

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA EX REL. DEPARTMENT OF TAXATION,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF
NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE
HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE,

Respondents,

NEVADA WELLNESS CENTER, LLC,

Real Party in Interest.

**PETITIONER'S APPENDIX
VOLUME II OF II**

Respectfully submitted by:

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Elizabeth A. Brown
Clerk of Supreme Court

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 21st day of February, 2020.

I certify that some of the participants in the case are not currently registered electronic filing system users. For those parties service was made by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada to the following unregistered participants:

Eighth Judicial District Court
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Las Vegas, Nevada 89155
Respondent

The Honorable Elizabeth Gonzalez
Regional Justice Center
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Respondent

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Center, LLC*

/s/ Traci Plotnick
Traci Plotnick, an employee of the
Office of the Attorney General

- 1 allowed pursuant to this paragraph;
- 2 (e) The locality in which the proposed marijuana
- 3 establishment will be located does not affirm to the
- 4 Department that the proposed marijuana establishment will be
- 5 in violation of zoning or land use rules adopted by the
- 6 locality; and
- 7 (f) The persons who are proposed to be owners, officers, or
- 8 board members of the proposed marijuana establishment:
- 9 (1) Have not been convicted of an excluded felony
- 10 offense; and
- 11 (2) Have not served as an owner, officer, or board
- 12 member for a medical marijuana establishment or a
- 13 marijuana establishment that has had its registration
- 14 certificate or license revoked.

15 6. When competing applications are submitted for a proposed retail

16 marijuana store within a single county, the Department ***shall use an***

17 ***impartial and numerically scored competitive bidding process*** to

18 determine which application or applications among those competing

19 will be approved. (emphasis added).

20 166. On November 8, 2016, by Executive Order 2017-02, Governor Brian Sandoval

21 established a Task Force composed of 19 members to offer suggestions and proposals for legislative,

22 regulatory, and executive actions to be taken in implementing BQ2.

23 167. The Task Force recommended that "the qualifications for licensure of a marijuana

24 establishment and the impartial numerically scored bidding process for retail marijuana stores be

25 maintained as in the medical marijuana program except for a change in how local jurisdictions

26 participate in selection of locations."

27 168. During the 2017 legislative session, Assembly Bill 422 transferred responsibility for

28 the registration, licensing and regulation of marijuana establishments to the DOT.

1 169. On February 27, 2018, the DOT adopted regulations governing the issuance,

2 suspension, or revocation of retail recreational marijuana licenses, which were codified in NAC

3 453D (the "Regulations").

4 170. The Regulations for licensing were to be "directly and demonstrably related to the

5 operation of a marijuana establishment." NRS 453D.200(1)(b).

6 171. NRS 453D.200(1) provides, in part, "[t]he regulations must not prohibit the operation

7 of marijuana establishments, either expressly or through regulations that make their operation

8 unreasonably impracticable."

1 172. The limitation of "unreasonably impracticable" in NRS 453D.200(1) applies to the
2 Regulations adopted by the DOT, not the mandatory language of BQ2.

3 173. According to an August 16, 2018 letter from the DOT, pursuant to Section 80(3) of
4 Adopted Regulation of the Department of Taxation, LCB File No. R092-17 ("R092-17"), the DOT
5 was responsible for allocating the licenses of recreational marijuana stores "to jurisdictions within
6 each county and to the unincorporated area of the county proportionally based on the population of
7 each jurisdiction and of the unincorporated area of the county."

8 **B. The Licenses Applications**

9 174. The DOT issued a notice for an application period wherein the DOT sought
10 applications from qualified applicants to award sixty-four (64) recreational marijuana retail store
11 licenses throughout various jurisdictions in Nevada.

12 175. The DOT posted the license application on its website and released the application
13 for recreational marijuana establishment licenses on July 6, 2018, which required disclosure of an
14 actual physical address for each establishment.

15 176. The DOT published a revised license application on July 30, 2018 eliminating the
16 physical address requirement, which was not publicly available and was only disseminated to some
17 but not all of the applicants via a DOT listserv.

18 177. The application period for retail recreational marijuana licenses ran from September
19 7, 2018 through September 20, 2018.

20 178. As of September 20, 2018, the DOT received a total of 462 applications.

21 179. When competing applications for licenses were submitted, the DOT was required to
22 use "an impartial and numerically scored competitive bidding process" to determine successful
23 license applicants. NRS 453D.210(6).

24 180. Under NAC 453D.272(1), when the DOT received more than one "*complete*"
25 application *in compliance with the Regulations and NRS 453D*, the DOT was required to "rank the
26 applications... in order from first to last based on the compliance with the provisions of [NAC 453D]
27 and [NRS 453D] and on the content of the applications relating to..." several enumerated factors.

28 181. The factors set forth in NAC 453D.272(1) used to rank competing applications

1 (collectively, the "Factors") are:

2 a. Whether the owners, officers or board members have
3 experience operating another kind of business that has given them
4 experience which is applicable to the operation of a marijuana
establishment;

5 b. The diversity of the owners, officers or board members of
the proposed marijuana establishment;

6 c. The educational achievements of the owners, officers or
7 board members of the proposed marijuana establishment;

8 d. The financial plan and resources of the applicant, both
liquid and illiquid;

9 e. Whether the applicant has an adequate integrated plan for
10 the care, quality and safekeeping of marijuana from seed to sale;

11 f. The amount of taxes paid and other beneficial financial
12 contributions, including, without limitation, civic or philanthropic
involvement with this State or its political subdivisions, by the
applicant or the owners, officers or board members of the proposed
marijuana establishment;

13 g. Whether the owners, officers or board members of the
14 proposed marijuana establishment have direct experience with the
operation of a medical marijuana establishment or marijuana
15 establishment in this State and have demonstrated a record of
operating such an establishment in compliance with the laws and
16 regulations of this State for an adequate period of time to demonstrate
success;

17 h. The experience of key personnel that the applicant intends
18 to employ in operating the type of marijuana establishment for which
the applicant seeks a license; and

19 i. Any other criteria that the Department determines to be
20 relevant.

21 182. NAC 453D.255, enacted by Defendant DOT in contravention of NRS Chapter 453D
22 and implemented by Defendant PUPO and his subordinates, provides as follows:

23 1. Except as otherwise required in subsection 2, the requirements of
24 this chapter concerning owners of marijuana establishments only
apply to a person with an aggregate ownership interest of 5 percent or
25 more in a marijuana establishment.

26 2. If, in the judgment of the Department, the public interest will be
served by requiring any owner with an ownership interest of less than
27 5 percent in a marijuana establishment to comply with any provisions
of this chapter concerning owners of marijuana establishments, the
Department will notify that owner and he or she must comply with
28 those provisions.

1 183. Defendant DOT also enacted NAC 453D.258, NAC 453D.260, NAC 453D.265, NAC
2 453D.268 and NAC 453D.272. These administrated codes enforced by Defendant PUPO and his
3 subordinates established the procedures for recreational application process, fees to be charged for
4 applying, fees to be charged for applying if the applicant holds a medical marijuana establishment
5 registration certificate, and the ranking of applications if the Defendant D.O.T. received more than
6 one application for a retail marijuana license.

7 184. The application published by the DOT described how applications were to be scored,
8 dividing scoring criteria into identified criteria and non-identified criteria.

