

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of the Supreme Court

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.

**RESPONDENTS' SUPPLEMENTAL APPENDIX
VOLUME I**

Respectfully submitted by:

THEODORE PARKER, III, ESQ. (Bar No. 4716)
MAHOGANY TURFLEY, ESQ. (Bar No. 13974)
PARKER, NELSON & ASSOCIATES, CHTD.
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128
(702) 868-8000
Attorneys for Real Party in Interest
Nevada Wellness Center, LLC

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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 2nd day of March, 2020.

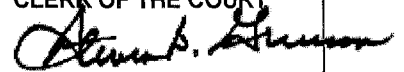
I certify that some of the participants in the case are not currently registered electronic filing system users. For those parties service was made by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada to the following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

Aaron D. Ford
Nevada Attorney General
Steve Shevorski, Esq.
Chief Litigation Counsel
Kiel B. Ireland, Esq.
Deputy Attorney General
Office of the Attorney General
555 E. Washington Avenue,
Suite 3900
Las Vegas, Nevada 89101
Attorneys for Petitioner
State of Nevada ex rel. Department of
Taxation

Eighth Judicial District Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

Honorable Elizabeth Gonzalez
Regional Justice Center
Department 11
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent

/s/ Eloisa Nuñez
An employee of PARKER, NELSON & ASSOCIATES, CHTD.



1 **MOT**
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@pnlaw.net
10 *Attorneys for Plaintiff*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

3/8/19
930 AM

10 NEVADA WELLNESS CENTER, LLC, a
11 Nevada Limited Liability Company

Case No.: A-19-787540-W
Dept. No.: XVIII

12 Plaintiff,

13 vs.

14 STATE OF NEVADA, DEPARTMENT OF
15 TAXATION; and DOES I through X; and
16 ROE CORPORATIONS I through X,
17 inclusive.

Defendants.

PLAINTIFFS' EMERGENCY MOTION
FOR ORDER REQUIRING THE SMC,
MS. KAREN CRONKITA AND MR.
DAMON HERNANDEZ OF
DEPARTMENT OF TAXATION TO
PRESERVE AND/OR IMMEDIATELY
TURN OVER RELEVANT
ELECTRONICALLY STORED
INFORMATION FROM SERVERS,
STAND-ALONE COMPUTERS, AND
CELL PHONES ON ORDER
SHORTENING TIME

18 NOW APPEARS Plaintiff, NEVADA WELLNESS CENTER, by and through its
19 counsel of record, Theodore Parker, III., and hereby moves the Court to enter an order requiring
20 the out-of-state marijuana consultant employed by Defendants (the State Marijuana or "SMC")
21 to preserve relevant electronically stored information from servers, stand-alone computers,
22 and/or cell phones. Thirty-one licenses with an estimated street value of \$465 million dollars
23 were awarded on December 5, 2019¹.

24 Plaintiff is informed and believes that the SMC did all of the processing and rating of the
25 licensees' applications at an out-of-state office. The proposed order is required to ensure the
26

27 ¹ See December 11, 2018 Review Journal, Section B, p. 6B ("Dispensary licenses in Clark County sell on
28 the secondary market for between \$10 million and \$20 million said John Lamb, president of the Las Vegas Medical

1 preservation of electronic data that is of utmost significance to prove critical facts regarding the
2 unreasonable and unconstitutional denial of Plaintiff's applications for recreational marijuana
3 retail stores in Clark County, Nevada. Plaintiff also seeks an Order that Defendant preserve all
4 electronically stored information from servers, stand-alone computer and for all cell phones of
5 Ms. Karen Cronkita and Damon Hernandez, Chief Investigator with the Department of
6 Taxation.

7 DATED this 17th day of February, 2019.

8 PARKER, NELSON & ASSOCIATES, CHTD.

9 
10 THEODORE PARKER, III, ESQ.

Nevada Bar No.: 4716

2460 Professional Court, Suite 200

Las Vegas, Nevada 89128

Telephone: (702) 868-8000

Facsimile: (702) 868-8001

Email: tparker@pnlaw.net

Attorneys for Plaintiff

28 Marijuana Association.”)

1 ORDER SHORTENING TIME

2 It appearing to the satisfaction of the Court, and good cause appearing therefore, IT IS
3 HEREBY ORDERED that the time for hearing on PLAINTIFFS' EMERGENCY MOTION
4 FOR ORDER REQUIRING THE SMC, MS. KAREN CRONKITA AND MR. DAMON
5 HERNANDEZ OF DEPARTMENT OF TAXATION TO PRESERVE AND/OR
6 IMMEDIATELY TURN OVER RELEVANT ELECTRONICALLY STORED
7 INFORMATION FROM SERVERS, STAND-ALONE COMPUTERS, AND CELL
8 PHONES be and the same is hereby shortened to the 8th day of March, 2019, at the

9 hour of 930 a.m. in ~~Department XVIII~~ in front of the

10 DATED this 26 day of February, 2019. Discovery Commissioner

11 Aimée Duran
12 DISTRICT COURT JUDGE
13 acting DISCOVERY COMMISSIONER

14 Respectfully submitted by:
15 PARKER, NELSON & ASSOCIATES, CHTD.

16 THEODORE PARKER, III, ESQ.
17 Nevada Bar No.: 4716
18 2460 Professional Court, Suite 200
19 Las Vegas, Nevada 89128
20 Telephone: (702) 868-8000
21 Facsimile: (702) 868-8001
22 Email: tparker@pnalaw.net
23 Attorneys for Plaintiff
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25
26
27
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1 **DECLARATION OF THEODORE PARKER, III, ESQ. IN SUPPORT OF PLAINTIFFS'**
2 **EMERGENCY MOTION FOR ORDER REQUIRING THE SMC, MS. KAREN**
3 **CRONKITA AND MR. DAMON HERNANDEZ OF DEPARTMENT OF TAXATION**
4 **TO PRESERVE AND/OR IMMEDIATELY TURN OVER RELEVANT**
5 **ELECTRONICALLY STORED INFORMATION FROM SERVERS, STAND-ALONE**
6 **COMPUTERS, AND CELL PHONES, STAND-ALONE COMPUTERS, AND CELL**
7 **PHONES ON ORDER SHORTENING TIME**

8 STATE OF NEVADA)
9) ss.
10 COUNTY OF CLARK)

11 THEODORE PARKER, III, ESQ., being first duly sworn, under oath, deposes and says
12 that:

13 1. Declarant is an attorney licensed to practice law in the State of Nevada and
14 partner with the law firm of PARKER, NELSON & ASSOCIATES, counsel for Plaintiffs in
15 this matter;

16 2. Declarant is informed and believes that the Nevada Department of Taxation
17 retained an out-of-state consultant to rank the recently-filed marijuana applications. The Nevada
18 Department of Taxation has thus far refused to provide the applicants with any information
19 about their rankings. The estimated value of the thirty-one Clark County licenses is
20 approximately \$465 million.

21 3. On January 19, 2019, Declarant and owners of Nevada Wellness Center met with
22 Ms. Cronkita and Mr. Hernandez. During the meeting Declarant was informed that Ms.
23 Cronkita and Mr. Hernandez would not provide information on training the evaluators or the
24 method of scoring.

25 4. Moreover, Ms. Cronkita and Mr. Hernandez informed Declarant that they were
26 instructed not to answer any questions regarding how the scoring was done. Ms. Cronkita and
27
28

1 Mr. Hernandez also refused to tell Declarant who instructed them to not answer any such
2 questions.

3 5. It is essential to immediately preserve the electronic data of the out-of-state
4 consultant in order to avoid irreparably prejudicing Plaintiff.

5 6. This matter cannot be heard in the ordinary course because some of this data is
6 on readily disposable electronic instruments.

7 7. It is essential to immediately preserve any electronically stored data relative to
8 communication between Ms. Cronkita and Mr. Hernandez and the out-of-state consultant.

9 7. I make this declaration under penalty of perjury.
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14 THEODORE PARKER, III, ESQ.
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I

STATEMENT OF FACTS

In 2018, Plaintiff, NEVADA WELLNESS CENTER, LLC, submitted applications for recreational marijuana retail store licenses to own and operate recreational marijuana retail stores in the following jurisdictions: unincorporated Clark County, Nevada; Las Vegas, Nevada; North Las Vegas, Nevada; and Reno, Nevada. Under Nevada law, the State of Nevada's Department of Taxation (the "Department") was responsible for allocating the new licenses of recreational marijuana retail stores to jurisdictions within each county and was required to rank the applications in accordance with applicable regulations and statutes. The highest ranking applications were to be awarded licenses. Upon information and belief, the Department delegated these responsibilities to an unidentified State Marijuana Consultant ("SMC") that offices outside of Nevada. The applications were supposed to be ranked by specified criteria set forth below.

Prior to the 2018 application process with the Department, Plaintiff was previously scored and ranked in the 2015 licensing procedure, pursuant to NRS 453A, in conjunction with a medical marijuana establishment permit application. **In 2015, Plaintiff received a score of 198.62 and was ranked as the highest applicant for a medical marijuana dispensary in Las Vegas, Nevada** and Plaintiff was the seventh-highest ranked applicant for its license in the City of Henderson, Nevada. A copy of the 2015 Medical Marijuana Dispensaries Scores and Rankings by Jurisdiction is attached as Exhibit 1. The factors used for the 2015 rankings were substantially similar to the factors to be used by the Department for the 2018 rankings for the allocated licenses. The only additional factor was the diversity consideration. Plaintiff is the only one hundred percent (100%) minority owned applicant.

On or about December 5, 2018, despite its prior exceptional ranking, Plaintiff was informed by the Department that **all** of its applications to operate recreational marijuana retail stores were denied. Plaintiff is informed and believes that the Department improperly granted "conditional" licenses to applicants that were ranked substantially lower than the highest rated Plaintiff on the 2015 rankings. Because substantially the same criteria were supposed to be

1 used for the 2015 rankings and the 2018 rankings, it is stunning that Plaintiff went from first to
2 a ranking that did not qualify for a license and that three applicants that were dozens of spots
3 below Plaintiff in the 2015 rankings were awarded licenses.

4 According to press reports and public filings, the following applicants were given
5 licenses in Clark County:

- 6 1. Essence/Green Thumb—8 licenses
- 7 2. Tap Roots—7 licenses
- 8 3. Green Growth Brands—7 licenses

9 The entire industry is shocked both because disparity between the 2015 rankings and the 2018
10 rankings and because it was not anticipated that any single applicant could get more than 2 or 3
11 licenses. To quote the Las Vegas Medical Marijuana Association, Vegas Medical Marijuana
Association, “distribution should have been more disbursed.”²

12 As a result, on January 15, 2019, Plaintiff initiated the present action for declaratory
13 relief, injunctive relief, and constitutional violations of procedural due process, substantive due
14 process, and equal protection. Plaintiff also sought a petition for judicial review and petition for
15 writ of mandamus. Plaintiff is informed and believes that the SMC’s electronic devices,
16 including computer servers, stand-alone computers, hard drives, laptops, tablets, thumb drives,
17 cell phones, and similar devices holding electronically stored information contain critical
18 evidence regarding Plaintiff’s claims. This evidence will show how the rankings were made. If
19 approved, an expert computer consultant who can download this electronically stored
20 information if the devices and passwords are provided should be retained/appointed.
21 Downloading this data—essentially, making copies of the relevant devices—will ensure this
22 potentially critical evidence is preserved and available in this case. A copy of the proposed
23 order requested by Plaintiff is attached as Exhibit 2.

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27 ² Essence issued a press release on December 11, 2018 stating it was awarded 8 licenses. The Review
28 Journal reported on December 11, 2018 that Tap Roots got 7 licenses and Green Growth 7 licenses. December 11,
2018 Review Journal, Section B, p. 6B.

1 It is equally important that their members of the Department of Taxation working with
2 SMC be ordered to preserve all electronically stored information relative to its communication
3 of SMC and the manner in which these applicators were evaluated.

4 As set forth in the proposed order, Plaintiff requests the preservation and/or immediate
5 production of electronically stored information:

- 6 - Within 10 days of the entry of the order, the SMC shall make available to Plaintiff for
7 copying any servers or stand-alone computers, including external hard drives, laptops,
8 tablets, thumb drives, and similar devices containing electronically stored information;
- 9 - Plaintiff's counsel, the Department's counsel, and their respective computer consultants
10 shall meet and confer to discuss the best way to facilitate the copying process;
- 11 - If the SMC has a pre-existing organizational chart, it shall provide the same to Plaintiff's
12 counsel within three business days of the entry of the order;
- 13 - Within three business days of the entry of the order, the SMC shall provide a list of all
14 personnel who assisted in the processing and/or evaluation of applications for dispensary
15 licenses and a list of the cell phone numbers, including but not limited to personal cell
16 phone numbers, for each such person;
- 17 - The SMC shall also designate up to five persons from this list that the SMC believes
18 were primarily involved in the processing and/or evaluation of license applications;
- 19 - Within three business days of receiving the forgoing list, Plaintiff shall be allowed to
20 take the telephonic deposition of the Rule 30(b)(6) representative for the SMC to
21 identify the names and job descriptions of all those involved on behalf of the SMC in
22 assisting in the processing and/or evaluating of applications for dispensary licenses (the
23 purpose of the 30(b)(6) deposition is to identify persons whose cell phone data may
24 contain relevant, discoverable materials to ensure that all such data is preserved;
- 25 - Within 10 business days of the entry of the order, the SMC shall make available for
26 copying all cell phones (business and personal) of each person that assisted in the
27 processing and/or evaluation of dispensary applications;
- 28 - In the event that the SMC claims that a cell phone is not available, it shall file a sworn
declaration from the person whose cell phone is unavailable explaining why such phone
is unavailable (Plaintiff will have the option of conducting a telephonic deposition of
any employees claiming that their cell phone is unavailable);
- Neither Plaintiff's counsel nor Plaintiff or its agents or employees shall access the cell
phone data until the Department and Plaintiff agree on a procedure to protect non-
discoverable, confidential information on the cell phone (if the parties cannot agree, they
will submit their dispute to the Court);
- Plaintiff's counsel are **not** restricted from accessing the server data, including data from
any stand-alone computers, tablets, external hard drives, thumb drives, or similar
devices but shall maintain all such data as confidential for attorneys' eyes only
(including review by Plaintiff's General Counsel) pending the issuance of a
confidentiality order, if a Confidentiality Order is requested by Plaintiff, the Department,
or the SMC.

- 1
2 - While the ruler of governing discovery require Defendant to preserve and maintain all
3 electronically stored information (ESI) related to this case, Plaintiff seeks an Order
4 which specifically requires Ms. Cronkita and Mr. Hernandez to preserve such ESI
5 related to their communication with SMC.

6 II

7 ARGUMENT

8 A. Despite the common law duty of preservation, critical evidence is often lost 9 and/or destroyed.

10 Bass-Davis held that there is a common law duty to “preserve evidence” when a “party
11 is on notice when litigation is reasonably foreseeable . . .;” holding:

12 In other words, when presented with a spoliation allegation, the threshold
13 question should be whether the alleged spoliator was under any
14 obligation to preserve the missing or destroyed evidence. The duty to
15 preserve springs from a variety of sources, **including ethical obligations**,
16 statutes, regulations, and common law. Courts, including this court, that
17 adhere to a common-law duty to preserve evidence have held that a party
18 is required to preserve documents, tangible items, and information
19 relevant to litigation that are reasonably calculated to lead to the
20 discovery of admissible evidence. Thus, the prelitigation duty to preserve
21 evidence is imposed once a party is on “notice” of a potential legal claim.
22 While few courts have expounded on the concept of notice, those that
23 have conclude that **a party is on notice when litigation is reasonably
24 foreseeable.**

25 Bass-Davis v. Davis, 122 Nev. 442, 449-50, 134 P.3d 103, 108 (2006) (Bold added). Our High
26 Court cited the following decisions for the bolded proposition. Blinzer v. Marriott Intern., Inc.,
27 81 F.3d 1148 (1st Cir. 1996); Rice v. U.S., 917 F.Supp. 17, 20 (D.D.C. 1996); Shaffer v. RWP
28 Group, Inc., 169 F.R.D. 19, 24 (E.D.N.Y. 1996). Like Bass-Davis, all of these cases held that it
was the reasonable prospect of potential litigation—not actual litigation—that triggered the
obligation to preserve evidence.

