicants based on the diversity of its owners, officers, and board members because—despite some Plaintiffs' protestations to the contrary—diversity is directly and demonstrably related to the operation of a marijuana establishment. Accordingly, this Court must deny Plaintiffs' motion.

II. ARGUMENT

A. Plaintiffs Lack Standing to Challenge the Department's Denial of Their Applications, and Both Public Policy and the Separation of Powers Doctrine Also Bar Relief.

Although their arguments in favor of a preliminary injunction vary wildly from Plaintiff to Plaintiff in this matter, all the Plaintiffs share in the same, unsolvable problem: they lack standing to challenge the Department of Taxation's (the "Department") denials of

their applications. Nev. Admin. Code § 453D.996(2) authorizes aggrieved parties to "seek judicial review of a final decision of the Nevada Tax Commission in accordance with the provisions of chapter 233B of NRS that apply to a contested case." However, this is not a "contested case," which is defined as "a proceeding … in which the legal rights, duties or privileges of a party ***are required by law to be determined by an agency after an opportunity for hearing***, or in which an administrative penalty may be imposed." Nev. Rev. Stat. § 233B.032 (emphasis added).

Here, there was no opportunity for a hearing before the Department determined which applicants would receive a conditional license to operate a retail marijuana store. *See* Nev. Rev. Stat. § 453D.210(6) (mandating an "impartial and numerically scored competitive bidding process"—not an opportunity for hearing—for issuance of licenses); *see generally* Nev. Admin. Code §§ 453D.250-312 (describing application process and rules). Indeed, the only hearings contemplated by Nev. Rev. Stat. § 453D or Nev. Admin. Code § 453D pertain to Department investigations of already-existing marijuana establishments which operate pursuant to already-granted licenses, which Plaintiffs do not have. *See* Nev. Rev. Stat. § 453D.200(3)-(4) (authorizing Department to punish licensees for violations after opportunity for hearing); Nev. Admin. Code §§ 453D.940-996 (rules and procedures for Department disciplinary hearings).

The application process was not a "contested case" under Nevada law. Thus, it is clear the legislature did not intend for the Department of Taxation's denial of licensure to be subject to judicial review, and judicial review of the Department of Taxation's decision in this instance is therefore unavailable to Plaintiffs. *See Nevada DPBH v. Samantha Inc.*, 407 P.3d 327, 331-32 (Nev. 2017) (holding that "a disappointed applicant for a medical marijuana establishment registration certificate does not have a right to judicial review under the APA or NRS Chapter 453A" because "the application process provided by NRS 453A.322" was not a "contested case").[1]

[1] In addition to the arguments above, GreenMart hereby joins in the arguments regarding standing raised by Defendant-Intervenors Integral Associates LLC d/b/a Essence Cannabis Dispensaries, Essence Tropicana, LLC, Essence Henderson, LLC, CPCM Holdings, LLC

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Moreover, Plaintiffs have not and cannot establish any entitlement to relief. Indeed, many of them scored abysmally badly in the process, demonstrating their lack of fitness to operate marijuana establishments. Others have made clear that they simply wished to sell licenses. Finally, it would violate public policy and the separation of powers doctrine if this Court were to allow for relief that permits non-performing applicants to obtain licenses and to insert its own interpretation and judgment regarding how an application process, in hindsight, should have been administered. *See, e.g., State, Victims of Crime Fund v. Barry*, 106 Nev. 291, 292-93, 792 P.2d 26, 27 (1990). [2]

Because Plaintiffs lack standing to obtain judicial review of the Department's issuance of licenses and because granting any relief would violate the separation of powers doctrine and the important public policy concerns underlying the application process, this Court must deny Plaintiffs' motion for a preliminary injunction on this ground alone.