9 185. The application provided that "*applications that have not demonstrated a sufficient*
10 *response related to the criteria set forth above will not have additional [unspecified, unpublished]*
11 *criteria considered in determining whether to issue a license and will not move forward in the*
12 *application process.*" (emphasis added).

13 186. NAC 453D.272(1) required the DOT to determine that an application is "complete
14 and in compliance" with the provisions of NAC 453D in order to properly apply the licensing criteria
15 set forth therein and the provisions of BQ2 and NRS 453D.

16 187. No later than December 5, 2018, the DOT was responsible for issuing conditional
17 licenses to those applicants who score and rank high enough in each jurisdiction to be awarded one
18 of the allocated licenses in accordance with the impartial bidding process mandated by NRS
19 453D.210.

20 188. The DOT identified, hired, and trained eight individuals as temporary employees to
21 grade the applications in accordance with the provisions of BQ2 and NRS 453D.

22 189. The DOT allocated throughout the state of Nevada.

23 190. Plaintiff submitted applications to the DOT for a conditional licenses to own and
24 operate recreational marijuana retail stores in compliance with the specified, published requirements
25 of DOT regulations together with the required application fee in accordance with NRS 453D.210.

26 191. Plaintiff's applications identified each prospective owner, officer, and board member
27 for background check pursuant to NRS 453D.200(6).

28 192. Plaintiff secured and identified in its application addresses for each and every

1 proposed recreational marijuana establishment it intended to operate.

2 193. Plaintiff was informed by letter from the DOT that its applications to operate
3 recreational marijuana retail stores was denied "because it did not achieve a score high enough to
4 receive an available license."

5 194. On May 24, 2019, the Honorable Elizabeth Gonzales conducted an evidentiary
6 hearing concerning a motion for preliminary injunction sought by a group of unsuccessful applicants
7 for retail marijuana licenses in Nevada against Defendant D.O.T. The hearing concluded on August
8 16, 2019. Thereafter, Judge Gonzales issued her findings of fact, conclusions of law granting
9 preliminary injunction. See Findings of Fact and Conclusions of Law Granting Preliminary
10 Injunction, filed August 23, 2019, Clark County District Court Case No. A-19-786962-B. Among
11 her findings, Judge Gonzales found that the DOT undertook no effort to determine if the applications
12 were in fact "complete and in compliance." Id., par. 37.

13 195. Judge Gonzales also found that the DOT departed from the mandatory language of
14 NRS 453D.200(6) requiring "a background check of each prospective owner, officer, and board
15 member of a marijuana establishment license applicant" and made no attempt in the application
16 process to verify that the applicant's complied with the mandatory language of the BQ2 or even the
17 impermissibly modified language." Id., par. 41.

18 196. The DOT improperly issued conditional licenses to applicants who did not disclose
19 in their application an actual physical address for proposed retail recreational marijuana
20 establishment.

21 197. Upon information and belief, the DOT's denial of Plaintiff's licenses applications was
22 not properly based upon actual implementation of the impartial and objective bidding process
23 mandated by NRS 453D.210, but was based upon arbitrary and capricious exercise of administrative
24 partiality and favoritism that was the policy and routine of the DOT as promulgated by Defendant
25 PUPO and others in the DOT hierarchy.

26 198. Upon information and belief, the temporary employees hired by the DOT were
27 inadequately and improperly trained regarding the scoring process, leading to an arbitrary scoring
28 process in contravention of Nevada law.

1 199. Upon information and belief, the DOT undertook no effort to determine whether
2 applications were in fact "complete and in compliance."

3 200. By revising the application on July 30, 2018 and selectively eliminating the
4 requirement to disclose an actual physical address for each proposed retail recreational marijuana
5 establishment, the DOT limited the ability of the temporary employees to adequately assess graded
6 criteria such as (i) prohibited proximity to schools and certain other public facilities, (ii) impact on
7 the community, (iii) security, (iv) building plans and (v) other material considerations prescribed by
8 the regulations.

9 201. The DOT's scoring process was impacted by its selective elimination of the
10 requirement to disclose an actual physical address for each proposed retail recreational marijuana
11 establishment, resulting in incomplete applications being considered and awarding of conditional
12 licenses.

13 202. Upon information and belief, the DOT selectively discussed with applicants or their
14 agents the modification of the application related to physical address information.

15 203. Upon information and belief, the DOT undertook no effort to verify owners, officers
16 or board members in evaluating whether an application was "complete and in compliance."

17 204. Upon information and belief, if an applicant's disclosure in its application of its
18 owners, officers, and board members did not match the DOT's records, the DOT permitted the
19 grading, and in some cases, awarded a conditional license.

20 205. Upon information and belief, the DOT departed from the mandatory requirements of
21 NRS 453D.200(6), which provides that "[t]he DOT shall conduct a background check of each
22 prospective owner, officer, and board member of a marijuana establishment license application," by
23 adopting NAC 453D.255(1), which only required information on the application from persons "with
24 an aggregate ownership interest of 5 percent or more in a marijuana establishment."

25 206. The DOT's determination that only owners of a 5% or greater interest in the business
26 were required to submit information on the application was an impermissible regulatory modification
27 of BQ2 and violated Article 19, Section 3 of the Nevada Constitution.

28 207. The adoption of NAC 453D.255(1) as it applied to the marijuana establishment

1 license application process was an unconstitutional modification of BQ2.

2 208. The failure of the DOT to carry out the mandatory provisions of NRS 53D.200(6),
3 which required the DOT to conduct a background check of each prospective owner, officer, and
4 board member of a marijuana establishment license applicant, is fatal to the application process and
5 impedes an important public safety goal in BQ2.

6 209. By adopting regulations in violation of BQ2's mandatory application requirements,
7 the DOT violated Article 19, Section 2(3) of the Nevada Constitution.

8 210. The DOT disregarded the voters' mandate in BQ2 when it decided the requirement
9 that each prospective owner be subject to a background check was too difficult for implementation
10 by industry. This decision was a violation of the Nevada Constitution, arbitrary and capricious.

11 211. The DOT did not comply with BQ2 by requiring applicants to provide information
12 for each prospective owner, officer and board member or verify ownership of applicants who
13 applying for retail recreational marijuana licenses.

14 212. The DOT's inclusion of the diversity category in the factors was implemented in a
15 way that created a process which was subject to manipulation by applicants.

16 213. The DOT's scoring process was impacted by personal relationships in decisions
17 related to the requirements of the application and the ownership structures of competing applicants.

18 214. Due to the DOT's violations of BQ2, Plaintiff was unconstitutionally denied
19 recreational marijuana licenses.

20 215. The DOT's constitutional violations and refusal to issue conditional licenses to
21 Plaintiff resulted in irreparable harm to Plaintiff.

22 IV.

23 CLAIMS FOR RELIEF

24 FIRST CLAIM FOR RELIEF

25 (Declaratory Relief)

26 216. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

27 217. A justiciable controversy exists that warrants a declaratory judgment pursuant to
28 Nevada's Uniform Declaratory Judgments Act, NRS 30.010 to 30.160, inclusive.

1 218. Plaintiff and the Defendants have adverse and/or competing interests as the
2 Department, through its Marijuana Enforcement Division, has denied the applications submitted by
3 Plaintiff and has violated Plaintiff's Constitutional Rights, Nevada law, and State policy.