Despite the clear duty to preserve evidence, there have been dozens of Nevada cases
where a litigant did not preserve relevant evidence—either through inadvertence or
intentionally. See, e.g., Foster v. Dingwall, 126 Nev. ___, 227 P.3d. 1042 (2010); Bahena v.
Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. 26, 235 P.3d 592 (2010); Stubli v. Big D.
Intern. Trucks, Inc., 810 P.2d 785 (1991); Young v. Johnny Ribeiro Building, 106 Nev. 88, 787

1 P.2d 777 (1990). In each of the foregoing cases, an order to preserve and turn over relevant
2 evidence could have avoided acrimonious sanctions debates.

3 In this case, there are serious concerns about the preservation of the evidence. First, the
4 defendant does not have the evidence—it is out of state in the possession of SMC. Second,
5 some types of the evidence have mysteriously disappeared in like cases, e.s., Tom Brady deleted
6 cell phone messages in the NFL deflate-gate investigation. Losing any of the critical electronic
7 records of the SMC would irreparably prejudice Plaintiff's ability to prove its case.

8 **B. Plaintiff is entitled to an order requiring the preservation and immediate**
9 **production of relevant electronically stored information from computer**
10 **servers and cell phones.**

11 Bass-Davis v. Davis, 122 Nev. 442, 449-50, 134 P.3d 103, 108 (2006) holds that
12 “documents, tangible items, and information relevant to litigation that are reasonably calculated
13 to lead to the discovery of admissible evidence” must be preserved and produced. In this case,
14 the electronic data described above is both relevant to the litigation and potentially unavailable
15 at a future date without immediate preservation. Using the requested cell phones as an example,
16 the NFL deflategate investigation of Tom Brady highlights how critical cell phone data can
17 disappear. See NFL Mgt. Council v. NFL Players Assoc., 820 F.3d 527, 544 (2016) (“Finally,
18 any reasonable litigant would understand that the destruction of evidence, revealed just days
19 before the start of arbitration proceedings, would be an important issue. It is well established
20 that the law permits a trier of fact to infer that a party who deliberately destroys relevant
21 evidence that party had an obligation to produce did so in order to conceal damaging
22 information from the adjudicator.”) The proposed preservation order will ensure that such
23 electronic data does not disappear in this case.

24 **C. The parameters of Plaintiff's requested preservation and turn-over order**
25 **are reasonable.**

26 Plaintiff is not requesting anything that it is not otherwise entitled to receive in the
27 regular course of this litigation. Given the \$465 million stakes of this litigation and the reality
28 that electronically stored information is regularly lost or deleted, Plaintiff simply seeks an order
ensuring that this information is preserved and available. Plaintiff has proposed safeguards

1 protecting potentially confidential or privileged information on all cell phones and is willing to
2 cooperate with the Department to protect the reasonable interests of all involved. This is not a
3 novel request, as Plaintiff's counsel have had similar requests granted by other courts in the
4 Eighth Judicial District.

5 **III**

6 **CONCLUSION**

7 Plaintiff has filed a lawsuit against the Department relating to the unreasonable and
8 unconstitutional denial of its applications for recreational marijuana retail stores in Clark
9 County, Nevada. The thirty-one licenses in dispute have an estimated value of \$465 million
10 dollars. Defendant hired an out-of-state marijuana consultant ("SMC") to do all the ratings of
11 hundreds of applicants. The SMC's electronic devices, including computer servers, stand-alone
12 computers, hard drives, laptops, tablets, thumb drives, cell phones, and similar devices holding
13 electronically stored information contain critical evidence regarding Plaintiff's claims. The
14 proposed electronic data preservation and turn-over order is required to ensure that potentially
15 significant electronically stored information is not lost. Accordingly, and for all of the forgoing
16 reasons, the instant motion should be granted.

17 DATED this 17th day of February, 2019.

18 **PARKER, NELSON & ASSOCIATES, CHTD.**


19 
20 THEODORE PARKER, III, ESQ.
21 Nevada Bar No.: 4716
22 2460 Professional Court, Suite 200
23 Las Vegas, Nevada 89128
24 Telephone: (702) 868-8000
25 Facsimile: (702) 868-8001
26 Email: tparker@pnalaw.net
27 *Attorneys for Plaintiff*
28

EXHIBIT “1”

RSA000012

MEDICAL MARIJUANA DISPENSARIES

Scores and Rankings by Jurisdiction

*Revised 12/21/2015 3pm

*Results not shown below reflect the confidentiality of NRS 453A.700 and applicant did not provide a consent to release.

CARSON CITY				
Rank	Business Name	Score	Provisional License Yes / No	
1	Nevada Organix LLC	209.83	Y	
2	CONSENT TO RELEASE NOT PROVIDED		Y	
3	NNV Service III, LLC	193.35	N	
4	NNV Services II, LLC	193.01	N	
5	SSeat Investments LLC	186.66	N	
6	CapWell, LLC	178.3	N	
7	BioNeva Innovations of Carson City, LLC	161.36	N	
8	CONSENT TO RELEASE NOT PROVIDED		N	
9	The MedMen of Nevada 2, LLC	150.99	N	
10	CONSENT TO RELEASE NOT PROVIDED		N	
11	Green Grasshaper	15.67	N	

CHURCHILL COUNTY				
Rank	Business Name	Score	Provisional License Yes / No	
1	CONSENT TO RELEASE NOT PROVIDED		Y	

CLARK COUNTY- HENDERSON				
Rank	Business Name	Score	Provisional License Yes / No	
1	Livfree Wellness, LLC	208.3	Y	
2	Integral Associates II, LLC	204.03	Y	
3	Clear River, LLC	201.8	Y	
4	CONSENT TO RELEASE NOT PROVIDED		Y	
5	WaveSeer of Nevada	199.38	Y	
6	Henderson Organic Remedies LLC	194	N	
7	Nevada Wellness Center	193.62	N	
8	NuLeaf Henderson Dispensary, LLC	192.37	N	
9	The Clinic Nevada, LLC	191.01	N	
10	Gravitas Henderson LLC	182.4	N	
11	Sagebrush Wellness, LLC	172.66	N	
12	Serenity Wellness Center, LLC	169.13	N	
13	360 Global Sciences, Inc.	164.71	N	
14	CONSENT TO RELEASE NOT PROVIDED		N	
15	BioNeva Innovations of Henderson, LLC	163.03	N	
16	CONSENT TO RELEASE NOT PROVIDED		N	
17	The MedMen of Nevada 2, LLC	161	N	
18	CONSENT TO RELEASE NOT PROVIDED		N	
19	Twelve Twelve, LLC	147.76	N	
20	Green Life Dispensary, Inc.	144.93	N	
21	Agua Street LLC	142.27	N	
22	CONSENT TO RELEASE NOT PROVIDED		N	
23	Via Vida LLC	128.69	N	
24	Unifern	125.63	N	
25	Unifern	124	N	
26	Greenway Health Community, LLC	112.23	N	
27	CONSENT TO RELEASE NOT PROVIDED		N	

CLARK COUNTY- LAS VEGAS				
Rank	Business Name	Score	Provisional License Yes / No	
1	Nevada Wellness Center	198.62	Y	
2	Medifarm, LLC	197.72	Y	
3	NuLeaf CLV Dispensary, LLC	189.71	N***	
4	CONSENT TO RELEASE NOT PROVIDED		Y	
5	Silver Sage Wellness, LLC	187.01	Y	
6	Paradise Wellness	186.84	Y	
7	Clark NMMSD, LLC DBA NuVeda	185.45	Y	
8	CONSENT TO RELEASE NOT PROVIDED		Y	
9	CONSENT TO RELEASE NOT PROVIDED		Y	
10	Desert Aire Wellness	172.33	Y	
11	Serenity Wellness Center, LLC	171.8	Y	
12	Nevada Wellness Project, LLC	169	Y	
13	Acres Medical, LLC	167.3	Y**	
14	CONSENT TO RELEASE NOT PROVIDED		N	
15	Samantha's Remedies	163.26	N	
16	Nevada Cares, LLC	161.56	N	
17	CONSENT TO RELEASE NOT PROVIDED		N	
18	CONSENT TO RELEASE NOT PROVIDED		N	
19	CONSENT TO RELEASE NOT PROVIDED		N	
20	THC Nevada LLC	154.67	N	
21	CONSENT TO RELEASE NOT PROVIDED		N	
22	Red Rock Wellness LLC	153.96	N	
23	CONSENT TO RELEASE NOT PROVIDED		N	
24	CONSENT TO RELEASE NOT PROVIDED		N	
25	CONSENT TO RELEASE NOT PROVIDED		N	
26	CONSENT TO RELEASE NOT PROVIDED		N	
27	CONSENT TO RELEASE NOT PROVIDED		N	
28	QualCan of Las Vegas, LLC	151.29	N	
29	Cannabis Renaissance Group LLC	150.65	N	
30	CONSENT TO RELEASE NOT PROVIDED		N	

*Reallocated provisional registration issued pursuant to Senate Bill 276 from the 2015 Legislative Session.

**Provisional registration issued per court order.

***Provisional registration rescinded/withdrawn per court order.

RSA000013

MEDICAL MARIJUANA DISPENSARIES

Scores and Rankings by Jurisdiction

*Revised 12/21/2015 3pm

31	CONSENT TO RELEASE NOT PROVIDED		N
32	The MedMen of Nevada 2, LLC	148.33	N
33	CONSENT TO RELEASE NOT PROVIDED		N
34	Physis One LLC	143.82	N
35	Buffalo Center Medical Advocates	142.5	N
36	Primo Dispensary	137.33	N
37	CONSENT TO RELEASE NOT PROVIDED		N
38	Diversified Modalities Retail Ltd.	124.66	N
39	Green Leaf Farms Holdings Inc.	115.27	N
40	M'Life Wellness, LLC	113.67	N
41	CONSENT TO RELEASE NOT PROVIDED		N
42	Blossum Group, LLC	111.67	N
43	CONSENT TO RELEASE NOT PROVIDED		N
44	CONSENT TO RELEASE NOT PROVIDED		N
45	CONSENT TO RELEASE NOT PROVIDED		N
46	Valley Healing Group Inc.	96.53	N
47	CONSENT TO RELEASE NOT PROVIDED		N
48	CONSENT TO RELEASE NOT PROVIDED		N
49	CONSENT TO RELEASE NOT PROVIDED		N

CLARK COUNTY- MESQUITE			
Rank	Business Name	Score	Provisional License Yes / No
1	CONSENT TO RELEASE NOT PROVIDED		Y

CLARK COUNTY- NORTH LAS VEGAS			
Rank	Business Name	Score	Provisional License Yes / No
1	Waveser of Las Vegas	197.71	Y
2	Tryke Companies SO NV, LLC	192.97	Y
3	Cheyenne Medical, LLC	191.07	Y
4	Clark NMSD, LLC DBA NuVeda	187.1	Y
5	Green Therapeutics LLC	178.33	N
6	NLV-1 LLC	164.2	N
7	360 Global Sciences, Inc.	163.37	N
8	Mountainside Health Center NV LLC	160.98	N
9	NLV Health and Wellness LLC	154	N
10	CONSENT TO RELEASE NOT PROVIDED		N
11	CONSENT TO RELEASE NOT PROVIDED		N
12	CONSENT TO RELEASE NOT PROVIDED		N
13	NLVD, LLC	137.94	N
14	Lone Mountain Partners, LLC	133.82	N
15	CONSENT TO RELEASE NOT PROVIDED		N
16	CONSENT TO RELEASE NOT PROVIDED		N
17	CONSENT TO RELEASE NOT PROVIDED		N
18	Greenway Health Community North, LLC	110.23	N
19	CONSENT TO RELEASE NOT PROVIDED		N
20	CONSENT TO RELEASE NOT PROVIDED		N
21	Medical Cannabis Healing LLC	78.01	N

CLARK COUNTY- UNINCORPORATED CLARK COUNTY			
Rank	Business Name	Score	Provisional License Yes / No
1	Tryke Companies SO NV, LLC	212.97	Y
2	CONSENT TO RELEASE NOT PROVIDED		Y
3	CONSENT TO RELEASE NOT PROVIDED		Y
4	MM Development Company, LLC	203.58	Y
5	Livfree Wellness, LLC	201.64	Y
6	Medifarm, LLC	201.04	Y
7	Medifarm, LLC	200.71	Y
8	Clear River, LLC	197.46	Y
9	CONSENT TO RELEASE NOT PROVIDED		Y
10	CONSENT TO RELEASE NOT PROVIDED		Y
11	The Clinic Nevada, LLC	190.68	Y
12	NuLeaf Clark Dispensary, LLC	189.03	Y
13	CONSENT TO RELEASE NOT PROVIDED		Y
14	CONSENT TO RELEASE NOT PROVIDED		Y
15	CONSENT TO RELEASE NOT PROVIDED		Y
16	Euphoria Wellness LLC	176.32	Y
17	Gravitas Nevada LTD	176.03	Y
18	CONSENT TO RELEASE NOT PROVIDED		Y
19	Just Quality LLC	172.86	Y*
20	Just Quality LLC	171.19	N
21	CONSENT TO RELEASE NOT PROVIDED		N
22	CONSENT TO RELEASE NOT PROVIDED		Y*
23	Polaris Dispensary, LLC	163.67	N
24	CONSENT TO RELEASE NOT PROVIDED		Y*
25	CONSENT TO RELEASE NOT PROVIDED		Y*
26	CONSENT TO RELEASE NOT PROVIDED		N
27	The MedMen of Nevada	151.67	Y*
28	QualCan, LLC	150.95	N
29	CONSENT TO RELEASE NOT PROVIDED		Y*
30	CONSENT TO RELEASE NOT PROVIDED		N
31	Las Vegas Wellness Center, Inc.	143.56	N
32	Global Harmony, LLC	141.26	Y*
33	Nevada Medical Marijuana Dispensary, Inc.	137.18	Y*
34	Camelot NV LLC	132.32	N
35	CONSENT TO RELEASE NOT PROVIDED		N

*Reallocated provisional registration issued pursuant to Senate Bill 276 from the 2015 Legislative Session.