B. The Doctrines of Laches and Estoppel Bar Plaintiffs from Challenging the Regulations and the Application.

Evidencing both gamesmanship and hubris, Plaintiffs did not challenge the regulations or the application and only raised concerns once they failed to perform in the application process. Thus, they should not be able to now raise arguments that the regulations or application are invalid. As the Nevada Supreme Court has explained:

> Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of

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d/b/a Thrive Cannabis Marketplace, Commerce Park Medical, LLC, and Cheyenne Medical, LLC's Bench Brief. (*See* The Essence Entities' Bench Brief, pp. 3:4-7:7.)

[2] Further, granting relief in this case would lead to absurd results because it would upend an intensive process that awarded licenses to applicants that were better qualified. *See Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) ("Statutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results."). For example, some Plaintiffs failed to read the changed application and did not understand its requirements. This does not bode well for an ability to operate compliant businesses. Likewise, many failed to "connect up" the financial information they provided to establish the funds they detailed were for the use of the establishment.

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> circumstances which would make the grant of relief to the delaying party inequitable." *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-37 (1992). "Thus, laches is more than a mere delay in seeking to enforce one's rights; it is a delay that works to the disadvantage of another." *Home Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). "The condition of the party asserting laches must become so c hanged that the party cannot be restored to its former states.

Carson City vs. Price, 113 Nev. 409, 412-43 *Id*., at 412-13.

C. The Court Must Defer to the Department's Interpretation of Nev. Rev. Stat. § 453D.200.

Even assuming *arguendo* that Plaintiffs could surmount the enormous issue regarding their standing, Plaintiffs face yet another hurdle: the considerable deference this Court must grant to the Department in adopting the regulations governing the processes for the application for and issuance of conditional licenses. As explained in the Nevada Supreme Court's decision in *Nuleaf*, this Court must defer to an administrative agency's interpretation of a statute "unless it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious." *See, e.g., Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. Adv. Op. 17, 414 P.3d 305, 308 (2018) (quoting *Cable v. State ex rel. Emp'rs Ins. Co. of Nev*., 122 Nev. 120, 126, 127 P.3d 528, 532 (2006)); *see also Desert Aire Wellness, LLC v. GB Scis., LLC*, 416 P.3d 1055 (Nev. 2018) (reversing the district court and finding, consistent with *Nuleaf* that "allowing the Department to issue a provisional registration certificate before an applicant receives local government approval does not supersede local oversight of MMEs and does not conflict with the statute's plain language or the legislative intent").

In *Nuleaf*, the Nevada Supreme Court specifically recognized that it "**must afford great deference to the Department's interpretation of a statute that it is tasked with enforcing** when the interpretation does not conflict with the plain language of the statute or legislative intent." *Id.*at 311 (emphasis added) (citation omitted).

Despite weeks of testimony and evidence, Plaintiffs have not established the Department exceeded the scope of its powers or otherwise acted arbitrarily or capriciously in limiting background checks of applicants' prospective owners, officers, and board

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members to those with an ownership interest of five percent or more. Accordingly, this Court must defer to the Department and deny Plaintiffs' request for a preliminary injunction.

1. The Court Must Afford the Department Great Deference in Interpreting The Provisions of NRS Chapter 453D.

As the Nevada Supreme Court has explained, an administrative agency charged with the duty of administering a statute "is entitled to receive deference from this court to its interpretations of the laws it administers so long as such interpretations are 'reasonable' and 'consistent with the legislative intent.'" *State Indus. Ins. Sys. v. Miller*, 112 Nev. 1112, 1118, 923 P.2d 577, 581 (1996) (quoting *SIIS v. Snyder*, 109 Nev. 1223, 1228, 865 P.2d 1168, 1171 (1993)); *see also Nuleaf*, 414 P.3d at 311; *see also City of Reno v. Reno Police Protective Ass'n*, 118 Nev. 889, 900, 59 P.3d 1212, 1219 (2002) (acknowledging that "[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action [and] great deference should be given to the agency's interpretation when it is within the language of the statute" (alterations in original; internal quotations omitted)).

2. The Department is Entitled to Deference for Its Decision to Limit Background Checks to Prospective Owners, Officers, and Board Members of Applicants With an Ownership Interest of Five Percent or More.