4 219. The Department's refusal to issue Plaintiff a "conditional" license affects Plaintiff's
5 rights afforded it by NRS 453D, NAC 453D, R092-17, and other Nevada laws and regulations.

6 220. Further, the Department's improper ranking of the other applicants for a recreational
7 marijuana establishment license and the Department's subsequent, improper issuance to each of a
8 "conditional" license also affects the rights of Plaintiff afforded it by NRS 453D, NAC 453D,
9 R09217, and other Nevada laws and regulations.

10 221. The Department's actions and/or inactions also have created an actual justiciable
11 controversy ripe for judicial determination between Plaintiff and the Department with respect to the
12 construction, interpretation, and implementation of NRS 453D, NAC 453D, and R092-17 as to
13 Plaintiff. Plaintiff has been harmed, and will continue to be harmed, by the Defendants' actions.

14 222. The Department's actions and/or inactions failed to appropriately address the
15 necessary considerations and intent of NRS 453D.210, designed to restrict monopolies.

16 223. Accordingly, Plaintiff seeks a declaration from this Court that, inter alia:

- 17 a. That the Department improperly denied Plaintiff four (4) "conditional"
18 licenses for the operation of a recreational marijuana establishment in the
19 following jurisdictions: unincorporated Clark County, Nevada; Las Vegas,
20 Nevada; North Las Vegas, Nevada; and Reno, Nevada.
- 21 b. The denial of a "conditional" license to Plaintiff is void *ab initio*;
- 22 c. The procedures employed in the denial violated Plaintiff's procedural due
23 process rights and equal protection rights under the Nevada and United States
24 Constitutions and, therefore, the denial is void and unenforceable;
- 25 d. The denial violates Plaintiff's substantive due process rights and equal
26 protection rights under the Nevada and United States Constitutions and,
27 therefore, the denial is void and unenforceable;
- 28 e. The denial is void for vagueness and therefore unenforceable;

- 1 f. Defendant acted arbitrarily and capriciously or in contravention of a legal
2 duty and Plaintiff is therefore entitled to a writ of mandamus;
3 g. Plaintiff is entitled to judicial review; and
4 h. The Department's denial lacked substantial evidence.

5 224. Plaintiff also seeks a declaration from this Court that the Department must issue
6 Plaintiff four (4) "conditional" licenses for the operation of a recreational marijuana establishment
7 in unincorporated Clark County, Nevada; Las Vegas, Nevada; North Las Vegas, Nevada; and Reno,
8 Nevada, since Plaintiff's score issued by the Department would have ranked high enough to entitle
9 it to "conditional" licenses had the Department properly applied the provisions of NRS 453D, NAC
10 Chapter 453D, and R092-17.

11 225. Plaintiff asserts and contends that a declaratory judgment is both necessary and proper
12 at this time for the Court to determine the respective rights, duties, responsibilities and liabilities of
13 the Plaintiff afforded it by NRS 453D, NAC Chapter 453D, R092-17, and other Nevada laws and
14 regulations.

15 226. Plaintiff has found it necessary to retain the legal services of Parker, Nelson &
16 Associates, Chtd. to bring this action, and Plaintiff is entitled to recover its reasonable attorneys' fees
17 and costs therefor.

18 **SECOND CLAIM FOR RELIEF**

19 **(Injunctive Relief)**

20 227. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

21 228. The Department's flawed interpretation of the provisions of NRS 453D, NAC Chapter
22 453D, and R092-17, and refusal to issue "conditional" licenses in accordance with the law constitute
23 and cause continuing and irreparable harm to Plaintiff with no adequate remedy at law.

24 229. The purpose of this refusal was and is to unreasonably interfere with Plaintiff's
25 business and causing Plaintiff to suffer irreparable harm.

26 230. The Department will suffer no harm by following the law with respect to issuing
27 "conditional" licenses.

28 231. The Department's interpretation of NRS 453D, NAC Chapter 453D, and R092-17 is

1 flawed and Plaintiff is likely to succeed on the merits in this litigation.

2 232. The public interest favors Plaintiffs because in the absence of injunctive relief, the
3 consumers who would have benefitted will have less available options from which they can receive
4 recreational marijuana licenses.

5 233. Therefore, Plaintiff is entitled to preliminary injunctive relief, and after a trial on the
6 merits, permanent injunctive relief, ordering the Department to issue "conditional" licenses to
7 Plaintiff in accordance with NRS 453D, NAC 453D, and R092-17.

8 234. Plaintiff has retained the legal services of Parker, Nelson & Associates, Chtd. to bring
9 this action, and Plaintiff is entitled to recover its reasonable attorneys' fees and costs therefor.

10 **THIRD CLAIM FOR RELIEF**

11 **(Violation of Procedural Due Process)**

12 235. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

13 236. The procedures employed by the Department in denying Plaintiff's applications have
14 deprived Plaintiff of due process of law as guaranteed by the Nevada Constitution and the United
15 States Constitution.

16 237. The process in which denial was considered, noticed to the public, and passed failed
17 to provide Plaintiff a meaningful opportunity to be heard at a consequential time and was
18 fundamentally unfair and violated the due process requirements of the Nevada and United States
19 Constitutions.

20 238. The Constitutional infirmity of this entire process renders the denial void and
21 unenforceable, and Plaintiff is entitled to a declaration as to the denials' ineffectiveness and an order
22 enjoining its enforcement.

23 239. Plaintiff is also entitled to damages for these due process violations.

24 240. As the action of the Department necessitated that Plaintiff retain the legal services
25 of Parker, Nelson & Associates, Chtd., and incur fees and costs to bring this action, Plaintiff is also
26 entitled to attorneys' fees and costs of suit.

27 241. Plaintiff has found it necessary to bring this action, and Plaintiff is entitled to recover
28 its reasonable attorneys' fees and costs therefor.

1 **FOURTH CLAIM FOR RELIEF**

2 **(Violation of Substantive Due Process)**

3 242. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

4 243. The denial violates Plaintiff's substantive due process rights guaranteed by the Nevada
5 Constitution and the United States Constitution.

6 244. The Constitutional infirmity of this entire process and the Department's denial renders
7 the denial void and unenforceable, and Plaintiff is entitled to a declaration as to the denials'
8 ineffectiveness and an order enjoining its enforcement.

9 245. Plaintiff is also entitled to damages for these due process violations.

10 246. As the action of the Department necessitated that Plaintiff retain the legal services
11 of Parker, Nelson & Associates, Chtd., and incur fees and costs to bring this action, Plaintiff is also
12 entitled to attorneys' fees and costs of suit.

13 **FIFTH CLAIM FOR RELIEF**

14 **(Equal Protection Violation)**

15 247. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

16 248. The denial violates Plaintiff's right to equal protection under the Nevada and United
17 States Constitutions.

18 249. The denial divides up marijuana applications into two or more classes.

19 250. This classification and disparate treatment is unconstitutional because there is no
20 rational relationship between the disparity of this treatment and any legitimate governmental
21 purpose.

22 251. The constitutional infirmity of this denial renders it void and unenforceable, and
23 Plaintiff is entitled to a declaration as to the denials' ineffectiveness and an order enjoining its
24 enforcement.