**Provisional registration issued per court order.

***Provisional registration rescinded/withdrawn per court order.

RSA000014

MEDICAL MARIJUANA DISPENSARIES

Scores and Rankings by Jurisdiction

*Revised 12/21/2015 3pm

36	CONSENT TO RELEASE NOT PROVIDED		N
37	NXTGEN Wellness, LLC	117.01	N

NYE COUNTY			
Rank	Business Name	Score	Provisional License Yes / No
1	CONSENT TO RELEASE NOT PROVIDED		Y
2	MM Development Company, LLC	206.93	N
3	Nye Natural Medicinal Solutions, LLC	186.1	N
4	Options Medical Center Pahrump, LLC	166.96	N
5	NCCMM, LLC	136.95	N
6	CONSENT TO RELEASE NOT PROVIDED		N

STOREY COUNTY			
Rank	Business Name	Score	Provisional License Yes / No
1	CONSENT TO RELEASE NOT PROVIDED		Y

WASHOE COUNTY- RENO			
Rank	Business Name	Score	Provisional License Yes / No
1	Livfree Wellness Reno, LLC	207	Y
2	CONSENT TO RELEASE NOT PROVIDED		Y
3	MediFarm I, LLC	203.68	Y
4	The Clinic Nevada, LLC	196.33	Y*
5	CONSENT TO RELEASE NOT PROVIDED		N
6	The Cannavative Group, LLC	193.37	N
7	NNV Services IV, LLC	191.99	N
8	CONSENT TO RELEASE NOT PROVIDED		N
9	NuLeaf Reno Dispensary, LLC	189.37	N
10	CapWell, LLC	171.23	N
11	NevWA, LLC	156.66	N
12	The MedMen of Nevada 2, LLC	154.99	N
13	The Canopy Reno, Inc.	153.41	N
14	Naturally Nevada LLC	150.73	N
15	CONSENT TO RELEASE NOT PROVIDED		N
16	A New Leaf Wellness Center, LLC	146.6	N
17	High Sierra Holistics	122.05	N
18	CONSENT TO RELEASE NOT PROVIDED		N
19	Wells and Taylor, LLC	88.99	N
20	Herbal Care, LLC	83.91	N
21	CONSENT TO RELEASE NOT PROVIDED		N
22	CONSENT TO RELEASE NOT PROVIDED		N
23	Green Tree Therapy, LLC	62.69	N
24	CONSENT TO RELEASE NOT PROVIDED		N
25	Green Grasshopper	21.67	N

WASHOE COUNTY- SPARKS			
Rank	Business Name	Score	Provisional License Yes / No
1	Silver State Relief, LLC	225.19	Y
2	Tryke Companies Reno, LLC	202.03	Y
3	Greenleaf Wellness, Inc.	194	Y*
4	NNV Services IV, LLC	193	N
5	The MedMen of Nevada 2, LLC	152.93	N
6	Common Sense Botanicals	143.97	N
7	CONSENT TO RELEASE NOT PROVIDED		N
8	CONSENT TO RELEASE NOT PROVIDED		N
9	CONSENT TO RELEASE NOT PROVIDED		N

WASHOE COUNTY- UNINCORPORATED WASHOE			
Rank	Business Name	Score	Provisional License Yes / No
1	Nevada Organix LLC	212.49	Y
2	Tryke Companies Reno, LLC	204.69	Y
3	NuLeaf Incline Dispensary, LLC	191.7	Y
4	The Clinic Nevada, LLC	191.01	Y
5	SSeat Investments LLC	188.34	Y
6	Washoe Dispensary, LLC	173.67	Y*
7	BioNeva Innovations of Washoe County, LLC	163.04	N
8	CONSENT TO RELEASE NOT PROVIDED		N
9	CONSENT TO RELEASE NOT PROVIDED		N
10	CONSENT TO RELEASE NOT PROVIDED		N
11	CONSENT TO RELEASE NOT PROVIDED		N

*Reallocated provisional registration issued pursuant to Senate Bill 276 from the 2015 Legislative Session.

**Provisional registration issued per court order.

***Provisional registration rescinded/withdrawn per court order.

RSA000015

EXHIBIT “2”

RSA000016

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

THEODORE PARKER, III, ESQ.
Nevada Bar No.: 4716
PARKER, NELSON & ASSOCIATES, CHTD.
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128
Telephone: (702) 868-8000
Facsimile: (702) 868-8001
Email: tparker@pnalaw.net
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA WELLNESS CENTER, LLC a
Nevada Limited Liability Company,

Case No.: A-19-787540-W
Dept. No.: XVIII

Plaintiff,

vs.

STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES I through X; and
ROE CORPORATIONS I through X,
inclusive.

Defendants.

**ORDER GRANTING EMERGENCY
MOTION FOR ORDER REQUIRING
THE SMC TO PRESERVE AND/OR
IMMEDIATELY TURN OVER
RELEVANT ELECTRONICALLY
STORED INFORMATION FROM
SERVERS, STAND-ALONE
COMPUTERS, AND CELL PHONES**

Plaintiff, NEVADA WELLNESS CENTER, having filed an Emergency Motion For Preservation Of Electronic Data and having given the counsel for Department of Taxation notice of such request, and it appearance that the Department of Taxation retained a consultant to evaluate and rate marijuana dispensary license applications (hereinafter referred to as the SMC or "State Marijuana Consultant"), and good cause appearing for the preservation of electronic data of the SMC, it is hereby ORDERED, ~~ADJUDGED~~ and DECREED as follows:

ORDERED that the SMC ("State Marijuana Consultant") shall make any servers or any standalone computers (including laptops, iPads or thumb drives) in its possession available for copying by Plaintiff in the next 10 business days after execution of this order. To allow Plaintiff

1 and the State (i.e., the Nevada Department of Taxation) to determine the most efficient way to
2 allow the EDI expert for Plaintiff to make such copies, the SMC shall make its primary IT
3 person available for a conference call with counsel for the Plaintiff, counsel for the State (and
4 counsel for the SMC if desired by the SMC) to identify in general the types of servers
5 (including standalone computers and laptops) that will be subject to the copying protocol and
6 types and amount of data maintained on such servers (including standalone computers and
7 laptops). The conference call shall be held no later than 5 business days after execution of this
8 order.

9 ORDERED that the SMC shall provide Plaintiff a list of personnel that assisted in the
10 processing of all applications for dispensary licenses and/or evaluated such license applications
11 and provide a list of the cell phone numbers (including but not limited to personal cell phone
12 numbers) for each such person within 3 business days of after execution of this order. At the
13 same time, the SMC shall also designate up 5 persons on such list that the SMC believes were
14 primarily involved on behalf of the SMC in the processing of all applications for dispensary
15 licenses and/or the evaluation of such license applications. If the SMC has a pre-existing
16 organizational chart, it shall provide the same to Plaintiff at such time but the SMC is not
17 obligated to create an organizational chart. Within 3 business days after receiving the foregoing
18 list from the SMC, Plaintiffs shall be allowed to take the telephonic deposition of the person
19 most knowledgeable (hereinafter "PMK") for the SMC to identify the names and job
20 descriptions of all persons (including temporary employees, if any) that were involved on behalf
21 of SMC in assisting in the processing of applications for dispensary licenses and/or evaluating
22 such licenses. The purpose of the PMK deposition is to identify persons whose cell phone data
23 may contain relevant discoverable materials to ensure that all such data is preserved.

24 ORDERED that the SMC shall make all cell phones of each such person that assisted in
25 the processing of applications for dispensary licenses and/or evaluated such license applications
26 available for copying in the 10 business days after execution of this order at a location
27 convenient to SMC. The SMC shall be required to produce both business and personal cell
28 phones for each such person. In the event any such cell phones are not available, the SMC shall

1 file a sworn declaration from the person whose cell phone is not available explaining why such
2 cell phone is not available within 10 business days after execution of this order. If Plaintiff so
3 desires, Plaintiff may conduct a telephonic deposition or any person claiming that a cell phone
4 is not available to be copied to explore the validity of the reason that the cell phone is
5 supposedly unavailable.

6 ORDERED that neither Plaintiff's counsel nor Plaintiff or their agents or employees
7 shall access the cell phone data until the State and Plaintiff agrees to a procedure to protect non-
8 discoverable confidential data or the Court allows such access by subsequent order. The SMC
9 is authorized to inform any such persons whose cell phone data is copied that any and all
10 personal information will either be returned or destroyed at a later date. Plaintiff's counsel and
11 Plaintiff and their agents or employees are not restricted from accessing server data or any data
12 from standalone computers (including laptops, iPads and thumb drives) but shall maintain all
13 such data as confidential for attorneys' eyes only (including review by General Counsel for
14 Plaintiff) pending issuance of a confidentiality order, if a confidentiality order is requested by
15 Plaintiff, the State or SMC.

16 ORDERED that the SMC is directed to maintain any and all documents in its possession
17 regarding the processing of applications for dispensary licenses and/or evaluation of such
18 license applications, including but not limited to the following: (1) any and all communications
19 between the SMC and the State; (2) any and all directions provided by the State to the SMC
20 regarding the processing of applications or the evaluation of the applications; (3) any and all
21 communications between the SMC and any applicant (or with the attorneys or consultants for an
22 applicant) regarding any subject matter; (4) the contract, if any, between the SMC and the State
23 and all invoices, if any, sent by the SMC to the State; (5) any and all preliminary rankings of
24 applicants by jurisdiction or otherwise by SMC that pre-date the final ranking; (6) any and all
25 work papers (including notes) used by the SMC in the processing of applications for dispensary
26 licenses and/or evaluation of such license applications; (7) any and all spread sheets created by
27 the SMC regarding the applications for dispensary licenses; and (8) any and all notes of formal
28 or informal meetings among SMC personnel regarding the processing of applications for

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

1 dispensary licenses and/or evaluation of such license applications. The State shall not be
2 required to produce the documents set forth in categories 1 through 8 at an expedited pace but
3 shall be required to identify the same with specificity at the Rule 16.1 conference, and

4 ORDERED that the State shall serve a copy of this Order upon the SMC within one
5 business day of its execution.

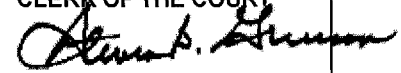
6 DATED this ____ day of February, 2019.
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DISTRICT JUDGE

Respectfully submitted by:

PARKER, NELSON & ASSOCIATES, CHTD.

THEODORE PARKER, III., ESQ.
Nevada Bar No. 4716
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128



OPPS
AARON D. FORD
Attorney General
Robert E. Werbicky (Bar No. 6166)
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3105 (phone)
(702) 486-3416 (fax)
rwerbicky@ag.nv.gov
*Attorneys for Defendants
State of Nevada Department of Taxation*

DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA WELLNESS CENTER, LLC, a
Nevada Limited Liability Company,

Plaintiff,

vs.

STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES I through X; and ROE
CORPORATIONS I through X, inclusive.

Defendants.

Case No. A-19-787540-W
Dept. No. XVIII

**OPPOSITION TO EMERGENCY MOTION
FOR ORDER REQUIRING THE SMC, MS.
KAREN CRONKITA AND MR. DAMON
HERNANDEZ OF DEPARTMENT OF
TAXATION TO PRESERVE AND/OR
IMMEDIATELY TURN OVER RELEVANT
ELECTRONICALLY STORED
INFORMATION FROM SERVERS, STAND-
ALONE COMPUTERS, AND CELL PHONES
ON ORDER SHORTENING TIME**

Date of Hearing: March 8, 2019
Time of Hearing: 9:30 a.m.

The STATE OF NEVADA, DEPARTMENT OF TAXATION by and through their counsel,
AARON D. FORD, Attorney General and ROBERT WERBICKY, Deputy Attorney General, hereby
make a SPECIAL APPEARANCE and files its Opposition to Plaintiff's Emergency Motion for Order
Requiring the SMC, Ms. Karen Cronkita [sic] and Mr. Damon Hernandez of Department of Taxation to
Preserve and/or Immediately Turn Over Relevant Electronically Stored Information From Servers,
Stand-alone Computers, and Cell Phones on Order Shortening Time.

This opposition is based on the attached Points and Authorities, all papers and pleadings on file
herein, and any argument allowed at a hearing on this matter.

...

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

A. The Applications for Retail Marijuana Stores

As is well known, once recreational marijuana usage became legal in Nevada, the Legislature limited the number of store licenses that could be issued. NRS 453D.210. In 2014 there were 66 Marijuana Retail Store licenses available. There were 198 applications submitted for these 66 licenses. In this application period, one out of every three applications resulted in a license being issued.

On July 5, 2018 the Department posted its intent to accept applications in September 2018. From September 7, 2018 until September 20, 2018 the Department of Taxation Marijuana Enforcement Division accepted applications for Marijuana Retail Store licenses. In this application period, by statute, there were only 64 licenses available state-wide. Only 61 conditional licenses were issued.¹ Some of the 61 licenses were issued in jurisdictions that don't currently allow for marijuana sales.²

The coveted licenses were in Clark County where only 31 licenses were available. Ten (10) licenses were allotted to Unincorporated Clark County, ten (10) were allotted to the City of Las Vegas, six (6) were allotted to the City of Henderson,³ and five (5) were allotted to the City of North Las Vegas. Zero (0) licenses were available in Mesquite, Nevada.

The Department had a contract with a company called Manpower to provide personnel for temporary employment. The Department used this contract to secure six (6) temporary workers to grade the 462 applications. These employees are usually referred to as the Manpower Employees. After training, the Manpower Employees graded the applications. These grades were put onto a spreadsheet and totaled. The spreadsheet was submitted to the Department to ensure there were no math errors and then rank the applications based on the total scores. The Department then awarded the conditional licenses based on the total score until the number of licenses in any jurisdiction was exhausted.

¹ Churchill County had one license allocated, but the Department didn't receive any applications for Churchill County. Pershing County had two licenses allocated, but the Department only received one application for Pershing County. Lincoln County had two licenses allocated, but the Department only received one application.

² The Department does not take the local jurisdiction's position on legality when issuing license. If awarded a license in such a jurisdiction, the licensee has 12 month to convince the jurisdiction to change their mind and become operational.

³ At the time, the City of Henderson had a moratorium on the issuance of new licenses by the city.

1 On December 5, 2018 the Department notified the applicants individually whether they were
2 awarded a license or not. Given the limited number of licenses available approximately 87% (or 401 of
3 462) applications) were denied. The competition was even fiercer in Clark County. In those jurisdictions
4 312 applications were submitted but only 31 conditional licenses issued. Thus, over 90% of the
5 applications were rejected.

6 As such, Nevada Wellness Center, LLC was just one of the hundreds of disappointed applicants
7 who were not awarded a licenses in 2018.

8 **B. The Score Review Meeting**

9 Pursuant to regulation NAC 453D.274(2) Nevada Wellness Center, LLC requested a review of
10 the scoring information. This review occurred on or about January 19, 2019.⁴ Ms. Karalin Cronkhite
11 and Mr. Damon Hernandez were the two Department of Taxation employees designated to conduct the
12 score review.

13 NRS 453D.274(3) strictly limits the scope of the score review. It is not appropriate for an
14 applicant to ask questions about the process during this review. In fact, the regulation specifically
15 prohibits the Department employees from discussing the scoring process. NRS 453D.274(3) provides,
16 in part:

17 The employee designated by the Department to conduct the review shall
18 not discuss or comment on the scores, the review of the application by the
Department or any other application submitted to the Department.

19 The score review only allows the applicant to see the scores received in the various categories that make
20 up the total score issued.

21 **C. The Instant Motion**

22 The Plaintiff is seeking an emergency preservation order which was filed on February 27, 2019.
23 The Plaintiff's only factual basis for seeking a preservation order is contained in the affidavit of Theodore
24 Parker, III, Esq.. He states:

25 3. On January 19, 2019, Declarant and owners of Nevada Wellness
26 Center met with Ms. Cronkita [sic] and Mr. Hernandez. During the
27 meeting Declarant was informed that Ms. Cronkita [sic] and Mr.

28 ⁴ The Plaintiff filed the instant litigation on January 15, 2019. The Complaint still has not been properly served.

1 Hernandez would not provide information on training the evaluators or the
2 method of scoring.

3 4. Moreover, Ms. Cronkita [sic] and Mr. Hernandez informed
4 Declarant that they were instructed not to answer any questions regarding
5 how the scoring was done. Ms. Cronkita [sic] and Mr. Hernandez also
6 refused to tell Declarant who instructed them to not answer any such
7 questions.

8 Affidavit of Theodore Parker, III, Esq., p. 4, ln. 20 – p. 5, ln. 3.

9 As noted, these employees are prohibited by law from discussing these issues. Thus, Plaintiff is
10 requesting a preservation order solely on the basis that Department employees **followed the law**.