A central issue that has arisen in this case is whether the Department erred in applying NAC 453D.255, which caps the requirement for background checks to those owners, officers, or board members of an applicant with an ownership interest of five percent or more. Some Plaintiffs have argued that this five percent cap runs afoul of Nev. Rev. Stat. § 453D.200(6), which provides that the "Department shall conduct a background check of each prospective owner, officer, and board member of a marijuana establishment license applicant." In making this argument, however, Plaintiffs are asking this Court to ignore the broad discretion the Department has in interpreting Chapter 453D.

The Department's broad discretion to interpret the provisions of Chapter 453D is explicitly provided for in the very first provision of Nev. Rev. Stat. § 453D.200:

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> Not later than January 1, 2018, 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.

Nev. Rev. Stat. § 453D.200(1). Chapter 453D also provides a definition of "unreasonably impracticable":

> "Unreasonably impracticable" means that the measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson.

Nev. Rev. Stat. § 453D.030(19). Under this plain language, the Department was empowered to interpret Nev. Rev. Stat. § 453D.200(6) and craft regulations which would permit it to carry out a primary intent of Chapter 453D: protecting public health and safety by taking the cultivation and sale of marijuana from the domain of criminals and regulating it under a controlled system. Nev. Rev. Stat. § 453D.020(1) and (2) without creating requirements that would effectively make the operation of a recreational dispensaries impossible.

And as several witnesses testified, requiring background checks on ***all*** owners, officers, and board members of an applicant—particularly when that applicant is owned by a publicly traded company—would be unreasonably impracticable and essentially impossible to comply with. (*See, e.g.*, Trans. Hrg. Day 13, p. 97:4-20 (Deonne Contine's testimony that requiring background checks of every shareholder of a publicly traded company would be impossible and impractical); *see also* Trans. Hrg. Day 14, p. 159:16-20 (Ms. Contine's testimony that requiring background checks of all shareholders—which change on minute-by-minute basis—"would basically shut down the ability to operate"); Trans. Hrg. Day 15, p. 18:5 (Testimony of Robert Groesbeck that requiring background checks on the shareholders of publicly traded companies "would potentially have a chilling effect on the industry").) Thus, the Department decision to limit the background checks required under Nev. Rev. Stat. § 453D.200(6) to the owners, officers, and board members of an applicant with an ownership interest of five percent or more.

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Further, this Court must avoid reading Nev. Rev. Stat. § 453D.2 in a way that renders any of its provisions nugatory. *See S. Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (holding that courts must give the terms of statutes "their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory") (quotation omitted). In insinuating that the Court should apply a literal—and fundamentally unworkable—interpretation of Nev. Rev. Stat. § 453D.200(6), the Plaintiffs are asking the Court to read Nev. Rev. Stat. § 453D.200(1) and Nev. Rev. Stat. § 453D.030(19) out of Chapter 453D.

Moreover, no background check was required as part of the application process as this was not a new application process for non-vetted entities or owners; instead, existing establishments were able to apply for conditional establishments. Thus, this argument raised by the Plaintiffs is not even relevant.

D. Diversity Is Directly and Demonstrably Related to the Operation of a Marijuana Establishment.

Another criticism directed at the Department is that its decision to allocate up to 20 points (out of a possible 250) to applicants based on the diversity of its owners, officers, and board members was improper because diversity is allegedly not "directly and demonstrably related to the operation of a marijuana establishment." Nev. Rev. Stat. § 453D.200(1)(b). While Plaintiffs such as MM Development's ownership and management—and conduct at the evidentiary hearing—evidence a lack of concern and respect for diversity, the Department properly considered diversity as part of an establishment's suitability. Several witnesses have testified that diversity is indeed directly and demonstrably related to the operation of a marijuana establishment. For example, Deonne Contine testified that diversity is integral to the operation of a marijuana establishment because "[i]f you have a diverse group of people in your organization, you might be more willing to operate in a community that is -- you know, has been underserved or has been disserved by the war on drugs or, you know, you have a more friendly face to

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some communities like that." (Trans. Hrg. Day 13, p. 212-7.)