25 252. As the action of the Department necessitated that Plaintiff retain the legal services
26 of Parker, Nelson & Associates, Chtd., and incur fees and costs to bring this action, Plaintiff is also
27 entitled to attorneys' fees and costs of suit.

28 ///

1 **SIXTH CLAIM FOR RELIEF**

2 **(Petition for Judicial Review)**

3 253. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

4 254. The Department, in misinterpreting and incorrectly applying NRS 453D, NAC 453D
5 and the related Nevada laws and regulations, has exceeded its jurisdiction by issuing "conditional"
6 licenses to applicants that do not merit "conditional" licenses under NRS 453D, NAC 453D, and
7 R092-17.

8 255. Plaintiff is aggrieved by the decision of the Department to deny Plaintiff's application
9 without proper notice, substantial evidence, or compliance with. NRS 453D, NAC 453D, R092-17,
10 and other Nevada state laws or regulations.

11 256. There is no provision in NRS 453D, NAC 453D, or R092-17 allowing for an
12 administrative appeal of the Department's decision, and apart from injunctive relief, no plain, speedy,
13 and adequate remedy for the Department's improper actions.

14 257. Accordingly, Plaintiff petitions this Court for judicial review of the record on which
15 the Department's denial was based, including but not limited to:

- 16 a. A determination that the decision lacked substantial evidence;
17 b. A determination that the denial is void ab initio for non-compliance with
18 NRS 453D, NAC 453D, R092-17, and other Nevada state laws or
19 regulations; and
20 c. Other relief consistent with those determinations.

21 258. Plaintiff has found it necessary to retain the legal services of Parker, Nelson &
22 Associates, Chtd. to bring this action, and Plaintiff is entitled to recover its reasonable attorneys' fees
23 and costs therefor.

24 **SEVENTH CLAIM FOR RELIEF**

25 **(Petition for Writ of Mandamus)**

26 259. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

27 260. When a governmental body fails to perform an act "that the law requires" or acts in
28 an arbitrary or capricious manner, a writ of mandamus shall issue to correct the action. Nev. Rev.

1 Stat. § 34.160.

2 261. The Department failed to perform various acts that the law requires including but not
3 limited to:

4 a. Providing proper pre-hearing notice of the denial; and

5 b. Arbitrarily and capriciously denying the application for no legitimate reason.

6 262. The Department acted arbitrarily and capriciously in the denial by performing or
7 failing to perform the acts enumerated above and because, inter alia:

8 a. The Board lacked substantial evidence to deny the application; and

9 b. The Board denied the application solely to approve other competing
10 applicants without regard to the merit of Plaintiff's application.

11 263. These violations of the Defendants' legal duties were arbitrary and capricious actions
12 that compel this Court to issue a Writ of Mandamus directing the Department to review the
13 application on its merits and/or approve it.

14 264. As a result of the Defendants' unlawful and arbitrary and capricious actions, Plaintiff
15 has been forced to retain legal services of Parker, Nelson & Associates, Chtd. to prosecute this
16 action, and is therefore also entitled to its damages, costs in this suit, and an award of attorneys' fees
17 pursuant to NRS 34.270.

18 **EIGHTH CLAIM FOR RELIEF**

19 **(Violation of 42 USC 1983 by Defendants Jorge Pupo and Department of Taxation)**

20 265. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

21 266. The Fourteenth Amendment to the United States Constitution provides that "no state
22 [may] deprive any person of life, liberty, or property, without due process of law....nor shall any
23 State...deny to any person within its jurisdictions the equal protection of the laws."

24 267. Article 1, Section 8 of the Nevada Constitution provides that "[n]o person shall be
25 deprived of life, liberty, or property, without due process of law."

26 268. Plaintiff is a person within the meaning of the Nevada Constitution and the United
27 States Constitution guarantees of due process. Plaintiff's managers and members are also of African
28 American descent warranting strict scrutiny of Plaintiff's claim for a violation of 42 USC 1983.

1 269. Plaintiff and those similarly situated have a protected property interest in the
2 recreational license application process deriving from the mandatory statutory language couched in
3 NRS 453D, NAC453D and R092-17 as set forth above. See *Board of Regents v. Roth*, 408 U.S., 577
4 (1972) and *Goodisman v. Lyle*, 724 F.2d 818, 820 (9th Cir. 1984).

5 270. The arbitrary and illegal conduct of the DOT and Defendant JORGE PUPO have
6 deprived Plaintiff of the guarantees afforded by the Nevada Constitution and the United States
7 Constitution as set forth in paragraphs 266 and 267 above.

8 271. Plaintiff was not given a meaningful opportunity to be heard at a consequential time
9 which was fundamentally unfair and violated procedural and substantive due process as afforded by
10 the Nevada and United States Constitution.

11 272. Plaintiff's injury as described above by the failure of the DOT and Defendant PUPO
12 to follow the mandate of Nevada law explicitly set forth above is a result of Defendants' official
13 policy and/or custom to deprive Plaintiff and those similarly situated of the rights and entitlements
14 afforded to them under the Nevada and United States Constitution.

15 273. Defendants the DOT and PUPO conducted illegal and unconstitutional actions
16 described above under color of state Law.

17 274. While acting under color of state law, Defendants' actions described above where
18 the official policy and/or custom of Defendants to deprive Plaintiff and those similarly situated of
19 their constitutional rights afforded to them under the Nevada and United States Constitution,
20 specifically the 14th Amendment to the United States Constitution and Article 1, Section 8 of the
21 Nevada Constitution. Specifically, Defendants through Defendant PUPO and his subordinates,
22 directed the unconstitutional and illegal conduct in violation of the Nevada and United States
23 Constitution. Moreover, Defendants had direct and actual knowledge of the violations and/or were
24 deliberately indifferent to the constitutional violations that harmed Plaintiff.

25 275. The harm occasioned upon Plaintiff resulting from Defendants' illegal and
26 unconstitutional conduct, in addition, resulted from inadequate supervision, training, and screening
27 of agents/employees of the DOT.

28 276. As a direct and proximate result of Defendants' violations of Plaintiff's rights

1 afforded to him under the Nevada and United States Constitution, Defendants are liable to Plaintiff
2 for damages pursuant to 42 USC 1983. Moreover, because Defendant PUPO's conduct was reckless
3 and/or showed callous indifference to the federally protected rights of Plaintiff, punitive damages
4 should be awarded.

5 277. Moreover, pursuant 42 USC 1988, Plaintiff is entitled to its reasonable attorney's fees
6 and costs.

7 **NINTH CLAIM FOR RELIEF**

8 **(Unjust Enrichment)**

9 278. Plaintiff repeats and realleges all prior paragraphs as though fully set forth herein.

10 279. Plaintiff applied for recreational marijuana licenses in accordance with NRS Chapter
11 453D and the regulations and rules promulgated by the DOT.

12 280. Plaintiff applied for these licenses because NRS Chapter 453's mandate that did not
13 allow the DOT to "pick and choose" winners and losers at their whim, but provided specific,
14 mandatory criterion that the DOT was obligated to comply with in awarding the recreational
15 marijuana licenses.

16 281. Plaintiff paid to the DOT in excess of \$15,000 to apply for the recreational marijuana
17 licenses that as of the date of the filing of this complaint, the DOT has not returned.