11 II. Legal Argument

12 A. The Plaintiff is not entitled to a preservation order.

13 The Sedona Principles and Sedona commentaries⁵ thereto are the leading authorities on electronic
14 document retrieval and production. *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418, 424
15 (D.N.J. 2009); *William A. Gross Const. Assc., Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136
16 (S.D.N.Y.2009) (“[t]his Court strongly endorses The Sedona Conference Cooperation Proclamation”);
17 *John B. v. Goetz*, 531 F.3d 448 (6th Cir.2008) (following principles); *Aguilar v. Immigration and*
18 *Customs Enforc. Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y.2008) (same).

19 Comment 5 f of the Sedona Principles deals with preservation orders and provides, in part:

20 In general, courts should not issue a preservation order over
21 objection unless the party requesting such an order demonstrates its
22 necessity, which may require an evidentiary hearing in some
23 circumstances. Because all litigants are obligated to preserve relevant
24 information in their possession, custody, or control, **a party seeking a
25 preservation order must first demonstrate a real danger of evidence
26 destruction, the lack of any other available remedy, and that a
27 preservation order is an appropriate exercise of the court's discretion
28 and is tailored to require only preservation of information relevant to
the claims and defenses.**

Such orders violate the principle that responding parties are
responsible for preserving and producing their own ESI. See Principle 6.
More generally, preservation orders should rarely be issued over

⁵ *The Sedona Principles*, Third Edition: Best Practices, Recommendations & Principles for Addressing
Electronic Document Production, 19 Sedona Conf. J. 1 (2018). The copyright notice indicates the Journal
is available on a complementary basis to courthouses.

1 objection, and only after a full and fair opportunity to present
2 evidence and argument. This is particularly important when dealing with
3 ESI that may be transitory, not reasonably accessible, or not susceptible to
4 reasonable preservation measures. The 2006 Advisory Committee Note to
5 Rule 26(f) instructs that “the requirement that the parties discuss
6 preservation does not imply that courts should routinely enter preservation
7 orders. A preservation order entered over objections should be narrowly
8 tailored. Ex parte preservation orders should issue only in exceptional
9 circumstances.”

10 (emphasis added).

11 The Plaintiff has not provided any evidence demonstrating a real danger of evidence destruction,
12 that no other remedy is available, or such an order would be appropriate. The Department is objecting
13 and Plaintiff did not provide any relevant evidence in support of its request.

14 The Sedona Principals also discuss the obligation to preserve evidence generally. Sedona
15 Principle 5 provides:

16 The obligation to preserve electronically stored information requires
17 reasonable and good faith efforts to retain information that is expected to
18 be relevant to claims or defenses in reasonably anticipated or pending
19 litigation. However, it is unreasonable to expect parties to take every
20 conceivable step or disproportionate steps to preserve each instance of
21 relevant electronically stored information.

22 Comment 5.e. provides:

23 The preservation obligation for ESI does not impose heroic or unduly
24 burdensome requirements on parties. Rather, the obligation to preserve
25 normally requires reasonable and good faith efforts. As discussed in
26 Comment 3.a., the identification of data sources that may be subject to
27 preservation and production should be discussed among the parties early
28 in the case. If the parties are unable to agree on the scope of preservation,
they should raise the issue with the court at the Rule 16(b) conference. See
also Comment 4.b.

An obligation to undertake extraordinary efforts should be imposed only
when a court, after consideration of proportionality principles, determines
that there is a substantial likelihood that the ESI exists; that it is directly
relevant to a claim or defense and would not remain in existence absent
intervention; that the ESI (or its substantial equivalent) cannot be found in
another, more accessible data source; and that its preservation is likely to
materially advance the resolution of the litigation in a just, efficient, and
relatively inexpensive manner.

There is no need for a preservation order because there is no indication the Department is destroying or
losing data. Indeed, the Department is already preserving potentially relevant data.

1 Further, the Sedona Principles clearly show the Plaintiff is demanding discovery far out of
2 proportion to legitimate discovery purposes. Sedona Principle 2 provides:

3 When balancing the cost, burden, and need for electronically stored
4 information, courts and parties should apply the proportionality standard
5 embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which
6 requires consideration of the importance of the issues at stake in the action,
7 the amount in controversy, the parties' relative access to relevant
8 information, the parties' resources, the importance of the discovery in
9 resolving the issues, and whether the burden or expense of the proposed
10 discovery outweighs its likely benefit.

11 Comment 2 d further provides:

12 Evaluating the need to produce ESI requires that a balance be struck
13 between the burdens and need for ESI, taking into account the
14 technological feasibility and realistic costs involved.

15 Discovery burdens should be proportional to the amount in controversy
16 and the nature of the case, including consideration of the importance of
17 issues at stake in the litigation. See Comment 2.a. In fact, Rule
18 26(g)(1)(B)(iii) requires counsel to certify that discovery requests are
19 proportional. **If proportionality is not observed, discovery costs may
20 prevent the just, speedy, and inexpensive determination of litigation as
21 Rule 1 contemplates.**

22 Costs cannot be calculated solely in terms of the expense of computer
23 technicians to retrieve the ESI, but must factor in other litigation costs,
24 including the accessibility of the ESI, the interruption and disruption of
25 routine business processes and IG practices, and the costs of reviewing the
26 ESI. These burdens on information technology personnel and the resources
27 required to review ESI for relevance, privilege, confidentiality, and privacy
28 should be considered in any calculus of whether to allow discovery, and,
if so, under what terms. **In addition, the non-monetary costs (such as the
invasion of privacy rights, risks to business and legal confidences, and
risks to privileges) should be considered.**

(emphasis added). Thus, the relevance of the phone data to the Plaintiff's allegations should be examined
before a preservation order is issued. Further, the non-monetary impact of the Plaintiffs' requests should
also be explored.

25 B. The Plaintiff has not met its burden.

- 26 1. The Plaintiff has not shown any likely information on the phones is relevant to
27 their allegations.

28 ...

1 The Plaintiff's motion does not establish what specific electronic information may support any
2 allegation made in its Complaint or in the Motion. In fact, the alleged basis for the preservation and/or
3 turnover is the fact the Department **complied with the law**. Obviously, this is absurd. The Plaintiff has
4 failed to provide anything but rank, unsubstantiated speculation as to what exists on the cell phones or
5 other electronic devices. Given the allegations in the Complaint, the request made by Plaintiff is
6 completely out of proportion to the burdens imposed.

7 **2. The burdens imposed by Plaintiffs' requests.**

8 **i. Forensic imaging is only very rarely employed.**

9 Forensic imaging of devices an extraordinary step. An oft quoted Sedona principle is:

10 [c]ivil litigation should not be approached as if information systems were
11 crime scenes that justify forensic investigation at every opportunity to
12 identify and preserve every detail.... [M]aking forensic image backups of
13 computers is only the first step of an expensive, complex, and difficult
14 process of data analysis that can divert litigation into side issues and
satellite disputes involving the interpretation of potentially ambiguous
forensic evidence.

15 *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008) (quoting The Sedona Principles: Best Practices,
16 Recommendations & Principles for Addressing Electronic Production, Second Edition, 34, 47 (2007),
17 available at <https://thesedonaconference.org/publication/The%20Sedona%20Principles>).⁶

18 The *Goetz* went on to hold forensic imaging is only to be employed very rarely. The *Goetz* court
19 held a lower court "committed a clear error in judgment" in compelling forensic imaging. The court
20 explained:

21 There is less clarity, however, surrounding the question of a district court's
22 authority to compel the forensic imaging and production of computer hard
23 drives as a means by which to preserve relevant electronic evidence.
24 Because litigants are generally responsible for preserving relevant
25 information on their own, such procedures, if at all appropriate, should be
26 employed in a very limited set of circumstances. Cf. *The Sedona*
27 *Principles, supra*, at 33 (noting that, because all litigants are obligated to
preserve relevant information in their possession, preservation orders
generally must be premised on a demonstration that a real danger of
evidence destruction exists, a lack of any other available remedy, and a
showing that the preservation order is an appropriate exercise of the court's

28 ⁶ *Goetz* seems to be cited heavily in electronic discovery cases in federal courts.

1 discretion). In this case, the district court ordered the forensic imaging
2 predominantly for preservation purposes, explaining that “[t]hese Orders
3 were to protect against the Defendants’ destruction of responsive
4 information in light of the Defendants’ persistent refusals to produce ESI
5 in violation of the Court’s orders.” In so doing, the district court committed
6 a clear error in judgment.

7 *Goetz, supra*. 531 F.3d at 459 (6th Cir. 2008). After the *Goetz* court noted a party may voluntarily chose
8 to forensically image information, it went on to explain:

9 Nevertheless, “[c]ourts have been cautious in requiring the mirror imaging
10 of computers where the request is extremely broad in nature and the
11 connection between the computers and the claims in the lawsuit are unduly
12 vague or unsubstantiated in nature.” *Balboa Threadworks*, 2006 WL
13 763668, at *3; *see also Balfour Beatty Rail, Inc. v. Vaccarello*, No. 3:06-
14 CV-551-J-20MCR, 2007 WL 169628, at *2-*3 (M.D.Fla. Jan.18, 2007);
15 *Diepenhorst v. City of Battle Creek*, No. 1:05-CV-734, 2006 WL
16 1851243, at *2-*4 (W.D. Mich. June 30, 2006). As the Tenth Circuit has
17 noted, albeit in an unpublished opinion, mere skepticism that an opposing
18 party has not produced all relevant information is not sufficient to warrant
19 drastic electronic discovery measures. *See McCurdy Group, LLC v. Am.*
20 *Biomedical Group, Inc.*, 9 Fed.Appx. 822, 831 (10th Cir.2001).

21 *Goetz, supra*, 531 F.3d at 459-60. As noted above, the connection between the phones and the claims
22 made by Plaintiff is extremely vague and entirely unsubstantiated. The Plaintiff’s request for imaging is
23 extremely broad as well as intrusive in nature.

24 Mere skepticism that a party has not produced relevant information is not a proper basis for
25 forensic imaging or does it even warrant a preservation order. The case of *Matrix Partners VIII, LLP v.*
26 *Nat. Res. Recovery, Inc.*, No. 1:08-CV-547-TH, 2009 WL 10677430 (E.D. Tex. June 5, 2009) provides:

27 As previously stated, compelled forensic imaging is a drastic measure that
28 “should be employed in a very limited set of circumstances.” *John B. [v.*
29 *Goetz]*, 531 F.3d at 459. And, mere skepticism that a party has not
30 produced all relevant information is insufficient to justify such a procedure.
31 *Id.* at 460. Such skepticism is the basis for Matrix’s request to compel
32 forensic mirror imaging of the computer hard drives belonging to
33 Defendants Dan Bochsler, Jim Lowden, Tracy Edwards, and Don Dean.
34 Accordingly, Matrix’s broad request to compel forensic imaging will be
35 denied.

36 *Id.* at 5. This case is just one of many denying forensic imaging based on mere skepticism that not all
37 information was provided.

1 In *Advante Int'l Corp. v. Mintel Learning Tech.*, No. C 05 01022 JW(RS), 2006 WL 1806151
2 (N.D. Cal. June 29, 2006) the court indicated specific, concrete evidence of concealment or destruction
3 of evidence to warrant an order of forensic imaging:

4 The mere fact that this case involves electronic data does not change the
5 basic concepts or rules of the discovery process. Had Mintel made the same
6 basic accusations in an earlier age, its claims of incomplete document
7 production, inconsistencies, or even perjury and destruction of evidence,
8 would not automatically entitle it to an order permitting it to enter
9 Advante's offices to rummage through filing cabinets and desks. The relief
10 Mintel is asking for here is no different and no more warranted.
11 Furthermore, notwithstanding the breadth of accusations Mintel has
12 leveled, it has not presented specific, concrete evidence of concealment or
13 destruction of evidence sufficient to conclude that a forensic examination
14 of the vast scope it proposes is warranted at this juncture, even under an
15 examination protocol that would protect the other parties' legitimate
16 privacy and other interests.

17 *Id.* at 1.

18 **ii. Confidentiality concerns**

19 As noted in the Sedona Principles confidentiality and privilege concerns must be taken into
20 account. The Division of Marijuana Enforcement is a division in the Department of Taxation. The
21 Department has strict confidentiality laws given its access to financial and other proprietary information.
22 NRS 360.255(1) provides, in relevant part:

23 Except as otherwise provided in this section and NRS 239.0115 and
24 360.250, the records and files of the Department concerning the
25 administration or collection of any tax, fee, assessment or other amount
26 required by law to be collected are confidential and privileged. The
27 Department, an employee of the Department and any other person engaged
28 in the administration or collection of any tax, fee, assessment or other
amount required by law to be collected or charged with the custody of any
such records or files:

(a) Shall not disclose any information obtained from those records or
files; and

(b) May not be required to produce any of the records or files for the
inspection of any person or governmental entity or for use in any action or
proceeding.

NRS 360.255(5) provides:

As used in this section:

(a) "Records" or "files" means any records and files related to an
investigation or audit, financial information, correspondence, advisory

1 opinions, decisions of a hearing officer in an administrative hearing and
2 any other information specifically related to a taxpayer.

3 (b) "Taxpayer" means a person who pays any tax, fee, assessment or
4 other amount required by law to the Department.

5 The statutes required all license holders to also be medical marijuana certificate holder (called dual
6 licensing), so the marijuana companies are taxpayers as defined by the statute. The applicants pay a
7 mandatory fee to the Department as part of the application process. The applications submitted contain
8 vast amounts of financial and proprietary information that companies would certainly not want in the
9 hands of competitors.

10 As noted, all applicants held a medical marijuana certificate. NRS 453A.700(1) provides:

11 Except as otherwise provided in this section, NRS 239.0115 and subsection
12 4 of NRS 453A.210, the Division and **the Department shall not disclose:**

13 (a) The contents of any tool used by the Department to evaluate an
14 applicant or its affiliate.

15 (b) **Any information, documents or communications provided to**
16 **the Department by an applicant or its affiliate pursuant to the**
17 **provisions of this chapter,** without the prior written consent of the
18 applicant or affiliate or pursuant to a lawful court order after timely notice
19 of the proceedings has been given to the applicant or affiliate.

20 (c) The name or any other identifying information of:

21 (1) An attending provider of health care; or

22 (2) A person who has applied for or to whom the Division or its
23 designee has issued a registry identification card or letter of approval.

24 - Except as otherwise provided in NRS 239.0115, **the items of**
25 **information described in this subsection are confidential, not subject**
26 **to subpoena or discovery and not subject to inspection by the general**
27 **public.**

28 (emphasis added). Given this prohibition, the Plaintiff cannot point to any specific items of information
which it would be permitted to obtain. Thus, the preservation order just causes a meaningless expense
and waste of time and effort.⁷

NRS Chapter 453D was instituted by referendum, so it cannot be altered until 2020. NRS
453D.200 mandated the Department institute regulation. NAC 453D.185 provides:

Except as otherwise provided in this section and NRS 239.0115, the
Department will and any designee of the Department shall maintain the
confidentiality of and shall not disclose the name or any other identifying
information of any person who facilitates or delivers services pursuant to

⁷ The Department will seek reimbursement from the Plaintiffs.

1 this chapter or chapter 453D of NRS. Except as otherwise provided in NRS
2 239.0115, the name and any other identifying information of any person
3 who facilitates or delivers services pursuant to this chapter or chapter 453D
of NRS are confidential, not subject to subpoena or discovery and not
subject to inspection by the general public.

4 As noted, all the applicants are dual licensees which already facilitate or deliver services.⁸ Thus, even
5 disclosing the name of an applicant is likely prohibited.