Additionally, Stacey Dougan, a board member of GreenMart, testified that diversity is important because of the historical underrepresentation of women and people of color in the marijuana industry:

> Well, it's been said, and again, this has not been from my research, but it's been said that the cannabis industry has been a male -- more male-dominated industry, as far as ownership, as far as, you know, control over whether it be the front end or the back end. And so that's what I mean by disparity. And, of course, being a woman of color, and people of color not necessarily having the avenues to go in because of, you know, felonies, or criminal records, or whatever the case may be.

(Trans. Hrg. Day 5 Vol. II. p. 147:4-12). Judah Zakalik, a managing member of Zion Gardens, also testified about why diversity is important to the operation of a marijuana establishment:

> I believe that people of color, black and brown, have been targeted by marijuana laws prior to legalization. I think there's been a lack of fairness in the imprisonment of people of color, and I think that -- I've seen and I continue to see people of color excluded from the legal marijuana industry, either because lack of finances, maybe criminal backgrounds. And so I think we see a gentrification of a burgeoning multibillion-dollar industry, and that bothers me.

(Trans. Hrg. Day 16, p. 7:2-10; *see also id.* at p. 8:5-7 ("People from diverse backgrounds are often very valuable in businesses, because they bring different perspectives.").) Craig Rombough, the president of Mother Herb, also testified that diversity was important to the operation of a marijuana establishment because "[o]ur society's diverse, people that use the product are diverse, the company should be diverse." (Trans. Day 16, p. 55:7-8.)

Thus, the Department's decision to allocate up to 20 points to applicants based on the diversity of its owners, officers, and board members was proper because it is directly and demonstrably related to the operation of a marijuana establishment.

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III. CONCLUSION

The Plaintiffs' Motions for Preliminary Injunction at issue in this consolidated hearing must be denied,

DATED this the 15th day of August, 2019.

/s/ Alina M. Shell

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2019, pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, I did cause a true copy of the foregoing DEFENDANT-INTERVENOR GREENMART OF NEVADA NLV, LLC'S TRIAL MEMORANDUM in *Serenity Wellness Center, LLC, et al. v. State of Nevada, Department of Taxation, et al.*, Clark County District Court Case No A-19-786962-B, to be served electronically using the Odyssey File & Serve system, to all parties with an email address on record.

/s/ Pharan Burchfield
An Employee of McLetchie Law

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DISTRICT COURT

CLARK COUNTY, NEVADA

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, DOE PLAINTIFFS I through X; and ROE ENTITY PLAINTIFFS I through X,

Plaintiffs,

vs.

THE STATE OF NEVADA, DEPARTMENT OF TAXATION,

Defendants.

Case No.: A-19-786962-B
Dept. No.: XI

THE ESSENCE ENTITIES' BENCH BRIEF (CORRECTED)

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INTEGRAL ASSOCIATES LLC d/b/a ESSENCE CANNABIS DISPENSARIES, a Nevada limited liability company; ESSENCE TROPICANA, LLC, a Nevada limited liability company; ESSENCE HENDERSON, LLC, a Nevada limited liability company; CPCM HOLDINGS, LLC d/b/a THRIVE CANNABIS MEDICAL, LLC, a Nevada limited liability company; and CHEYENNE MEDICAL, LLC, a Nevada limited liability company,

Defendants in Intervention.

I. INTRODUCTION

Plaintiffs request a preliminary injunction to preclude the Nevada Department of Taxation (the "State") from taking further action on the provisional recreational marijuana licenses it issued in December, 2018, including the licenses it issued to Integral Associates LLC d/b/a Essence Cannabis Dispensaries, Essence Tropicana, LLC, and Essence Henderson, LLC (together "Essence"). There are several problems with the relief Plaintiffs seek, not the least of which is that they lack standing for such an injunction against the State.