18 282. In the event that this Court finds that Plaintiff is not entitled to the relief requested
19 in the first through fifth claims for relief, under the circumstances as alleged in this Complaint, it
20 would be unjust for the DOT to retain the benefit of Plaintiff's expenditures to apply for the
21 recreational marijuana licenses.

22 283. As a direct and proximate result of the DOT being unjustly enriched, Plaintiff has
23 incurred damages in excess of \$15,000.00.

24 **V.**

25 **PRAYER FOR RELIEF**

26 **WHEREFORE**, Plaintiff prays for judgment as follows:

- 27 1. For declaratory relief as set forth above;
28 2. For a preliminary and permanent injunction enjoining the enforcement of the denial;

3. For judicial review of the record and history on which the denial was based;
4. For the issuance of a writ of mandamus;
5. For compensatory and special damages as set forth herein;
6. For attorneys' fees and costs of suit; and
7. For all other and further relief as the Court deems just and proper.

VI.

JURY DEMAND

Trial by jury is hereby demanded on all claims and issues so triable

DATED this 28th day of January, 2020.

PARKER, NELSON & ASSOCIATES, CHTD.



THEODORE PARKER, III, ESQ.

Nevada Bar No. 4716

MAHOGANY TURFLEY, ESQ.

Nevada Bar No. 13974

2460 Professional Court, Suite 200

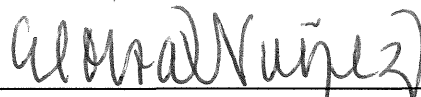
Las Vegas, Nevada 89128

*Attorneys for Plaintiff,
Nevada Wellness Center, LLC*

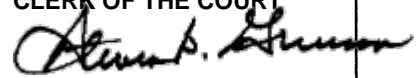
1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of the law office of PARKER,
3 NELSON & ASSOCIATES, CHTD., and that on this 28th day of January 2020, I served a true and
4 correct copy of the foregoing **AMENDED COMPLAINT AND PETITION FOR JUDICIAL**
5 **REVIEW OR WRIT OF MANDAMUS** on all parties currently on the electronic service list as set
6 forth below:

- 7 ☐ By placing an original or true copy thereof in a sealed envelope placed for collection and mailing
8 in the United States Mail, at Las Vegas, NV, postage prepaid, following ordinary business practices.
- 9 ☐ Facsimile transmission, pursuant to the amendment to the Eighth Judicial District Court Rule 7.26,
10 by faxing a true and correct copy of the same to each party addressed as follows:
- 11 ☐ By E-mail: by electronic mail delivering the document(s) listed above to the e-mail address(es) set
12 forth below on this date before 5:00 p.m.
- 13 ☒ By EFC: by electronic filing with the Court delivering the document(s) listed above via E-file & E-
14 serve (Odyssey) filing system.

15 

16 An employee of PARKER, NELSON & ASSOCIATES, CHTD.



1 **NOTC**
2 THEODORE PARKER, III, ESQ.
3 Nevada Bar No. 4716
4 **PARKER, NELSON & ASSOCIATES, CHTD.**
5 2460 Professional Court, Suite 200
6 Las Vegas, Nevada 89128
7 Telephone: (702) 868-8000
8 Facsimile: (702) 868-8001
9 Email: tparker@pnalaw.net

10 *Attorneys for Plaintiff,*
11 *Nevada Wellness Center, LLC*

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 In Re: D.O.T. Litigation,

Case No.: A-19-787004-B

Consolidated with:

A-18-785818-W
A-18-786357-W
A-19-786962-B
A-19-787035-C
A-19-787540-W
A-19-787726-C
A-19-801416-B

Dept. No.: XI

16 **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART**
17 **NEVADA WELLNESS CENTER, LLC'S MOTION TO COMPEL ON ORDER**
18 **SHORTING TIME**

19 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that an ***ORDER GRANTING IN PART AND DENYING IN***
21 ***PART NEVADA WELLNESS CENTER, LLC'S MOTION TO COMPEL ON ORDER***
22 ***SHORTING TIME*** was entered with the Court in the above-entitled matter on the 7th, day of

23 ///

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APP000268

1 February, 2020. A true and correct copy of which is attached hereto.

2 DATED this 10th day of February, 2020.

3 PARKER, NELSON & ASSOCIATES, CHTD.

4 

5 THEODORE PARKER, III, ESQ.
6 Nevada Bar No. 4716
7 2460 Professional Court, Suite 200
8 Las Vegas, Nevada 89128
9 *Attorneys for Plaintiff,*
10 *Nevada Wellness Center, LLC*

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of the law office of PARKER,
3 NELSON & ASSOCIATES, CHTD., and that on this 10th day of February, 2020, I served a true
4 and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART**
5 **AND DENYING IN PART NEVADA WELLNESS CENTER, LLC'S MOTION TO COMPEL**
6 **ON ORDER SHORTING TIME** on all parties currently on the electronic service list as set forth
7 below:

- 8 ☐ By placing an original or true copy thereof in a sealed envelope placed for collection and mailing
9 in the United States Mail, at Las Vegas, NV, postage prepaid, following ordinary business practices.
- 10 ☐ Facsimile transmission, pursuant to the amendment to the Eighth Judicial District Court Rule 7.26,
11 by faxing a true and correct copy of the same to each party addressed as follows:
- 12 ☐ By E-mail: by electronic mail delivering the document(s) listed above to the e-mail address(es) set
13 forth below on this date before 5:00 p.m.
- 14 ☒ By EFC: by electronic filing with the Court delivering the document(s) listed above via E-file & E-
15 serve (Odyssey) filing system.

16 
17 _____
18 An employee of PARKER, NELSON & ASSOCIATES, CHTD.

19 K:\Personal Directories\PARKER\Nevada Wellness Center\ETW (Lead Case)\pldg\NEO - NWC Mtn to Compel on OST.wpd



1 **ORDR**
2 THEODORE PARKER, III, ESQ.
3 Nevada Bar No. 4716
4 **PARKER, NELSON & ASSOCIATES, CHTD.**
5 2460 Professional Court, Suite 200
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7 Telephone: (702) 868-8000
8 Facsimile: (702) 868-8001
9 Email: tparker@pnalaw.net

10 *Attorneys for Plaintiff,*
11 *Nevada Wellness Center, LLC*

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 In Re: D.O.T. Litigation,

15 **Case No.: A-19-787004-B**

16 **Consolidated with:**

17 A-18-785818-W
18 A-18-786357-W
19 A-19-786962-B
20 A-19-787035-C
21 A-19-787540-W
22 A-19-787726-C
23 A-19-801416-B

24 **Dept. No.: XI**

25 **ORDER GRANTING IN PART AND DENYING IN PART NEVADA WELLNESS**
26 **CENTER, LLC'S MOTION TO COMPEL ON ORDER SHORTENING TIME**

27 Plaintiff, NEVADA WELLNESS CENTER, LLC's (hereinafter "NWC"), Motion to Compel
28 on Order Shortening Time on January 13, 2019, in Department XI, before the Honorable Judge
Elizabeth Gonzalez, Plaintiff, NWC appeared by and through their counsel of record, Theodore
Parker, III, Esq., of Parker, Nelson & Associates; Defendant, STATE OF NEVADA,
DEPARTMENT OF TAXATION (hereinafter "DOT"), appeared by and through its counsel of
record, Steve Shevorski, Esq., of the Office of the Nevada Attorney General;

The Court having reviewed the papers and pleadings on file herein, and having heard oral
arguments of the parties, and after taking a portion of the Motion under advisement and having
reviewed the DOT's privilege log at issue, this Court now makes the following Findings of Fact and
Conclusions of Law.