6 These strict rules of confidentiality should be taken into account when establishing discovery,
7 including any preservation order. As noted, the Plaintiff cannot point to any relevant, specific evidence
8 that are on the phones or the electronic devices. It is even less likely they can point to any specific,
9 relevant information that would is not purely speculative and would not be covered by the confidentiality
10 rules mentioned above.

11 **iii. Privacy concerns**

12 As noted above, the Department employees properly followed the law during the score review.
13 To use these lawful acts and omission to serve as a basis for requiring the forensic imaging and/or
14 turnover of cell phone data is both absurd and an invasion of personal privacy rights. There is no
15 allegation of wrong-doing, let alone the type of misconduct necessary before a preservation order can be
16 issued.

17 **iv. Other considerations.**

18 Typically, discovery does not even begin until a NRCP 16.1 Conference is held and an early case
19 conference is filed. NRCP 26. The Plaintiff should not even be engaged in discovery this early in the
20 case. The Department has not even been properly served, let alone answered or otherwise plead so as to
21 narrow the issues or dispose of the case entirely.

22 As the Department already noted, it has a duty to preserve evidence in its control by statute as
23 well as by common law, rules, and ethical obligations. It has every intension of preserving relevant
24 evidence over which it has control. The Plaintiff has not shown that evidence relevant to their claims
25 exists in the cell phones or any other electronic devise. Neither has it shown a likelihood relevant
26 evidence was deleted or otherwise damaged.

27
28 ⁸ Some may not yet provide services pursuant to NRS 453D, but likely a majority (such as Plaintiffs) do
already facilitate or deliver services.

1 The Plaintiffs have not established any evidence relevant to their claims exists on the phones.
2 The Plaintiffs have not established the Department will not produce relevant evidence once the discovery
3 process begins. There is no evidence information has been lost or destroyed by the Department, or anyone
4 else. There is no basis for imposing sanctions because Plaintiffs have not met their burdens.

5 **III. Conclusion**

6 For the reasons specified above, the Plaintiff's Motion should be denied in its entirety, the
7 Department should be awarded attorney's fees for having to defend a baseless motion, and for such other
8 relief as the Court deems appropriate under the circumstances.

9 Dated: March 7, 2019.

10 AARON D. FORD
11 Attorney General

12 By: /s/ Robert E. Werbicky
13 ROBERT E. WERBICKY
14 Deputy Attorney General (Bar No. 6166)
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/s/ Danielle Wright
Danielle Wright, an employee of the
Office of the Nevada Attorney General



1 **RIS**
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 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 NEVADA WELLNESS CENTER, LLC, a
14 Nevada Limited Liability Company,

15 Plaintiff,

16 v.

17 STATE OF NEVADA, DEPARTMENT OF
18 TAXATION; and DOES I through X,
19 inclusive; and ROE CORPORATIONS I
20 through X, inclusive,

21 Defendants.

CASE NO.: A-19-787540-W
DEPT. NO.: XVIII

Date of Hearing: March 29, 2019
Time of Hearing: 9:30 a.m.

DISCOVERY COMMISSIONER

22 **PLAINTIFF'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR ORDER**
23 **REQUIRING THE SMC, MS. KARA CRONKHITE AND MR. DAMON HERNANDEZ**
24 **OF DEPARTMENT OF TAXATION TO PRESERVE AND/OR IMMEDIATELY TURN**
25 **OVER RELEVANT ELECTRONICALLY STORED INFORMATION FROM SERVERS,**
26 **STAND-ALONE COMPUTERS, AND CELL PHONES ON**
27 **ORDER SHORTENING TIME**

28 COMES NOW, Plaintiff, NEVADA WELLNESS CENTER, LLC (hereinafter "Plaintiff"),
by and through its attorney of record, THEODORE PARKER, III, ESQ. of the law firm of PARKER,
NELSON & ASSOCIATES, CHTD., and hereby files this Reply in Support of Emergency Motion
for Order Requiring the SMC, Ms. Kara Cronkhite and Mr. Damon Hernandez of Department of
Taxation to Preserve and/or Immediately Turn over Relevant Electronically Stored Information from
Servers, Stand-Alone Computers, and Cell Phones on Order Shortening Time.

///

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This Reply is made and based upon the pleadings and papers on file herein, the points and authorities included herewith, and such oral argument as the Court may entertain at the time of the hearing of this matter.

DATED this 25th day of March, 2019.

PARKER, NELSON & ASSOCIATES, CHTD.

THEODORE PARKER, III, ESQ.
Nevada Bar No. 4716
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128

Attorneys for Plaintiff

MEMORANDUM OF POINTS & AUTHORITIES

I.

STATEMENT OF FACTS

On March 8, 2019 this matter came on for hearing. The day before the hearing, the State of Nevada, Department of Taxation filed an Opposition within which it claimed that service had not been perfected. Following the hearing, Plaintiff's counsel provided proof to the State of Nevada, Department of Taxation's counsel, Robert E. Werbicky, Esq., that service was properly perfected and provided a copy of the Affidavit of Service. Attached as **Exhibit 1** is a copy of the correspondence sent to Mr. Werbicky, along with the Affidavit of Service. Since then, further efforts towards service have been made making this issue moot.

With regards to the substance of Plaintiff's motion, it is important for the Court to understand the status of a very similar order filed before the Honorable Judge Bailus, which was also heard and ruled upon by the Honorable Judge David Barker.

The Contract between the State of Nevada and Manpower related to the review and scoring of the applications for marijuana licenses is attached hereto as **Exhibit 2**. The Contract was effective from April 1, 2017 through March 31, 2021. Under paragraph 9 there is an "Inspection & Audit" right which allows the State to inspect, examine, review and audit and copy relevant books, records (written, electronic, computer related or otherwise), including, without limitation, relevant

1 accounting procedures and practices of Contractor or its subcontractors, financial statement and
2 supporting documentation, and copying at any office or location of Contractor where such records
3 may be found, with or without notice by the State Auditor, ...¹ It is this right that the State
4 contractually has to inspect that Nevada Wellness Center would like to utilize for purposes of this
5 litigation.

6 On December 13, 2018, MM Development Company, Inc. received an Order Granting In Part
7 and Denying In Part Emergency Motion for Order Requiring the SMC to Preserve and/or
8 Immediately Turn over Relevant Electronically Stored Information from Servers, Stand-Alone
9 Computers, and Cell Phones. A copy of this Order is attached as **Exhibit 3**. MM Development
10 Company, Inc. sought and was granted the same relief that Nevada Wellness Center is seeking. The
11 State of Nevada filed an almost identical opposition to this motion, but the Court ordered that the
12 State shall preserve the server or any standalone computers (including laptops, iPads or thumb
13 drives) in its possession and used in the evaluation and rating of marijuana dispensary license
14 applications as part of the September 2018 application period. The Court also ordered that the State
15 shall provide Plaintiff a list of Department personnel including Manpower personnel that primarily
16 assisted in the evaluation and rating of all applications for dispensary licenses and evaluated such
17 license applications received in the September 2018 application period. The Court ordered that the
18 State shall make all cell phones (personal and business) of each such person that assisted in the
19 processing of applications for dispensary licenses and/or evaluated such license applications
20 available for copying in the 10 business days after notice of entry of this order. The Court ordered
21 that neither Plaintiff's counsel nor Plaintiff or their agents or employees shall access the cell phone
22 data until the State and Plaintiff agrees to a procedure to protect non-discoverable confidential data
23 or the Court allows such access by subsequent order. Finally, the Court ordered that the State was
24 directed to maintain any and all documents in its possession regarding the processing of applications
25 for dispensary licenses and/or evaluation of such license applications, for the September 2018
26 application period. Finally, the Order indicated that the State shall serve a copy of the Order upon

27
28 ¹ See Section 9B.

1 Manpower within one business day of notice of entry of the order.

2 On January 3, 2019, the State of Nevada, Department of Taxation filed a Declaration
3 regarding any cell phone that is not available. This Declaration, attached as **Exhibit 4**, from Talova
4 V. Davis, indicates that the six (6) Manpower representatives involved after agreeing to provide their
5 phones, have determined that they will not make their phones available for forensic imaging. Ms.
6 Davis is a Cybercrime Investigator II employed by the Investigations Divisions of the Nevada Office
7 of the Attorney General. It is based upon this Declaration that it became even more important that
8 Nevada Wellness Center file this motion to protect and preserve information contained on these
9 phones in addition to laptops, computers, thumb drives, and desktops.

10 On February 5, 2019, the District Court heard the State's Motion for Reconsideration related
11 to an Order of Contempt Against the State of Nevada for Failure to Preserve Relevant Electronically
12 Stored Information from Cell Phones on an Order Shortening Time. The Minutes, which are
13 attached as **Exhibit 5**, indicate that Mr. Werbicky was advised originally that four of the six
14 Manpower employees indicated they had no opposition to the imaging of their phones, then changed
15 their minds. Further, Mr. Werbicky noted that the motion was filed when they began imaging
16 laptops. Mr. Kemp, on behalf of MM Development Company, Inc., argued against the motion,
17 however, requested the Manpower employees be deposed. The Court, by virtue of the hearing,
18 allowed for depositions for limited purposes of Manpower employees.

19 Attached as **Exhibit 6** is a copy of the Order electronically filed on March 7, 2019. The
20 Court ordered that pursuant to Rules 30 and 45 of the Nevada Rules of Civil Procedure, Plaintiffs
21 are given leave to take limited depositions of the six (6) Manpower employees. The depositions
22 were limited to the following questions: (1) "Please provide the make(s), model(s), and operating
23 system of your personal cellular telephone(s) used from July 2018 - December 2018."; (2) "Please
24 provide the name of the service provider(s) for each personal cellular telephone used from July 2018
25 - December 2018."; and (3) "Do you understand the December 13, 2018 Order Granting in Part and
26 Denying in Part Plaintiff's Emergency Motion (the "Preservation Order") issued in this case does
27 not permit the disclosure of any of your personal information unless and until ordered by the Court?"


28 ///

1 Based upon the attached documents, it is clear that the District Court has granted the identical
2 motion filed on behalf of Nevada Wellness Center. Moreover, the limitations of the Order and the
3 ability to take depositions at this point have also been decided by the District Court. Given these
4 orders and the obligations that have been recognized by the District Court, Nevada Wellness Center
5 requests that the Discovery Commissioner grant a similar order allowing for the identical rights
6 granted by the District Court in the MM Development Company, Inc. v. State of Nevada,
7 Department of Taxation case.

8 DATED this 25th day of March, 2019.

9 Respectfully submitted,

10 PARKER, NELSON & ASSOCIATES, CHTD.

11 
12 THEODORE PARKER, III, ESQ.
13 Nevada Bar No. 4716
14 2460 Professional Court, Suite 200
15 Las Vegas, Nevada 89128

16 *Attorneys for Plaintiff*
17
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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 25th day of March, 2019, I served a true and
4 correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF EMERGENCY**
5 **MOTION FOR ORDER REQUIRING THE SMC, MS. KARA CRONKHITE AND MR.**
6 **DAMON HERNANDEZ OF DEPARTMENT OF TAXATION TO PRESERVE AND/OR**
7 **IMMEDIATELY TURN OVER RELEVANT ELECTRONICALLY STORED**
8 **INFORMATION FROM SERVERS, STAND-ALONE COMPUTERS, AND CELL PHONES**
9 **ON ORDER SHORTENING TIME** on the party(s) set forth below by:

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

18 Aaron D. Ford, Esq.
19 Attorney General
20 Robert E. Werbicky, Esq.
21 Deputy Attorney General
22 Office of the Attorney General
23 555 E. Washington Avenue, Suite 3900
24 Las Vegas, NV 89101
25 (702) 486-3105
26 Fax: (702) 486-3416
27 Email: rwerbicky@ag.nv.gov
28 *Attorneys for Defendant,*
State of Nevada, Department of Taxation

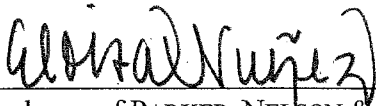
25 
26 _____
27 An employee of PARKER, NELSON & ASSOCIATES, CHTD.

EXHIBIT 1

EXHIBIT 1

RSA000040

Theodore Parker III
tparker@pnalaw.net
Admitted in Nevada & South Carolina

Todd N. Nelson
1965-2002



Jacqueline Dixon Phillips
jdixon@pnalaw.net
Admitted in South Carolina

Yadira Rios Gibson
Of Counsel
yrios@pnalaw.net
Admitted in Nevada, California & Illinois

Shana D. Weir
sweir@pnalaw.net
Admitted in Nevada

Carlton D. Bowers
cbowers@pnalaw.net
Admitted in South Carolina

Thomas B. Pritchard
tpritchard@pnalaw.net
Admitted in South Carolina

Casey D. Gish
Of Counsel
cgish@pnalaw.net
Admitted in Nevada & California

Mahogany A. Turfley
mturfley@pnalaw.net
Admitted in Nevada

Jennifer A. DelCarmen
jdelcarmen@pnalaw.net
Admitted in Nevada

March 14, 2019

VIA E-MAIL: rwerbicky@ag.nv.gov

Robert E. Werbicky, Esq.
Deputy Attorney General
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101

**Re: Nevada Wellness Center, LLC v. State of Nevada Department of Taxation
Case No.: A-19-787540-W**

Dear Mr. Werbicky:

As discussed during the hearing on Friday, March 8, 2019, please find enclosed proof of service. We perfected service in the exact same manner as MM Development Company, LLC.¹ As a result, I believe service was perfected on Wednesday, January 16, 2019. As a result, your answer was due on March 6, 2019. Consequently, please file your answer on behalf of the Department of Taxation as any NRS 12(b)(5) motion would be now untimely.

If after reviewing this correspondence you have any questions or concerns, please do not hesitate to contact me. Thank you again for your cooperation and assistance in this matter.

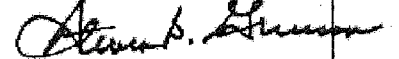
Sincerely,

PARKER NELSON & ASSOCIATES, CHTD.

Theodore Parker, III, Esq.

TP/en
Enclosures

¹ The Affidavit/Declaration of Service filed electronically on behalf of MM Development Company, LLC indicates that Ms. Tina Padovano, Administrative Assistant at the Department of Taxation was served at 1550 E. College Pkwy #115, Carson City, NV 89706. The Affidavit of Service filed on behalf of Nevada Wellness Center also indicates that Ms. Tina Padovano was served at 1550 E. College Pkwy #115, Carson City, NV 89706.



SUMM
THEODORE PARKER, III, ESQ.
Nevada Bar No. 4716
PARKER, NELSON & ASSOCIATES, CHTD.
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128
Telephone: (702) 868-8000
Facsimile: (702) 868-8001
Email: tparker@pnalaw.net

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA WELLNESS CENTER, LLC, a
Nevada Limited Liability Company,

Plaintiff,

v.

STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES I through X,
inclusive; and ROE CORPORATIONS I
through X, inclusive,

Defendants.

CASE NO.:
DEPT. NO.:

A-19-787540-W

Department 18

SUMMONS

NOTICE: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint has been filed by Plaintiff against you for the relief set forth in the Complaint.

State of Nevada, Department of Taxation
1550 College Parkway, Suite 115
Carson City, NV 89706-7937

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:

a. File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the court.

b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiffs and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

1 3. If you intend to seek the advice of an attorney in this matter, you should do so
2 promptly so that your response may be filed on time.