Plaintiffs have shown no "injury in fact" caused by the State's alleged errors. Plaintiffs have not shown that the supposed errors about which they complain resulted in their applications being unsuccessful, or that they resulted in anyone else's applications being successful, particularly those of Essence. Nor would the purported preliminary injunction that Plaintiffs seek redress their supposed injury. Because Plaintiffs have failed to prove an injury that will be redressed by a preliminary injunction, they lack the required standing for such relief.

Besides that, the matters on which Plaintiffs claim error by the State: (1) are neither errors when recognizing the State's broad discretion to implement and reconcile the competing interests of a new law, nor (2) are these procedures for the protection of Plaintiffs' business interests. The State's implementation of the ballot initiative is entitled to great deference and must be construed to advance the will of the people. The law does not elevate the interests of sore-losing competitors over the interests of the public. Plaintiffs are only complaining now because they did not receive licenses, but they did not protest the regulations before the results were announced.

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Plaintiffs cannot come to this Court after the fact to challenge a process in which they voluntarily participated. Plaintiffs' motion fails.

II. ARGUMENT

A. Plaintiffs Lack Standing for the Preliminary Injunction.

The first problem with Plaintiffs' request for a preliminary injunction is that none of them have the prerequisite standing to enjoin the operation of Essence's licenses. Unless the Legislature has provided a statutory right, Nevada courts require "an actual justiciable controversy as a predicate to judicial relief." *Stockmeier v. Nevada Dep't of Corr. Psychological Review Panel*, 122 Nev. 385, 393, 135 P.3d 220, 225 (2006) (quotation marks omitted).[1] Under either the federal or state constitutions, standing is a prerequisite to "an actual justiciable controversy." *See id.* at 392, 135 P.3d at 225. The doctrine of standing is part of the constitutional "case or controversy" or, simply, the "case" requirement. *Id.* at 392-93, 135 P.3d at 225; Nev. Const. art. 6, §§ 4, 6. There is also a "subconstitutional 'prudential' element." *In re Amerco Derivative Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011). Standing is central to the separation of powers. Nev. Const. art. 3, § 1. It "is founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To possess standing, a plaintiff must establish three things: (1) injury in fact; (2) causation; and (3) redressability. *Stockmeier*, 122 Nev. at 392, 135 P.3d at 225. "[T]he 'irreducible constitutional minimum' of standing requires that a plaintiff has suffered an 'injury in fact' that is not merely conjectural or hypothetical, that there be a causal connection between the injury and the conduct complained of, and that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable [court] decision." *Miller v. Ignacio*, 112 Nev. 930, 936 n.4, 921 P.2d 882, 885 n.4 (1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[1] Abrogated on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

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An "injury in fact" is one involving a "'an invasion of a judicially cognizable interest' that is 'concrete and particularized'" and "'actual or imminent.'" *Grasso v. Umpqua Bank*, 399 P.3d 332, 2017 WL 2815091, at *1 (Nev. 2017) (unpublished disposition) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). "[A] party must show a personal injury and not merely a general interest that is common to all members of the public." *Schwartz v. Lopez*, 132 Nev. Adv. Op. 73, 382 P.3d 886, 894 (2016). The plaintiff must have a "special or peculiar injury different from that sustained by the general public in order to maintain a complaint for injunctive relief." *Id.* (parenthetically describing *Blanding v. City of Las Vegas*, 52 Nev. 52, 69, 280 P. 644, 648 (1929)).

Here, none of the Plaintiffs have shown an "injury in fact" for standing to enjoin a State licensing process. Plaintiffs lack a "judicially cognizable interest" that has been invaded here. Plaintiffs have not won a license and do not have an entitlement to a license. At best, they speculate that if the rules had been different "maybe" they would have received a license rather than some of those who did.[2] Their purported "injury" is not concrete, particularized, actual, or imminent. There is no evidence that Plaintiffs would have been awarded a license absent the State's alleged errors, nor is there any evidence that Plaintiffs *will be* awarded a license at any future time under the supposed application process that they advance. The record is devoid of any proof that any of these Plaintiffs would *ever* receive a license, regardless of whatever process the State were to employ. Indeed, Plaintiffs have acknowledged that there are not enough licenses for all of them to win even if the State conducted a re-do.