02-05-20A05:46 RCVD

APP000271

1 **FINDINGS OF FACT**

2 1. On May 10, 2019, the Discovery Commissioner recommended as follows:

3 ...that the State shall make all cell phones (personal - only if used for work
4 purposes - and/or business) of each such person that assisted in the processing
5 of applications for dispensary licenses and/or evaluated such license
6 applications, available for copying in the 10 business days after notice of entry
7 of this order at a location convenient to State and Manpower, and that the
8 State, in the presence of Plaintiff's computer expert, shall make 3 copies of the
9 data from each cell phone. In the event any such cell phones are not available,
10 the State shall file a sworn declaration regarding any cell phone that is not
11 available explaining why such cell phone is not available within 10 business
12 days after notice of entry of this order.

13 2. DOT filed an Objection to the Discovery Commissioner's Report and Recommendations,
14 which was denied by this Court on December 2, 2019, as reflected in an Order filed December 31,
15 2019.

16 3. On December 2, 2019, NWC requested DOT provide the cell phones at issue available for
17 inspections by December 13, 2019.

18 4. DOT failed to make the cell phones at issue available for inspection.

19 5. DOT produced a privilege log relevant to DOT's Eighth Supplemental Disclosures. On
20 December 26, 2019, NWC requested that DOT provide certain documents identified in said privilege
21 log as it was NWC's position that the privilege log was over inclusive and contrary to previously
22 entered orders, NRCP 26, and Nevada case law. DOT agreed to review the privilege log in response
23 to NWC's voiced concerns, but ultimately did not respond or produce the requested documents.

24 6. On January 8, 2020, NWC filed a Motion to Compel on Order Shortening Time seeking
25 the cell phones identified above and documents contained in DOT's privilege log. NWC argued that
26 the cell phones at issue, more specifically the information contained therein, were relevant and
27 within the custody, control, and possession of DOT. NWC also argued that the documents sought
28 from DOT's Eighth Supplemental Disclosure were not privileged under the deliberative process.
Further, even if privileged, NWC has an overriding need for the documents.

7. On January 10, 2020, DOT filed an Opposition to NWC's Motion to Compel on Order
Shortening Time. DOT argued that it did not have custody, control, or possession of the "Manpower"
cell phones, that NWC failed to request the phones pursuant to NRCP 34, that DOT had complied

1 with the May 10, 2019 Discovery Commissioner's Recommendations, and that the "Manpower" cell
2 phones were irrelevant. In regards to the documents sought by NWC, DOT argued the documents
3 are protected by the deliberative process and that NWC failed to show an overriding need for said
4 documents.

5 CONCLUSIONS OF LAW

6 1. NRCP16.1(a)(1)(B) requires that a party "must, without awaiting a discovery request,
7 provide to other parties: (B) A copy of, or a description by category and location of, all documents,
8 data compilations, and tangible things that in the possession, custody, or control of the party and
9 which are discoverable under NRCP 26(b)."

10 2. NRCP 26(b) provides that:

11 [p]arties may obtain discovery regarding any matter, not privileged, which is
12 relevant to the subject matter involved in the pending action, whether it
13 relates to the claim or defense of the party seeking discovery or to the claim
14 or defense of any other party, including the existence, description, nature,
15 custody, condition and location of any books, documents, or other tangible
16 things.

17 3. NRCP 34 requires parties to produce discoverable items within the parties'
18 possession, custody, or control. "The 'phrase 'possession, custody, or control' is disjunctive and only
19 one of the numerated requirements need be met." Kiser v. Pride Communs., Inc., 2011 U.S. Dist.
20 LEXIS 124124, 10-12 (D. Nev. Oct. 26, 2011)(citing Soto v. City of Concord, 162 F.R.D. 603, 619
21 (N.D.Cal. 1995)(quoting Cumis Ins. Society, Inc. v. South-Coast Bank, 610 F.Supp. 193, 196 (N.D.
22 Ind. 1985)). Thus, "actual possession" is not required. Soto, 162 F.R.D. at 619. Rather, Nevada
23 Courts have agreed with a majority of jurisdictions that a "party may be ordered to produce a
24 document in the possession of a non-party entity if that party has a legal right to obtain the document
25 or has control over the entity who is in possession of the document." Kiser, 2011 U.S. Dist. LEXIS
26 124124, at 10-12 (D. Nev. Oct. 26, 2011) citing Soto, 162 F.R.D. at 619 (internal citation omitted).

27 4. Courts have broadly interpreted "control" in the context of document production. See
28 Camden Iron & Metal, Inc. v. Marubeni Am. Corp., 138 F.RD. 438, 441 (D.N.J. 1991) ("Control is
defined as the legal right, authority or ability to obtain documents upon demand." (citations
omitted)). In Gerling Int'l Ins. Co. v. Comm'r of Internal Revenue, the Third Circuit established that

1 "control" is present for Rule 34(a) when a corporation either can secure documents from the related
2 entity to meet its business needs or acted with it in the transaction that gave rise to the suit. 839 F.2d
3 131, 140-41 (3d Cir. 1988); See also Camden Iron, 138 F.R.D. at 443. In Gerling, it was established
4 that a corporation can be required to produce documents from a sister company, when it acted with
5 its sister company in the transaction at issue. See Davis v. Gamesa Tech. Corp., 2009 U.S. Dist.
6 LEXIS 97507, 2009 WL 3473391, at *5-*6 (E.D. Pa. Oct. 29, 2009); See also Sanofi-Aventis v.
7 Sandoz, Inc., 272 F.R.D. 391, 394 (D.N.J. 2011).

8 5. The analysis of document production under the Rules of Civil Procedure is subject to a
9 broad approach, as the "rule is to be liberally, rather than narrowly, construed, and its provisions
10 have the force and effect of a statute." See 8 Charles A. Wright & Arthur R. Miller, Federal Practice
11 and Procedure § 2202 (1970). "A party may be required to produce documents and things that he
12 possesses even though they belong to a third person who is not a party to the action. And if a party
13 has possession, custody or control, he must produce documents and things even though the
14 documents and things are themselves beyond the jurisdiction of the court." (See Japan Halon Co.
15 v. Great Lakes Chem. Corp., 155 F.R.D. 626, 627-628 (N.D. Ind. 1993) *citing* 8 Charles A. Wright
16 & Arthur R. Miller, 8 Federal Practice and Procedure § 2210 (1970)).

17 6. NRCP 37(a)(1) provides:

18 On notice to other parties and all affected persons, a party may move for an order
19 compelling disclosure or discovery. The motion must include a certification that
20 the movant has in good faith conferred or attempted to confer with the person or
21 party failing to make disclosure or discovery in an effort to obtain it without court
22 action.

23 7. NRCP 37(a)(3)(A) provides:

24 if a party fails to make a disclosure required by Rule 16.1(a), 16.2(d), or
25 16.205(d), any other party may move to compel disclosure and for appropriate
26 sanctions.