3 Issued at direction of:

4 **PARKER NELSON & ASSOCIATES, CHTD.**

5 By: 
6 THEODORE PARKER, III, ESQ.
7 Nevada Bar No. 4716
8 2460 Professional Court, Suite 200
9 Las Vegas, Nevada 89128

Attorney for Plaintiff

CLERK OF COURT

By:  1/15/2019
DEPUTY CLERK
County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155
Ivonne Hernandez

Attorney or Party without Attorney: Parker, Nelson & Associates, Chtd. Theodore Parker, III, Esq. (SBN 4716) 2460 Professional Court Suite 200 Las Vegas, NV 89128 Telephone No: (702) 868-8000 Attorney For: Plaintiff				For Court Use Only
Ref. No. or File No.: NV WELLNESS CENTER/DEPT				
Insert name of Court, and Judicial District and Branch Court: District Court Clark County Nevada				
Plaintiff: NEVADA WELLNESS CENTER, LLC, a Nevada Limited Liability Company, Defendant: STATE OF NEVADA, DEPARTMENT OF TAXATION, et al.				
AFFIDAVIT OF SERVICE	Hearing Date:	Time:	Dept/Div:	Case Number: A-19-787540-W

- At the time of service I was at least 18 years of age and not a party to this action.
- I served copies of the Summons, Complaint and Petition for Judicial Review or Writ of Mandamus
- Party served: State of Nevada, Department of Taxation
 - Person served: Tina Padovano - Executive Assistant, A person of suitable age and discretion, authorized to accept service at address shown in Item 4.
- Address where the party was served: 1550 College Parkway, Suite 115
Carson City, NV 89706
- I served the party:
 - by personal service. I personally delivered the documents listed in Item 2 to the party or person authorized to receive process for the party (1) on: Wed, Jan 16 2019 (2) at: 01:55 PM

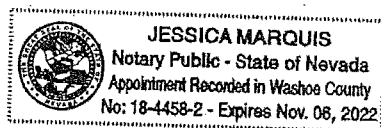
Fee for Service: \$0.00

I Declare under penalty of perjury under the laws of the State of NEVADA that the foregoing is true and correct.

- Person Who Served Papers:
 - Toni Ruckman (R-052005, Washoe)
 - FIRST LEGAL
NEVADA PI/PS LICENSE 1452
2920 N. GREEN VALLEY PARKWAY, SUITE 514
HENDERSON, NV 89014
(702) 671-4002

19 Jan 19 Toni Ruckman
(Date) (Signature)

- STATE OF NEVADA, COUNTY OF Washoe
Subscribed and sworn to (or affirmed) before on this 19 day of Jan, 2019 by Toni Ruckman (R-052005, Washoe)
proved to me on the basis of satisfactory evidence to be the person who appeared before me.




Jessica Marquis
(Notary Signature)



AFFIDAVIT OF SERVICE

2980520
(55104735)

RSA000044



CODE AFF.

WILL KEMP, ESQ.

Nevada Bar No. 01205

3800 Howard Hughes Pkwy, 17th floor

Las Vegas, Nevada 89169

Telephone: (702) 385-6000

Facsimile: (702) 385-6001

Attorney for: Plaintiff

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

MM DEVELOPMENT COMPANY, LLC, a Nevada
limited liability company,

Plaintiff(s)/Petitioner(s),

vs.

STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES 1 through 10; and ROE
CORPORATIONS 1 through 10.

Defendant(s)/Respondent(s)

Case No.: A-18-785818-W
Dept. No.: 18

**AFFIDAVIT/DECLARATION OF
SERVICE**

STATE OF NEVADA)
COUNTY OF CARSON CITY) ss.

I, James P. Thomas, being duly sworn or under penalty of perjury, state that at all times relevant, I was over 18 years of age and not a party to or interested in the above-captioned case; that I received a copy of the following document(s): Summons, and Complaint, on December 12, 2018, and that I served the Defendant, State of Nevada, Department of Taxation, on December 12, 2018 at the hour of 2:00 P.M. by the following method:

1. For personal service per NRCP 4(d)(6): Delivering and leaving a copy with Defendant at (insert address at which documents were served) _____.

2. For substitute service per NRCP 4(d)(6): Delivering and leaving a copy with (insert name or physical description of person served) _____, a person of suitable age and discretion residing at Defendant's dwelling house or usual place of abode, at (insert address _____).

1 where documents were served) _____

2 3. For service on a business entity per NCRCP 4(d)(1) or (2): Delivering and leaving a copy with
3 Tina Padovano, Administrative Assistant, pursuant to NRS 14.020 as a person of suitable age and discretion
4 at the below address, which address is the address of the State of Nevada, Department of Taxation at 1550
5 E. College Pkwy #115, Carson City, NV 89706.

6 4. For other method of service authorized by NRCP 4 or other rule or statute: _____

7
8 (Check one of the following boxes, date and sign, insert the address and phone number of the person performing service, and have this
affidavit notarized or sign the unsworn declaration per NRS 53.045.)

9 ☒ I am a licensed process server or an employee of a licensed process server; my license or registration
10 number is: 845.

11 ☐ I am not required to be licensed under chapter 648 of the Nevada Revised Statutes or another
provision of law because I am not engaged in the business of serving legal process within the State of
Nevada.

12 ☐ Residential/ ☒ Business Address: 1627 Salmon Drive
13 Carson City, Nevada 89701
Telephone: (775) 392-3237

14 **Per NRS 53.045**

15 (a) If executed in the State of Nevada: "I declare under penalty of perjury that the foregoing is true and
16 correct."

17 Executed on: December 12, 2018,
(Date)


(Signature of Person Making Service)

18 (b) If executed outside of the State of Nevada: "I declare under penalty of perjury under the law of the
State of Nevada that the foregoing is true and correct."

19 Executed on: _____
(Date)

(Signature of Person Making Service)

EXHIBIT 2

EXHIBIT 2

CONTRACT FOR SERVICES OF INDEPENDENT CONTRACTOR

A Contract Between the State of Nevada
Acting by and Through Its

Various State Agencies
Monitored By: Department of Administration
Purchasing Division
515 E Musser Street, Room 300
Carson City NV 89701
Contact: Annette Morfin, Purchasing Officer
Phone: (775) 684-0185 Fax: (775) 684-0188
Email: amorfin@admin.nv.gov

and

Manpower
63 Keystone Ave. #202
Reno NV 89503
Contact: Patrick Harrigan
Phone: (775) 328-6020 Fax: (775) 328-6030
Email: pharrigan@mpreno.com

WHEREAS, NRS 333.700 authorizes elective officers, heads of departments, boards, commissions or institutions to engage, subject to the approval of the Board of Examiners (BOE), services of persons as independent contractors; and

WHEREAS, it is deemed that the service of Contractor is both necessary and in the best interests of the State of Nevada.

NOW, THEREFORE, in consideration of the aforesaid premises, the parties mutually agree as follows:

1. **REQUIRED APPROVAL.** This Contract shall not become effective until and unless approved by the Nevada State Board of Examiners.
2. **DEFINITIONS.**
 - A. "State" – means the State of Nevada and any State agency identified herein, its officers, employees and immune contractors as defined in NRS 41.0307.
 - B. "Independent Contractor" – means a person or entity that performs services and/or provides goods for the State under the terms and conditions set forth in this Contract.
 - C. "Fiscal Year" – is defined as the period beginning July 1st and ending June 30th of the following year.
 - D. "Current State Employee" – means a person who is an employee of an agency of the State.
 - E. "Former State Employee" – means a person who was an employee of any agency of the State at any time within the preceding 24 months.
3. **CONTRACT TERM:** This Contract shall be effective as noted below, unless sooner terminated by either party as specified in Section 10, *Contract Termination*. Contract is subject to Board of Examiners' approval (anticipated to be March 14, 2017).

Effective from:	April 1, 2017	To:	March 31, 2021
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4. **NOTICE.** Unless otherwise specified, termination shall not be effective until 30 calendar days after a party has served written notice of termination for default, or notice of termination without cause upon the other party. All notices or other communications required or permitted to be given under this Contract shall be in writing and shall be deemed to have been duly given if delivered personally in hand, by telephonic facsimile with simultaneous regular mail, or mailed certified mail, return receipt requested, posted prepaid on the date posted, and addressed to the other party at the address specified above.
5. **INCORPORATED DOCUMENTS.** The parties agree that this Contract, inclusive of the following attachments, specifically describes the scope of work. This Contract incorporates the following attachments in descending order of constructive precedence:

ATTACHMENT AA:	REQUEST FOR PROPOSAL 3296 AND AMENDMENT #1
ATTACHMENT BB:	INSURANCE SCHEDULE
ATTACHMENT CC:	CONTRACTOR'S RESPONSE

A Contractor's attachment shall not contradict or supersede any State specifications, terms or conditions without written evidence of mutual assent to such change appearing in this Contract.

6. **CONSIDERATION.** The parties agree that Contractor will provide the services specified in *Section 5, Incorporated Documents* at a cost as noted below:

Total Contract or installments payable at:	Invoices will be done on a weekly basis to avoid possible timecard fraud. Invoices will be paid upon receipt of invoice and using agency's approval, invoices will be paid within 30 days. Agency Recruitment Invoices: will be paid per temporary employee hourly pay rate plus 24% Agency Recruitment Administrative Markup Fee. Contractor Recruitment Invoices: will be paid per temporary employee hourly pay rate plus 34% Contractor Recruitment Administrative Markup Fee. Both markup fees include a 20.89% for SUTA, FUTA, EICA, Modified Business Tax, General Liability, Bonding and Works Compensation (Self-Insured). Health Insurance, Employer Sponsored Health Insurance, Training, General Management, Administration and Operations Expenses are included in the markup rate. Manpower is compliant with the Patient Protection and Affordable Care Act (PPACA). Temporary employees may be required to drive State vehicles and contractor must maintain the \$1,000,000.00 automobile liability on their insurance policy to cover this requirement. There will be no fee incurred to the State should the temp employee accept a permanent position to the State regardless of the timeframe.
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Total Contract Not to Exceed:	\$7,000,000.00 for the contract term.
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The contractual authority, as identified by the not to exceed amount, does not obligate the State of Nevada to expend funds or purchase goods or services up to that amount; the purchase amount will be controlled by the individual using agency's purchase orders or other authorized means of requisition for services and/or goods as submitted to and accepted by the contractor.

The State does not agree to reimburse Contractor for expenses unless otherwise specified in the incorporated attachments. Any intervening end to a biennial appropriation period shall be deemed an automatic renewal (not changing the overall Contract term) or a termination as the result of legislative appropriate may require.

7. **ASSENT.** The parties agree that the terms and conditions listed on incorporated attachments of this Contract are also specifically a part of this Contract and are limited only by their respective order of precedence and any limitations specified.

8. **BILLING SUBMISSION: TIMELINESS.** The parties agree that timeliness of billing is of the essence to the Contract and recognize that the State is on a fiscal year. All billings for dates of service prior to July 1 must be submitted to the state no later than the first Friday in August of the same calendar year. A billing submitted after the first Friday in August, which forces the State to process the billing as a state claim pursuant to NRS 353.097, will subject the Contractor to an administrative fee not to exceed one hundred dollars (\$100.00). The parties hereby agree this is a reasonable estimate of the additional costs to the state of processing the billing as a state claim and that this amount will be deducted from the state claim payment due to the Contractor.
9. **INSPECTION & AUDIT.**
- A. Books and Records. Contractor agrees to keep and maintain under generally accepted accounting principles (GAAP) full, true and complete records, contracts, books, and documents as are necessary to fully disclose to the State or United States Government, or their authorized representatives, upon audits or reviews, sufficient information to determine compliance with all State and federal regulations and statutes.
- B. Inspection & Audit. Contractor agrees that the relevant books, records (written, electronic, computer related or otherwise), including, without limitation, relevant accounting procedures and practices of Contractor or its subcontractors; financial statements and supporting documentation, and documentation related to the work product shall be subject, at any reasonable time, to inspection, examination, review, audit, and copying at any office or location of Contractor where such records may be found, with or without notice by the State Auditor, the relevant State agency or its contracted examiners; the department of Administration, Budget Division, the Nevada State Attorney General's Office or its Fraud Control Units, the state Legislative Auditor, and with regard to any federal funding, the relevant federal agency, the Comptroller General, the General Accounting Office, the Office of the Inspector General, or any of their authorized representatives. All subcontracts shall reflect requirements of this Section.
- C. Period of Retention. All books, records, reports, and statements relevant to this Contract must be retained a minimum three (3) years, and for five (5) years if any federal funds are used pursuant to the Contract. The retention period runs from the date of payment for the relevant goods or services by the state, or from the date of termination of the Contract, whichever is later. Retention time shall be extended when an audit is scheduled or in progress for a period reasonably necessary to complete an audit and/or to complete any administrative and judicial litigation which may ensue.
10. **CONTRACT TERMINATION.**
- A. Termination Without Cause. Any discretionary or vested right of renewal notwithstanding, this Contract may be terminated upon written notice by mutual consent of both parties, or unilaterally by either party without cause.
- B. State Termination for Non-Appropriation. The continuation of this Contract beyond the current biennium is subject to and contingent upon sufficient funds being appropriated, budgeted, and otherwise made available by the state Legislature and/or federal sources. The State may terminate this Contract, and Contractor waives any and all claims(s) for damages, effective immediately upon receipt of written notice (or any date specified therein) if for any reason for the contracting Agency's funding from State and/or federal sources is not appropriated or is withdrawn, limited, or impaired.
- C. Cause Termination for Default or Breach. A default or breach may be declared with or without termination. This Contract may be terminated by either party upon written notice of default or breach to the other party as follows:
- 1) If Contractor fails to provide or satisfactorily perform any of the conditions, work, deliverables, goods, or services called for by this Contract within the time requirements specified in this Contract or within any granted extension of those time requirements; or
 - 2) If any State, county, city, or federal license, authorization, waiver, permit, qualification or certification required by statute, ordinance, law, or regulation to be held by Contractor to provide the goods or services required by this Contract is for any reason denied, revoked, debarred, excluded, terminated, suspended, lapsed, or not renewed; or
 - 3) If Contractor becomes insolvent, subject to receivership, or becomes voluntarily or involuntarily subject to the jurisdiction of the bankruptcy court; or
 - 4) If the State materially breaches any material duty under this Contract and any such breach impairs Contractor's ability to perform; or

- 5) If it is found by the State that any quid pro quo or gratuities in the form of money, services, entertainment, gifts, or otherwise were offered or given by Contractor, or any agent or representative of Contractor, to any officer or employee of the State of Nevada with a view toward securing a contract or securing favorable treatment with respect to awarding, extending, amending, or making any determination with respect to the performing of such contract; or
 - 6) If it is found by the State that Contractor has failed to disclose any material conflict of interest relative to the performance of this Contract.
- D. Time to Correct. Termination upon declared default or breach may be exercised only after service of formal written notice as specified in *Section 4, Notice*, and the subsequent failure of the defaulting party within fifteen (15) calendar days of receipt of that notice to provide evidence, satisfactory to the aggrieved party, showing that the declared default or breach has been corrected.
- E. Winding Up Affairs Upon Termination. In the event of termination of this Contract for any reason, the parties agree that the provisions of this Section survive termination:
- 1) The parties shall account for and properly present to each other all claims for fees and expenses and pay those which are undisputed and otherwise not subject to set off under this Contract. Neither party may withhold performance of winding up provisions solely based on nonpayment of fees or expenses accrued up to the time of termination;
 - 2) Contractor shall satisfactorily complete work in progress at the agreed rate (or a pro rata basis if necessary) if so requested by the Contracting Agency;
 - 3) Contractor shall execute any documents and take any actions necessary to effectuate an assignment of this Contract if so requested by the Contracting Agency;
 - 4) Contractor shall preserve, protect and promptly deliver into State possession all proprietary information in accordance with *Section 21, State Ownership of Proprietary Information*.
11. **REMEDIES.** Except as otherwise provided for by law or this Contract, the rights and remedies of the parties shall not be exclusive and are in addition to any other rights and remedies provided by law or equity, including, without limitation, actual damages, and to a prevailing party reasonable attorneys' fees and costs. It is specifically agreed that reasonable attorneys' fees shall include without limitation one hundred and twenty-five dollars (\$125.00) per hour for State-employed attorneys. The State may set off consideration against any unpaid obligation of Contractor to any State agency in accordance with NRS 353C.190. In the event that the Contractor voluntarily or involuntarily becomes subject to the jurisdiction of the Bankruptcy Court, the State may set off consideration against any unpaid obligation of Contractor to the State or its agencies, to the extent allowed by bankruptcy law, without regard to whether the procedures of NRS 353C.190 have been utilized.
12. **LIMITED LIABILITY.** The State will not waive and intends to assert available NRS Chapter 41 liability limitations in all cases. Contract liability of both parties shall not be subject to punitive damages. Liquidated damages shall not apply unless otherwise specified in the incorporated attachments. Damages for any State breach shall never exceed the amount of funds appropriated for payment under this Contract, but not yet paid to Contractor, for the fiscal year budget in existence at the time of the breach. Damages for any Contractor breach shall not exceed one hundred and fifty percent (150%) of the Contract maximum "not to exceed" value. Contractor's tort liability shall not be limited.
13. **FORCE MAJEURE.** Neither party shall be deemed to be in violation of this Contract if it is prevented from performing any of its obligations hereunder due to strikes, failure of public transportation, civil or military authority, act of public enemy, accidents, fires, explosions, or acts of God, including without limitation, earthquakes, floods, winds, or storms. In such an event the intervening cause must not be through the fault of the party asserting such an excuse, and the excused party is obligated to promptly perform in accordance with the terms of the Contract after the intervening cause ceases.
14. **INDEMNIFICATION.** To the fullest extent permitted by law Contractor shall indemnify, hold harmless and defend, not excluding the State's right to participate, the State from and against all liability, claims, actions, damages, losses, and expenses, including, without limitation, reasonable attorneys' fees and costs, arising out of any alleged negligent or willful acts or omissions of Contractor, its officers, employees and agents.