Plaintiffs' alleged injuries hinge on the speculation that they *might* obtain a license under a different application system, but they offer nothing more than this self-serving speculation. But the courts have long recognized that such speculative future outcomes – those dependent upon future decisions by third parties – are too conjectural or hypothetical to establish standing. *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)). Simply put, applicants who hypothesize that they maybe could have

[2] Notably, Plaintiffs cannot even pretend that they would have beaten out Essence, with its well-established track record.

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won a license under a different process lack standing to enjoin the operations of licenses issued to others.

And, Plaintiffs that are currently in the cannabis business cannot sidestep this constitutional flaw by referencing their existing licenses and claiming that new competition will diminish their existing business. First of all, Plaintiffs' arguments about "market share" are little more than conclusory lawyer arguments, unsubstantiated by actual evidence of market share or actual evidence of any hypothesized diminution. But even if there were such evidence, the theory fails as a matter of law. Governmental licensing systems are not designed to insulate business from competition, and competitors lack standing to procure an injunction over alleged violations in the granting of licenses to competitors. *See Nat'l Wine & Spirits Corp. v. Indiana Alcohol & Tobacco Comm'n*, 945 N.E.2d 182, 187 (Ind. Ct. App. 2011) (affirming dismissal for lack of standing because a liquor licensee has no property interest in the certificate of compliance issued to its competitors); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, No. 11-CV-04175-NKL, 2012 WL 123051, at *3 (W.D. Mo. Jan. 17, 2012) ("economic interest in preventing loss of . . . market share is essentially a desire to avoid the competition . . . [s]uch an interest fails to rise to the level of a legally protectable interest, for purposes of standing.").

For instance, in *Hauer v. BRDD of Indiana, Inc.*, 654 N.E.2d 316, 319 (Ind. Ct. App. 1995), the court reversed a trial court's entry of an injunction against the state fire marshall on behalf of existing fireworks wholesalers. The existing license holders sought and obtained an injunction against the state fire marshall for issuing certificates of compliance to competitors who they alleged were not complying with the law. As the court of appeals explained in reversing and vacating the injunction against the government, the regulatory scheme is "not designed to protect the market share" of existing operators. *Id.* at 319. As the court noted, the criteria under the state's licensing laws is to protect the public from the potential dangers of fireworks, it is not to protect existing operators from competition and thus they have no legally-protected property interest in the certificates issued to competitors. *Id.*

Simply put, without a cognizable legally protectable interest that is tangible and immediate, Plaintiffs are indistinguishable from other members of the public that may have a

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generic interest in a "fair" application process. But such an interest provides no grounds for standing to pursue injunctive relief against government actors, even presupposing that they had acted in some improper fashion. *See Blanding*, 52 Nev. 52, 280 P. at 650 (party whose interest in the right asserted that does not differ from that of the general public lacks standing).

Plaintiffs have also failed to establish the causation necessary for standing to exist. Plaintiffs have not proven that the alleged unlawful regulations or purported errors in the application process were the reason that they were unsuccessful. Conversely, they have not shown that the supposedly flawed regulations and process were the reason that Essence won its licenses. After all, to have standing – particularly standing to seek an injunction – the plaintiff must show that the supposed error is what actually caused their claimed harm. Plaintiffs have not remotely done so. By way of example, Plaintiffs have shown no harm by the State's purported failure to do a background check on owners holding less than five percent. Indeed, assuming that such people existed, Plaintiffs have failed to show that any of them would actually fail a background check. The same is true for Plaintiffs' complaints about alleged confusion in terms of listing "locations" for the outlets. Plaintiffs have presented no evidence that this matter had any impact on the outcome of any of their applications, let alone that they would have been chosen over Essence. Contrary to Plaintiffs' apparent wants, it is not sufficient to simply claim that the State committed an error. They have to prove that the error actually mattered.