27 8. NRCP 37(3)(B) provides:

28 party seeking discovery may move for an order compelling an answer,
designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or
31;

1 (ii) a corporation or other entity fails to make a designation under
2 Rule 30(b)(6) or 31(a)(4);

3 (iii) a party fails to answer an interrogatory submitted under Rule
4 33; or

5 (iv) a party fails to produce documents or fails to respond that
6 inspection will be permitted — or fails to permit inspection — as requested under
7 Rule 34.

8 9. Deliberative-process privilege “protects materials or records that reflect a government
9 official’s deliberative or decision-making process.” DR Partners v. Cty Comm’rs, 116 Nev. 616
10 (2000) (citing EPA v. Mink, 410 U.S. 73, 89 (1973), superceded on other grounds by 5 U.S.C.
11 552(a)(4)(B), (b)(1)). It thus “permits agency decision-makers to engage in that frank exchange of
12 opinions and recommendations necessary to the formulation of policy without being inhibited by fear
13 of later public disclosure.” Id. (internal citations and quotations omitted.)

14 10. Deliberative-process privilege applies where a documents is (1) predecisional and (2)
15 deliberative.

16 11. The deliberative-process privilege is not absolute. NLRB v. Sears, Roebuck & Co., 421
17 U.S. 132, 148, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975). Even if properly asserted, a litigant seeking
18 a document can overcome the privilege by demonstrating an overriding need for the document.
19 EPA v. Mink, 410 U.S. 73, 90-1, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1972). The ability of a private
20 litigant to override a privilege claim set up by the Government, with respect to an otherwise
21 disclosable document, may itself turn on the extent of the litigant's need in the context of the facts
22 of his particular case; or on the nature of the case. EPA v. Mink, 410 U.S., at 86 n. 13; Hickman v.
23 Taylor, 329 U.S. 495, 511-512 (1947); Jencks v. United States, 353 U.S. 657 (1957); United States
24 v. Nixon, 418 U.S. 683 (1974).

25 12. Based on the Court’s review of the privilege log relevant to DOT’s Eighth Supplemental
26 Disclosures, the deliberative-process privilege is generally applicable, but this privilege can be
27 potentially overcome if a party shows an overriding need for particular documents.
28

1 13. If any conclusions of law are properly findings of fact, or vice versa, they shall be treated
2 as if appropriately identified and designated.

3 **ORDER**

4 Based on the foregoing, **IT IS HEREBY ORDERED** that NWC's Motion to Compel on
5 Order Shortening Time is **GRANTED IN PART and DENIED IN PART**.

6 **IT IS FURTHER ORDERED** that NWC's Motion to Compel the cell phones, and
7 information obtained from the cell phones, is **GRANTED**.

8 **IT IS FURTHER ORDERED** that DOT shall produce the cell phones, as identified in the
9 Discovery Commissioner's May 10, 2019 Report Recommendations, and all information obtained
10 from the cell phones immediately.

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1 **IT IS FURTHER ORDERED** that NWC's Motion to Compel production of the documents
2 referenced in DOT's privilege log relevant to DOT's Eighth Supplemental Disclosures, is **DENIED**
3 **WITHOUT PREJUDICE** to allow NWC to renew its Motion related to particular documents
4 within the privilege log and to make a showing of an overriding need for the particular documents.


5 DATED this 5 day of ^{Feb} January, 2020.

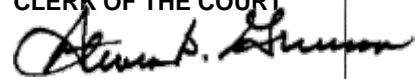
6
7 
DISTRICT COURT JUDGE
(CEH)

8 Submitted By:
9 **PARKER, NELSON & ASSOCIATES, CHTD.**

10 
11 THEODORE PARKER, III, ESQ.
12 Nevada Bar No. 4716
13 2460 Professional Court, Suite 200
14 Las Vegas, Nevada 89128
Attorneys for Plaintiff,
Nevada Wellness Center, LLC

15 Approved as to form.
16 **OFFICE OF THE ATTORNEY GENERAL**

17  #9256
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18 STEVE SHERVORSKI, ESQ.
19 Nevada Bar No.: 9256
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20 Las Vegas, Nevada 89101
Attorneys for Defendant
State of Nevada of Nevada, Department of Taxation



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Attorneys for Defendant
State of Nevada, Department of Taxation

HEARING REQUESTED

Date: February 21, 2020

Time: 9:00 a.m.

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DOT

Case No. A-19-787004-B
Dept. No. XI

CONSOLIDATED WITH:

A-18-785818-W
A-18-786357-W
A-19-786962-B
A-19-787035-C
A-19-787540-W
A-19-787726-C
A-19-801416-B

**DEPARTMENT OF TAXATION'S MOTION FOR STAY OF ORDER ON AN
ORDER SHORTENING TIME**

The State of Nevada ex rel. the Department of Taxation, by and through its counsel,
moves for a stay of this Court's order granting in part and denying in part Nevada Wellness

...

...

...

02-13-20P04:14 RCVD

Center, LLC's motion to compel on order shortening time, issued February 5, 2020. This motion is on an order shortening time.

DATED this 13th day of February, 2020.

AARON D. FORD
Attorney General

By: 

Steve Shevorsi (Bar No. 8256)
Chief Litigation Counsel

ORDER SHORTENING TIME

Upon Declaration of counsel and good cause appearing therefor:

IT IS HEREBY ORDERED that the hearing of the above-titled matter will be heard
21st on the ____ day of Feb, 2020 at 9a.m., or as soon thereafter as
counsel may be heard.

DATED this 14 day of Feb, 2020.


DISTRICT COURT JUDGE 

1 **EDCR 2.26 DECLARATION OF STEVE SHEVORSKI**

2 1. I am Chief Litigation Counsel for the Nevada Office of the Attorney General.
3 In that capacity, I am counsel of record for the State of Nevada ex rel. the Department of
4 Taxation in case no. #A-19-787004-B, and the cases consolidated therewith, A-18-785818-
5 W, A-19-786962-B, A-18-786357-W, A-19-787035-C, A-19-787540-W, A-19787726-C and A-
6 19801416-W.

7 2. I make this declaration in support of the Department of Taxation's (i) motion
8 for stay of order and (ii) request for an order shortening time.

9 3. This Court issued its order granting in part and denying in part Nevada
10 Wellness Center, LLC's motion to compel on order shortening time on February 5, 2020.
11 Nevada Wellness Center served notice of the order on the Department of Taxation two days
12 later, on February 7.

13 4. The order requires the Department of Taxation to seize and produce the
14 personal cell phones of six persons "immediately." These persons are the so-called
15 Manpower Contractors who scored the applications in the 2018 competition for retail
16 marijuana establishment licensure in Nevada.

17 5. The Department of Taxation intends to file, as soon as possible, an emergency
18 petition for writ of mandamus in the Nevada Supreme Court. The petition will seek
19 reversal or vacatur of this Court's order.

20 6. The Department of Taxation asks this Court to stay enforcement of its order
21 while the writ action is pending in the Nevada Supreme Court.

22 7. Good cause exists to shorten the time for hearing this motion. Discovery closes
23 on March 13, 2020. The Department of Taxation has no legal power to seize the private
24 cell phones of third parties such as the Manpower Contractors, let alone search private
25 property for discoverable information. Undoubtedly, Plaintiff will, at the close of discovery,
26 then move for evidentiary sanctions. As a result, the only way for the Department of
27 Taxation to obtain meaningful Supreme-Court review of the order is for enforcement of the
28 order to be stayed.