15. **INDEPENDENT CONTRACTOR.** Contractor is associated with the state only for the purposes and to the extent specified in this Contract, and in respect to performance of the contracted services pursuant to this Contract, Contractor is and shall be an independent contractor and, subject only to the terms of this Contract, shall have the sole right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this Contract. Nothing contained in this Contract shall be deemed or construed to create a partnership or joint venture, to create relationships of an employer-employee or principal-agent, or to otherwise create any liability for the state whatsoever with respect to the indebtedness, liabilities, and obligations of Contractor or any other party. Contractor shall be solely responsible for, and the State shall have no obligation with respect to: (1) withholding of income taxes, FICA or any other taxes or fees; (2) industrial insurance coverage; (3) participation in any group insurance plans available to employees of the state; (4) participation or contributions by either Contractor or the State to the Public Employees Retirement System; (5) accumulation of vacation leave or sick leave; or (6) unemployment compensation coverage provided by the State. Contractor shall indemnify and hold State harmless from, and defend State against, any and all coverage provided by the State. Contractor shall indemnify and hold State harmless from, and defend State against, any and all losses, damages, claims, costs, penalties, liabilities, and expenses arising or incurred because of, incident to, or otherwise with respect to any such taxes or fees. Neither Contractor nor its employees, agents, nor representatives shall be considered employees, agents, or representatives of the State and Contractor shall evaluate the nature of services and the term of the Contract negotiated in order to determine "independent contractor" status, and shall monitor the work, relationship throughout the term of the Contract to ensure that the independent contractor relationship remains as such. To assist in determining the appropriate status (employee or independent contractor), Contractor represents as follows:

QUESTION	CONTRACTOR'S INITIALS	
	YES	NO
1. Does the Contracting Agency have the right to require control of when, where and how the independent contractor is to work?	PH	
2. Will the Contracting Agency be providing training to the independent contractor?	PH	
3. Will the Contracting Agency be furnishing the independent contractor with worker's space, equipment, tools, supplies or travel expenses?	PH	
4. Are any of the workers who assist the independent contractor in performance of his/her duties employees of the State of Nevada?		PH
5. Does the arrangement with the independent contractor contemplate continuing or recurring work (even if the services are seasonal, part-time, or of short duration)?	PH	
6. Will the State of Nevada incur an employment liability if the independent contractor is terminated for failure to perform?		PH
7. Is the independent contractor restricted from offering his/her services to the general public while engaged in this work relationship with the State?		PH

16. **INSURANCE SCHEDULE.** Unless expressly waived in writing by the State, Contractor, as an independent contractor and not an employee of the state, must carry policies of insurance and pay all taxes and fees incident hereunto. Policies shall meet the terms and conditions as specified within this Contract along with the additional limits and provisions as described in *Attachment BB*, incorporated hereto by attachment. The State shall have no liability except as specifically provided in the Contract.

The Contractor shall not commence work before:

- 1.) Contractor has provided the required evidence of insurance to the Contracting Agency of the State, and
- 2.) The State has approved the insurance policies provided by the Contractor.

Prior to approval of the insurance policies by the State shall be a condition precedent to any payment of consideration under this Contract and the State's approval of any changes to insurance coverage during the course of performance shall constitute an ongoing condition subsequent to this Contract. Any failure of the State to timely approve shall not constitute a waiver of the condition.

A. Insurance Coverage. The Contractor shall, at the Contractor's sole expense, procure, maintain and keep in force for the duration of the Contract insurance conforming to the minimum limits as specified in *Attachment BB*, incorporated hereto by attachment. Unless specifically stated herein or otherwise agreed to by the State, the required insurance shall be in effect prior to the commencement of work by the Contractor and shall continue in force as appropriate until:

- 1) Final acceptance by the State of the completion of this Contract; or
- 2) Such time as the insurance is no longer required by the State under the terms of this Contract; whichever occurs later.

Any insurance or self-insurance available to the State shall be in excess of and non-contributing with, any insurance required from Contractor. Contractor's insurance policies shall apply on a primary basis. Until such time as the insurance is no longer required by the State, Contractor shall provide the State with renewal or replacement evidence of insurance no less than thirty (30) days before the expiration or replacement of the required insurance. If at any time during the period when insurance is required by the Contract, an insurer or surety shall fail to comply with the requirements of this Contract, as soon as Contractor has knowledge of any such failure, Contractor shall immediately notify the State and immediately replace such insurance or bond with an insurer meeting the requirements.

B. General Requirements.

- 1) Additional Insured: By endorsement to the general liability insurance policy, the State of Nevada, its officers, employees and immune contractors as defined in NRS 41.0307 shall be named as additional insureds for all liability arising from the Contract.
- 2) Waiver of Subrogation: Each insurance policy shall provide for a waiver of subrogation against the State of Nevada, its officers, employees and immune contractors as defined in NRS 41.0307 for losses arising from work/materials/equipment performed or provided by or on behalf of the Contractor.
- 3) Cross Liability: All required liability policies shall provide cross-liability coverage as would be achieved under the standard ISO separation of insureds clause.
- 4) Deductibles and Self-Insured Retentions: Insurance maintained by Contractor shall apply on a first dollar basis without application of a deductible or self-insured retention unless otherwise specifically agreed to by the State. Such approval shall not relieve Contractor from the obligation to pay any deductible or self-insured retention. Any deductible or self-insured retention shall not exceed fifty thousand dollars (\$50,000.00) per occurrence, unless otherwise approved by the Risk Management Division.
- 5) Policy Cancellation: Except for ten (10) days notice for non-payment of premiums, each insurance policy shall be endorsed to state that without thirty (30) days prior written notice to the State of Nevada, c/o Contracting Agency, the policy shall not be canceled, non-renewed or coverage and/or limits reduced or materially altered, and shall provide that notices required by this Section shall be sent by certified mail to the address shown on page one (1) of this contract.
- 6) Approved Insurer: Each insurance policy shall be:
 - a) Issued by insurance companies authorized to do business in the State of Nevada or eligible surplus lines insurers acceptable to the State and having agents in Nevada upon whom service of process may be made; and
 - b) Currently rated by A.M. Best as "A-VII" or better.

C. Evidence of Insurance.

Prior to the start of any work, Contractor must provide the following documents to the contracting State agency:

- 1) Certificate of Insurance: The Acoed 25 Certificate of Insurance form or a form substantially similar must be submitted to the State to evidence the insurance policies and coverages required of Contractor. The certificate must name the State of Nevada, its officers, employees and immune contractors as defined in NRS 41.0307 as the certificate holder. The certificate should be signed by a person authorized by the insurer to bind coverage on its behalf. The State project/Contract number; description and Contract effective dates shall be noted on the

certificate, and upon renewal of the policies listed, Contractor shall furnish the State with replacement certificates as described within *Section 16A, Insurance Coverage*.

Mail all required insurance documents to the State Contracting Agency identified on Page one of the Contract.


- 2) **Additional Insured Endorsement:** An Additional Insured Endorsement (CG 20 10 11 85 or CG 20 26 11 85), signed by an authorized insurance company representative, must be submitted to the State to evidence the endorsement of the State as an additional insured per *Section 16B, General Requirements*.
 - 3) **Schedule of Underlying Insurance Policies:** If Umbrella or Excess policy is evidenced to comply with minimum limits, a copy of the underlying Schedule from the Umbrella or Excess insurance policy may be required.
 - 4) **Review and Approval:** Documents specified above must be submitted for review and approval by the State prior to the commencement of work by Contractor. Neither approval by the State nor failure to disapprove the insurance furnished by Contractor shall relieve Contractor of Contractor's full responsibility to provide the insurance required by this Contract. Compliance with the insurance requirements of this Contract shall not limit the liability of Contractor or its subcontractors, employees or agents to the State or others, and shall be in addition to and not in lieu of any other remedy available to the State under this Contract or otherwise. The State reserves the right to request and review a copy of any required insurance policy or endorsement to assure compliance with these requirements.
17. **COMPLIANCE WITH LEGAL OBLIGATIONS.** Contractor shall procure and maintain for the duration of this Contract any State, county, city or federal license, authorization, waiver, permit qualification or certification required by statute, ordinance, law, or regulation to be held by Contractor to provide the goods or services required by this Contract. Contractor will be responsible to pay all taxes, assessments, fees, premiums, permits, and licenses required by law. Real property and personal property taxes are the responsibility of Contractor in accordance with NRS 361.157 and NRS 361.159. Contractor agrees to be responsible for payment of any such government obligations not paid by its subcontractors during performance of this Contract. The State may set-off against consideration due any delinquent government obligation in accordance with NRS 353C.190.
18. **WAIVER OF BREACH.** Failure to declare a breach or the actual waiver of any particular breach of the Contract or its material or nonmaterial terms by either party shall not operate as a waiver by such party of any of its rights or remedies as to any other breach.
19. **SEVERABILITY.** If any provision contained in this Contract is held to be unenforceable by a court of law or equity, this Contract shall be construed as if such provision did not exist and the non-enforceability of such provision shall not be held to render any other provision or provisions of this Contract unenforceable.
20. **ASSIGNMENT/DELEGATION.** To the extent that any assignment of any right under this Contract changes the duty of either party, increases the burden or risk involved, impairs the chances of obtaining the performance of this Contract, attempts to operate as a novation, or includes a waiver or abrogation of any defense to payment by State, such offending portion of the assignment shall be void, and shall be a breach of this Contract. Contractor shall neither assign, transfer nor delegate any rights, obligations nor duties under this Contract without the prior written consent of the State.
21. **STATE OWNERSHIP OF PROPRIETARY INFORMATION.** Any reports, histories, studies, tests, manuals, instructions, photographs, negatives, blue prints, plans, maps, data, system designs, computer code (which is intended to be consideration under the Contract), or any other documents or drawings, prepare or in the course of preparation by Contractor (or its subcontractors) in performance of its obligations under this Contract shall be the exclusive property of the State and all such materials shall be delivered into State possession by Contractor upon completion, termination, or cancellation of this Contract. Contractor shall not use, willingly allow, or cause to have such materials used for any purpose other than performance of Contractor's obligations under this Contract without the prior written consent of the State. Notwithstanding the foregoing, the State shall have no proprietary interest in any materials licensed for use by the State that are subject to patent, trademark, or copyright protection.
22. **PUBLIC RECORDS.** Pursuant to NRS 239.010, information or documents received from Contractor may be open to public inspection and copying. The State has a legal obligation to disclose such information unless a particular record is made confidential by law or a common law balancing of interests. Contractor may label specific parts of an individual document as a "trade secret" or "confidential" in accordance with NRS 333.333, provided that Contractor thereby agrees to indemnify and defend the State for honoring such a designation. The failure to so label any document that is released by the State shall constitute a complete waiver of any and all claims for damages caused by any release of the records.

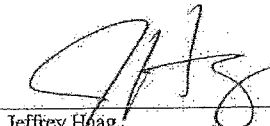
23. **CONFIDENTIALITY.** Contractor shall keep confidential all information, in whatever form, produced, prepared, observed or received by Contractor to the extent that such information is confidential by law or otherwise required by this Contract.
24. **FEDERAL FUNDING.** In the event federal funds are used for payment of all or part of this Contract:
- A. Contractor certifies, by signing this Contract, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by any federal department or agency. This certification is made pursuant to the regulations implementing Executive Order 12549, Debarment and Suspension, 28 C.F.R. pt 67, Section 67.510, as published as pt. VII of the May 26, 1988, Federal Register (pp. 19160-19211), and any relevant program-specific regulations. This provision shall be required of every subcontractor receiving any payment in whole or in part from federal funds.
 - B. Contractor and its subcontracts shall comply with all terms, conditions, and requirements of the Americans with Disabilities Act of 1990 (P.L. 101-136), 42 U.S.C. 12101, as amended, and regulations adopted there under contained in 28 C.F.R. 26.101-36.999, inclusive, and any relevant program-specific regulations.
 - C. Contractor and its subcontractors shall comply with the requirements of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, P.L. 93-112, as amended, and any relevant program-specific regulations, and shall not discriminate against any employee or offeror for employment because of race, national origin, creed, color, sex, religion, age, disability or handicap condition (including AIDS and AIDS-related conditions.)
25. **LOBBYING.** The parties agree, whether expressly prohibited by federal law, or otherwise, that no funding associated with this Contract will be used for any purpose associated with or related to lobbying or influencing or attempting to lobby or influence for any purpose the following:
- A. Any federal, State, county or local agency, legislature, commission, council or board;
 - B. Any federal, State, county or local legislator, commission member, council member, board member, or other elected official; or
 - C. Any officer or employee of any federal, State, county or local agency; legislature, commission, council or board.
26. **WARRANTIES.**
- A. General Warranty. Contractor warrants that all services, deliverables, and/or work products under this Contract shall be completed in a workmanlike manner consistent with standards in the trade, profession, or industry, shall conform to or exceed the specifications set forth in the incorporated attachments; and shall be fit for ordinary use, of good quality, with no material defects.
 - B. System Compliance. Contractor warrants that any information system application(s) shall not experience abnormally ending and/or invalid and/or incorrect results from the application(s) in the operating and testing of the business of the State.
27. **PROPER AUTHORITY.** The parties hereto represent and warrant that the person executing this Contract on behalf of each party has full power and authority to enter into this Contract. Contractor acknowledges that as required by statute or regulation this Contract is effective only after approval by the State Board of Examiners and only for the period of time specified in the Contract. Any services performed by Contractor before this Contract is effective or after it ceases to be effective are performed at the sole risk of Contractor.
28. **NOTIFICATION OF UTILIZATION OF CURRENT OR FORMER STATE EMPLOYEES.** Contractor has disclosed to the State all persons that the Contractor will utilize to perform services under this Contract who are Current State Employees or Former State Employees. Contractor will not utilize any of its employees who are Current State Employees or Former State Employees to perform services under this Contract without first notifying the Contracting Agency of the identity of such persons and the services that each such person will perform, and receiving from the Contracting Agency approval for the use of such persons.
29. **ASSIGNMENT OF ANTITRUST CLAIMS.** Contractor irrevocably assigns to the State any claim for relief or cause of action which the Contractor now has or which may accrue to the Contractor in the future by reason of any violation of State of Nevada or federal antitrust laws in connection with any goods or services provided to the Contractor for the purpose of carrying out the Contractor's obligations under this Contract, including, at the State's option, the right to

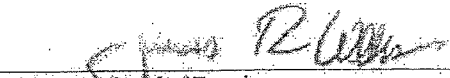
control any such litigation on such claim for relief or cause of action. Contractor shall require any subcontractors hired to perform any of Contractor's obligations under this Contract to irrevocably assign to the State, as third party beneficiary, any right, title or interest that has accrued or which may accrue in the future by reason of any violation of State of Nevada or federal antitrust laws in connection with any goods or services provided to the subcontractor for the purpose of carrying out the subcontractor's obligations to the Contractor in pursuance of this Contract, including, at the State's option, the right to control any such litigation on such claim or relief or cause of action.