Finally, and perhaps most importantly, Plaintiffs have failed to show that the extraordinary relief of a preliminary injunction bears any relationship to any legally-cognizable harm. The sole role of a preliminary injunction is to protect a plaintiff from imminent irreparable harm that will take place before a trial on the merits occurs. A preliminary injunction preventing Essence from opening and operating will not grant a license to the Plaintiffs. A preliminary injunction will not protect the Plaintiffs from any type of protectable harm pending a trial on the merits, let alone irreparable harm.[3] Plaintiffs will be in the exact same position at a trial as they are today, *i.e.*, they will not have a license.

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[3] As discussed previously, their so-called "market share" theory fails as a matter of law because the State's regulatory system is not designed to protect people from competition.

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The only thing a preliminary injunction will accomplish at this stage is harm the parties who complied with the State's directives, submitted quality applications, and who were awarded a license. Contrary to the Plaintiffs' way of thinking, success by your competitors is not irreparable harm to you. Similarly, the public's greater access to cannabis – which is what the public wanted with the ballot initiative – is not an irreparable harm to these Plaintiffs. They simply want an injunction so as to impose harm on everyone else and then use that harm as leverage. That is not an appropriate basis for any type of judicial action, let alone preliminary injunctive relief.

B. The Nevada Supreme Court's *Nuleaf* Decision Illustrates the Great Deference Owed to the State.

Even if Plaintiffs had presented evidence establishing standing (which they did not), their claims of error by the State require this Court to disregard the broad discretion that the State is accorded in deciding how to best manage the competing policy objectives of the ballot question. In *Nuleaf CLV Dispensary, LLC v. State Department of Health & Human Services, Division of Public & Behavioral Health*, 134 Nev. Adv. Op. 17, 414 P.3d 305 (2018), two unsuccessful applications for a medical marijuana certification brought an action seeking a mandatory injunction ordering the State to revoke a competitor's provisional certificate. The parties disputed whether the statutory scheme required all applicants to obtain prior approval from a local government before receiving a registration certificate. *Id.* at 308-09.

The relevant provision provided that "not later than 90 days after receiving an application to operate a medical marijuana establishment, the [Department] *shall register* . . . and issue a . . . registration certificate *if* . . . [the applicant] ***has submitted to the [department] all of the following:*** Proof of licensure with the applicable local governmental authority or a letter from the applicable local governmental authority certifying that the proposed medical marijuana establishment is in compliance with [zoning] restrictions and satisfies all applicable building requirements." *Id.* at 309 (emphasis in original) (quoting NRS 453A.322). The challengers argued that the statute required the applicants to provide proof of local approval before the Department could even consider the application. *Id.* The successful applicant, who did not have prior local approval – and in fact had been denied local approval – asserted that such local

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approval was merely one factor and the "nothing in the statute prohibits the Department from considering an applicant that fails to meet the requirements." *Id.* at 309-310.

The Nevada Supreme Court agreed with the successful applicant. Notwithstanding the ambiguous language of the statute, the Court held that adopting the challengers' reading would produce unreasonable results by precluding otherwise qualified applicants from receiving certificates. *Id.* at 310. The Court emphasized that it "must afford great deference to the Department's interpretation of a statute that it is tasked with enforcing when the interpretation does not conflict with the plain language of the statute or legislative intent." *Id.* at 311.