8. Further, good cause exists to grant the motion for stay. Nevada Wellness Center will *not* suffer irreparable harm in the event a stay is granted. Nevada Wellness Center never even explains upon what basis it believes relevant, discoverable public information exists on the Manpower Contractors private cell phones. Nevada Wellness Center can also easily issue a subpoena duces tecum as an appropriate mechanism to obtain information from third parties such as the Manpower Contractors.

9. This request is made in good faith and without dilatory motive.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 13th day of February, 2020.

STEVE SHEVORSKI

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

This Court should stay enforcement of its order compelling the Department of Taxation to immediately seize and search the private cell phones of third parties, the Manpower Contractors. A stay here is proper. Even assuming the Department of Taxation had the power to seize private property, the object of the writ (that it has no legal right or obligation to do so under the Nevada Rules of Civil Procedure) would be defeated if the stay were denied because the harm – seizing private individuals' cell phones and producing them to other parties – will have occurred by the time the writ could be heard. The Department of Taxation would suffer irreparable harm because it is being compelled to participate in a constitutional harm, the private search and seizure of private property of a third party. Conversely, Plaintiff Nevada Wellness Center, LLC would not suffer irreparable harm since they have an adequate remedy to seek the private cell phones through a subpoena duces tecum and Nevada Wellness Center has never divulged what public, relevant information exists on the private cell phones of these third parties.

The Department of Taxation is likely to succeed on its writ. Even if the Manpower Contractors were employees of the Department of Taxation (they're not), Nevada Wellness Center would still be required to use a *subpoena duces tecum* to require the production of the Manpower Contractors' private cell phones.

II. Procedural history

Nevada Wellness Center asserts claims for legal and equitable relief in connection with the Department's denial of its applications for retail recreational marijuana licenses. Nevada Wellness Center, LLC's Am. Compl. & Pet. Judicial Review or Writ of Mandamus ¶¶ 216-283. It alleges that the Department of Taxation hired and trained eight individuals (the "Manpower independent contractors") to grade its and others' license applications. *Id.* ¶ 188.

Nevada Wellness Center filed a motion to compel the production of the Manpower independent contractors' business cell phones, as well as their personal cell phones if they

1 used them for business. This Court issued an order granting the motion to compel on
2 February 5, 2020. Order Granting in Part & Denying in Part Nevada Wellness Center,
3 LLC's Mot. Compel on Order Shortening Time 7 [hereinafter "Order"]. Nevada Wellness
4 Center served a notice on the order on the Department of Taxation two days later. The
5 Department of Taxation intends to file a writ in the Nevada Supreme Court.

6 **III. Argument**

7 In assessing a motion for a stay pending appeal, Nevada courts assess four factors:

8 (1) whether the object of the appeal will be defeated if the stay is
9 denied, (2) whether [the moving party] will suffer irreparable or
10 serious injury if the stay is denied, (3) whether [the responding
11 party] will suffer irreparable or serious injury if the stay is
12 granted, and (4) whether [the moving party] is likely to prevail
13 on the merits in the appeal.

14 *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004). No one factor
15 carries more weight than the others. *Id.* While the Department of Taxation need not prove
16 all four factors to be entitled to the relief sought, in this case all of the factors weigh in
17 favor of granting the stay.

18 The object of the writ will be defeated if a stay is denied. By seeking a writ on the
19 order, the Department of Taxation is seeking to shield the Manpower Contractors from
20 having their private property seized by the State of Nevada. Even if the Department of
21 Taxation had the legal power to obtain the private phones, it will have to duplicate and
22 produce them to Nevada Wellness Center and, potentially, other litigants who request the
23 phones' contents. At that point the damage is done. A favorable decision in the Nevada
24 Supreme Court would not result in unseizing and unproducing the phones' contents, so the
25 purpose of the writ would be defeated. Indeed, in that scenario the writ could be held to be
26 moot, undermining the Department of Taxation's ability to obtain any kind of judicial
27 review of the order.

28 The Department of Taxation would suffer irreparable harm if a stay were denied.
The order commands that the Department of Taxation "produce the cell phones . . . and all
information obtained from the cell phones *immediately*." Order, *supra*, at 6 (emphasis

1 added). The plain terms of the order require the Department of Taxation to seize and
2 produce the phones before the Nevada Supreme Court would have had time to rule on the
3 Department of Taxation's writ. That would result in harm that could not be redressed by
4 a favorable decision in the high court.

5 Nevada Wellness Center would not suffer irreparable harm if a stay were issued.
6 The Nevada Supreme Court has recognized that "a mere delay in pursuing discovery and
7 litigation normally does not constitute irreparable harm." *Mikohn Gaming*, 120 Nev. at
8 253, 89 P.3d at 39. A delay in discovery will not even occur here since Nevada Wellness
9 Center could simply subpoena the phones. *Worse still*, Nevada Wellness Center has not
10 even demonstrated with any admissible evidence why it even believes relevant, public
11 information exists on these private cell phones.

12 Finally, the Department of Taxation is likely to succeed on the merits. **First**,
13 Nevada Wellness Center's motion to compel was procedurally improper because there was
14 no preexisting discovery request. *See* NEV. R. CIV. P. 37(a); *see also Okada v. Eighth Jud.*
15 *Dist. Ct.*, 134 Nev. 6, 12, 408 P.3d 566, 571 (2018) ("A motion to compel discovery is an
16 enforcement mechanism used when someone fails to comply with a discovery request.").
17 **Second**, in its motion Nevada Wellness Center argued that it was enforcing the discovery
18 commissioner's report and recommendation, but the Department of Taxation was already
19 in compliance with the report and recommendation. **Third**, no authority exists that the
20 Department of Taxation has an obligation to produce the private cell phones of the
21 Manpower Contractors. Indeed, even if they were employees (they are not), Nevada
22 Wellness Center would have to use a subpoena duces tecum to require the production of
23 information on those phones. That is because "a company does not possess or control the
24 text messages from the personal phones of its employees and may not be compelled to
25 disclose text messages from employees' personal phones." *Lalumiere v. Willow Springs*
26 *Care, Inc.*, No: 1:16-cv-3133-RMP, 2017 WL 6943148, at *2 (E.D. Wash. Sept. 18, 2017).¹

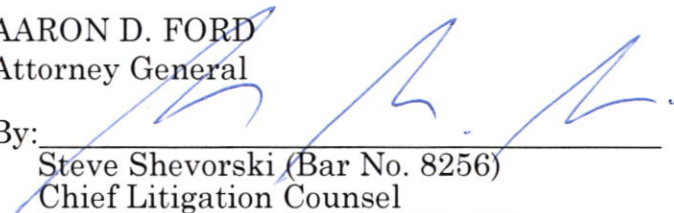
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28 ¹ These bases for reversal are illustrative, not exhaustive, and the Department
reserves the right to raise all applicable arguments in the Nevada Supreme Court.

1 **IV. Conclusion**

2 For these reasons, this Court should stay enforcement of its order compelling the
3 Department of Taxation to immediately seize and produce information on the Manpower
4 Contractor's private cell phones.

5 Respectfully submitted February 13, 2020.

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/s/ Traci Plotnick
Traci Plotnick, an employee of the
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