This Court owes that same "great deference" to the State's interpretation of the initiative provisions and statutes at issue here. The Court should not construe the provisions in a manner that would thwart the will of the people and frustrate access to recreational marijuana. Moreover, the State's discretion is at its apex here because the statutory scheme is a new one. Courts recognize that deference to the agency is "'heightened where . . . the regulations at issue represent the agency's initial attempt at interpreting and implementing a new regulatory concept.'" *Texaco, Inc. v. Dep't of Energy*, 663 F.2d 158, 165 (D.C. Cir. 1980) (quoting *Atchison, T. & S. F. Ry. Co. v. ICC*, 580 F.2d 623, 629 (D.C. Cir. 1978)) (parentheticals removed). After all, administrative agencies are often presented with statutory schemes that contain gaps or contradictions, especially when implementing ballot initiatives. The agency is thus vested with the authority to fill in those gaps and has leeway to reconcile any potential statutory contradictions. *Atwell v. Merritt Sys. Prot. Bd.*, 670 F. 2d. 272, 282 (D.C. Cir. 1981) (Agency is empowered to reconcile arguably conflicting statutory provisions, and court's role is limited to ensuring that the agency effectuated an appropriate harmonization within the bounds of its discretion).

Here, the State properly exercised its discretion to effectuate the competing policy objectives of the voters' decision to authorize recreational marijuana. On the one hand, the State wants to facilitate access to medical marijuana as the voters directed, but at the same time, it wants to safeguard the public health and welfare. That balancing act is for the State to achieve and implement. It is not subject to second-guessing after the fact, particularly by a group of Plaintiffs who only raised their complaints after they were not selected.

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C. Plaintiffs' Challenges to the Regulations are Barred by Laches.

Plaintiffs' request for a preliminary injunction – to now reverse the effect of the State's regulations – is particularly untenable under the equitable doctrine of laches. *See Carson City v. Price*, 113 Nev. 409, 412, 934 P.2d 1042, 1044 (1997) (concluding doctrine of laches barred injunctive relief). "Laches is an equitable doctrine which may be invoked when delay by one party works to the disadvantage of the other, causing a change of circumstances which would make the grant of relief to the delaying party inequitable." *Miller v. Burk*, 124 Nev. 579, 598, 188 P.3d 1112, 1125 (2008). A post-hoc challenge, like the one brought by Plaintiffs here, is barred by the doctrine of laches when the party inexcusably delayed bringing a challenge, constituting an acquiescence to the condition being challenged, resulting in prejudice to others. *Id.*

Plaintiffs' acquiescence to the regulations it now seeks to challenge only after they failed to secure license is the epitome of conduct the doctrine of laches was designed to prevent. For example, in *Miller*, the Court found that a challenge to a ballot question was barred by the doctrine of laches because the claim was ripe for judicial review before the question was presented to the voters. *Id.* As the Court explained, "to acquiesce to the ballot question's language . . . only to challenge now whether it satisfied requirements for placement on the ballot . . . is unconventional . . . [and] . . . prejudicial to the voters who . . . have been relying on the amendment." *Id.*

Plaintiffs' conduct here is no different. Plaintiffs voluntarily and eagerly applied to obtain licenses from the State knowing full well the rules and regulations that would apply. Not once did they object or submit any application under protest or file any legal action disputing the legality of the State's process. Instead, Plaintiffs hid in the weeds, waiting to see if they would succeed and, only after failing, did they claim that the State's regulations were unlawful. Had Plaintiffs believed the State's process and regulations were unlawful, they could have and should have made that challenge from the very beginning, before the State and all applicants expended resources in the application process. There is no question that Plaintiffs' inexcusable delay in bringing this suit after licenses were issed has resulted in prejudice to Essence and others. The

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evidence is uncontroverted that Essence has spent substantial time, effort, and money to prepare for opening. These harms cannot be undone, and the Court cannot return the parties to the *status quo* before the application process. The current *status quo* is that Essence won licenses. Plaintiffs' election to not challenge the State's regulations when it could have done so bars those claims now.

III. CONCLUSION

For these reasons, the Court should deny the Motion for Preliminary Injunction and all joinders thereto.

DATED this 15th day of August, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and that on this 15th day of August, 2019, I caused to be served via the Court's e-filing/e-service system true and correct copies of the above **THE ESSENCE ENTITIES' BENCH BRIEF** to all parties listed on the Court's Master Service List.

Kimberly Peets

An employee of Pisanelli Bice PLLC

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