30. **GOVERNING LAW; JURISDICTION.** This Contract and the rights and obligations of the parties hereto shall be governed by, and construed according to, the laws of the State of Nevada, without giving effect to any principle of conflict-of-law that would require the application of the law of any other jurisdiction. The parties consent to the exclusive jurisdiction of the First Judicial District Court, Carson City, Nevada for enforcement of this Contract.
31. **ENTIRE CONTRACT AND MODIFICATION.** This Contract and its integrated attachment(s) constitute the entire agreement of the parties and as such are intended to be the complete and exclusive statement of the promises, representations, negotiations, discussions, and other agreements that may have been made in connection with the subject matter hereof. Unless an integrated attachment to this Contract specifically displays a mutual intent to amend a particular part of this Contract, general conflicts in language between any such attachment and this Contract shall be construed consistent with the terms of this Contract. Unless otherwise expressly authorized by the terms of this Contract, no modification or amendment to this Contract shall be binding upon the parties unless the same is in writing and signed by the respective parties hereto and approved by the Office of the Attorney General and the State Board of Examiners.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be signed and intend to be legally bound thereby.


 1/26/17 General Manager
Independent Contractor's Signature Date Independent Contractor's Title

 1-30-2017
Jeffrey Haag Date Administrator, Nevada State Purchasing

 APPROVED BY BOARD OF EXAMINERS
Signature - Board of Examiners

On: 2/14/17
Date

Approved as to form by:

 On: 30 Jan 17
Deputy Attorney General for Attorney General Date

ATTACHMENT BB
INSURANCE SCHEDULE

RSA000057

ATTACHMENT BB INSURANCE SCHEDULE

INSURANCE REQUIREMENTS:

Contractor and subcontractors shall procure and maintain until all of their obligations have been discharged, including any warranty periods under this Contract are satisfied, insurance against claims for injury to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors.

The insurance requirements herein are minimum requirements for this Contract and in no way limit the indemnity covenants contained in this Contract. The State in no way warrants that the minimum limits contained herein are sufficient to protect the Contractor from liabilities that might arise out of the performance of the work under this contract by the Contractor, his agents, representatives, employees or subcontractors and Contractor is free to purchase additional insurance as may be determined necessary.

- A. **MINIMUM SCOPE AND LIMITS OF INSURANCE:** Contractor shall provide coverage with limits of liability not less than those stated below. An excess liability policy or umbrella liability policy may be used to meet the minimum liability requirements provided that the coverage is written on a "following form" basis.

1. **Commercial General Liability – Occurrence Form**

Policy shall include bodily injury, property damage and broad form contractual liability coverage.

• General Aggregate	\$2,000,000
• Products – Completed Operations Aggregate	\$1,000,000
• Personal and Advertising Injury	\$1,000,000
• Each Occurrence	\$1,000,000

- a. The policy shall be endorsed to include the following additional insured language: "The State of Nevada shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the Contractor".

2. **Automobile Liability**

Bodily Injury and Property Damage for any owned, hired, and non-owned vehicles used in the performance of this Contract.

Combined Single Limit (CSL)	\$1,000,000
-----------------------------	-------------

- a. The policy shall be endorsed to include the following additional insured language: "The State of Nevada shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the Contractor, including automobiles owned, leased, hired or borrowed by the Contractor".

3. **Worker's Compensation and Employers' Liability**


Workers' Compensation	Statutory
Employers' Liability	
Each Accident	\$100,000
Disease – Each Employee	\$100,000
Disease – Policy Limit	\$500,000

- a. Policy shall contain a waiver of subrogation against the State of Nevada.
- b. This requirement shall not apply when a contractor or subcontractor is exempt under N.R.S., AND when such contractor or subcontractor executes the appropriate sole proprietor waiver form.

- B. **ADDITIONAL INSURANCE REQUIREMENTS:** The policies shall include, or be endorsed to include, the following provisions:

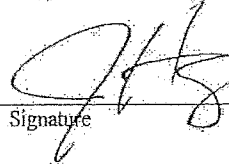
1. On insurance policies where the State of Nevada is named as an additional insured, the State of Nevada shall be an additional insured to the full limits of liability purchased by the Contractor even if those limits of liability are in excess of those required by this Contract.
 2. The Contractor's insurance coverage shall be primary insurance and non-contributory with respect to all other available sources.
- C. **NOTICE OF CANCELLATION:** Contractor shall for each insurance policy required by the insurance provisions of this Contract shall not be suspended, voided or canceled except after providing thirty (30) days prior written notice been given to the State, except when cancellation is for non-payment of premium, then ten (10) days prior notice may be given. Such notice shall be sent directly to Annette Morfin, Purchasing Officer, Nevada State Purchasing Division, 515 East Musser Street, Suite 300, Carson City, NV 89701. Should contractor fail to provide State timely notice, contractor will be considered in breach and subject to cure provisions set forth within this contract.
- D. **ACCEPTABILITY OF INSURERS:** Insurance is to be placed with insurers duly licensed or authorized to do business in the state of Nevada and with an "A.M. Best" rating of not less than A-VII. The State in no way warrants that the above-required minimum insurer rating is sufficient to protect the Contractor from potential insurer insolvency.
- E. **VERIFICATION OF COVERAGE:** Contractor shall furnish the State with certificates of insurance (ACORD form or equivalent approved by the State) as required by this Contract. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.
- All certificates and any required endorsements are to be received and approved by the State before work commences. Each insurance policy required by this Contract must be in effect at or prior to commencement of work under this Contract and remain in effect for the duration of the project. Failure to maintain the insurance policies as required by this Contract or to provide evidence of renewal is a material breach of contract.
- All certificates required by this Contract shall be sent directly to Annette Morfin, Purchasing Officer, Nevada State Purchasing Division, 515 East Musser Street, Suite 300, Carson City, NV 89701. The State project/contract number and project description shall be noted on the certificate of insurance. The State reserves the right to require complete, certified copies of all insurance policies required by this Contract at any time.
- F. **SUBCONTRACTORS:** Contractors' certificate(s) shall include all subcontractors as additional insureds under its policies or Contractor shall furnish to the State separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to the minimum requirements identified above.
- G. **APPROVAL:** Any modification or variation from the insurance requirements in this Contract shall be made by the Attorney General's Office or the Risk Manager, whose decision shall be final. Such action will not require a formal Contract amendment, but may be made by administrative action.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be signed and intend to be legally bound thereby.


Independent Contractor's Signature

1/26/17
Date

General Manager
Independent Contractor's Title


Signature

1-30-2017
Date

Administrator
Title

EXHIBIT 3

EXHIBIT 3



1 Will Kemp, Esq. (#1205)
2 Nathanael R. Rulis, Esq. (#11259)
3 n.rulis@kempjones.com
4 KEMP, JONES & COULTHARD, LLP
5 3800 Howard Hughes Parkway, 17th Floor
6 Las Vegas, Nevada 89169
7 Telephone: (702) 385-6000
8 *Attorneys for Plaintiff*

DISTRICT COURT

CLARK COUNTY, NEVADA

9 MM DEVELOPMENT COMPANY, INC., a
10 Nevada corporation,

11 Plaintiff,

12 vs.

13 STATE OF NEVADA, DEPARTMENT OF
14 TAXATION; and DOES 1 through 10; and
15 ROE CORPORATIONS 1 through 10.

16 Defendants.

Case No.: A-18-785818-W

Dept. No.: XVIII

**ORDER GRANTING IN PART AND
DENYING IN PART EMERGENCY
MOTION FOR ORDER REQUIRING
THE SMC TO PRESERVE AND/OR
IMMEDIATELY TURN OVER
RELEVANT ELECTRONICALLY
STORED INFORMATION FROM
SERVERS, STAND-ALONE
COMPUTERS, AND CELL PHONES**

Date of Hearing: 12/13/18
Time of Hearing: 10:00 a.m.

18 Plaintiff MM Development having filed an Emergency Motion For Preservation Of
19 Electronic Data and having given the counsel for Department of Taxation notice of such
20 request, the Court conducting a hearing on December 13, 2018 at 10:00 a.m., Plaintiff appearing
21 by Will Kemp, Esq., and Nathanael R. Rulis, Esq., of the law firm of Kemp, Jones & Coulthard,
22 LLP, the State of Nevada, Department of Taxation (the "State") appearing by Robert Werbicky,
23 Esq., and David J. Pope, Esq., and it appearing that the State used employees retained by an
24 outside employment agency (i.e. Manpower) to evaluate and rate marijuana dispensary license
25 applications (hereinafter referred to as "Manpower"), and good cause appearing for the
26 preservation of electronic data of the State and Manpower, the Motion is GRANTED IN PART
27
28

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

1 regarding preservation and DENIED IN PART regarding immediate turnover and it is hereby
2 ORDERED, ADJUDGED and DECREED as follows:

3 ORDERED that the State shall preserve server or any standalone computers (including
4 laptops, iPads or thumb drives) in its possession and used in the evaluation and rating of
5 marijuana dispensary license applications as part of the September 2018 application period (the
6 "ESI" or "electronically-stored information"). The State shall also preserve communication
7 made with Manpower related to the hiring of the personnel by Manpower for the September
8 2018 application period. The State shall make the ESI available for copying by the State in the
9 presence of a computer expert retained by Plaintiff in the next 10 business days after notice of
10 entry of this order. The State shall make 3 copies of the hard drive of the ESI with one copy
11 being preserved by the State as a master copy retained by the State and one additional copy
12 retained by the State, and one copy provided to the Court under seal. To allow Plaintiff and the
13 State (i.e., the Nevada Department of Taxation) to determine the most efficient way to allow the
14 State to make such copies, the State shall make their primary IT persons available for a
15 conference call with the ESI expert for Plaintiff and counsel for the Plaintiff, counsel for the
16 State (and counsel and IT manager for Manpower if desired by Manpower) to identify in
17 general the types of servers (including standalone computers and laptops) that will be subject to
18 the copying protocol and types and amount of data maintained on such servers (including
19 standalone computers and laptops). The conference call shall be held no later than 5 business
20 days after notice of entry of this order.

21 ORDERED that the State shall provide Plaintiffs a list of Department personnel
22 including Manpower personnel that primarily assisted in the evaluation and rating of all
23 applications for dispensary licenses and/or evaluated such license applications received in the
24 September 2018 application period and provide a list of any full or partial cell phone numbers
25 known to the Department sufficient to allow the identification of the cell phone (including but
26 not limited to personal cell phone numbers) for each such person within 5 business days of after
27 notice of entry of this order. At the same time, the State may use reasonable identifiers, e.g.
28 "Manpower Employee 1," instead of names if the State so desires. At the same time the State

KEMP, JONES & COULTHARD, LLP
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(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

1 may designate up to 6 persons on a list that the State believes were primarily involved on behalf
2 of Manpower and/or the State in the processing of all applications for dispensary licenses and/or
3 the evaluation of such license applications. If the State has a pre-existing organizational chart
4 of the Manpower employees, it shall provide the same to Plaintiff at such time but the State is
5 not obligated to create an organizational chart. Again, the State may use reasonable identifiers
6 instead of names. Within 10 business days after receiving the foregoing list from the State,
7 Plaintiffs shall be allowed to take the telephonic deposition of the PMK for the State to identify
8 the names (or reasonable identifiers) and job descriptions of all persons (including temporary
9 employees, if any) that were involved on behalf of State in assisting in the evaluation and rating
10 of applications for dispensary licenses and/or evaluating such licenses for the September 2018
11 application period. The purpose of the PMK deposition is to reasonably identify persons whose
12 cell phone data may contain relevant discoverable materials to ensure that all such data is
13 preserved. At its option, the State may provide a written response in lieu of the PMK
14 deposition.

15 ORDERED that the State shall make all cell phones (personal and/or business) of each
16 such person that assisted in the processing of applications for dispensary licenses and/or
17 evaluated such license applications, including but not limited to Steve F. Gilbert and a Northern
18 Nevada State employee, available for copying in the 10 business days after notice of entry of
19 this order at a location convenient to State and Manpower, and that the State, in the presence of
20 Plaintiff's computer expert, shall make 3 copies of the data from each cell phone with one copy
21 being preserved as a master copy, one copy provided to counsel for the State and one copy
22 provided to the Court under seal. In the event any such cell phones are not available, the State
23 shall file a sworn declaration regarding any cell phone that is not available explaining why such
24 cell phone is not available within 10 business days after notice of entry of this order.

25 ORDERED that neither Plaintiff's counsel nor Plaintiff or their agents or employees
26 shall access the cell phone data until the State and Plaintiff agrees to a procedure to protect non-
27 discoverable confidential data or the Court allows such access by subsequent order. The State is
28 authorized to inform any such persons whose cell phone data is copied that any and all personal

KEMP, JONES & COULTHARD, LLP
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Las Vegas, Nevada 89169
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1 information will either be returned or destroyed at a later date. Plaintiff's counsel and Plaintiff
2 and their agents or employees are restricted from accessing ESI data except as authorized by a
3 confidentiality order or other order of the Court.

4 ORDERED that the State is directed to maintain any and all documents in its possession
5 regarding the processing of applications for dispensary licenses and/or evaluation of such
6 license applications, for the September 2018 application period including but not limited to the
7 following: (1) any and all communications between Manpower and the State; (2) any and all
8 directions provided by the State to Manpower regarding the processing of applications or the
9 evaluation of the applications and any requests for information from Manpower; (3) any and all
10 communications between Manpower or State employees and any applicant (or with the
11 attorneys or consultants for an applicant) regarding any subject matter; (4) the contract, if any,
12 between Manpower and the State and all invoices, if any, sent by Manpower to the State; (5)
13 any and all preliminary rankings of applicants by jurisdiction or otherwise by Manpower or the
14 State that pre-date the final ranking; (6) any and all work papers (including notes) used by
15 Manpower or the State in the processing of applications for dispensary licenses and/or
16 evaluation of such license applications; (7) any and all spread sheets created by Manpower or
17 the State regarding the applications for dispensary licenses; and (8) any and all notes of formal
18 or informal meetings among Manpower or the State personnel regarding the processing of
19 applications for dispensary licenses and/or evaluation of such license applications. The State
20 shall not be required to produce the documents set forth in categories 1 through 8 at an
21 expedited pace but shall be required to identify the same with specificity at the Rule 16.1
22 conference subject to all privileges and objections by the State to such production.

23 ORDERED that the State shall serve a copy of this Order upon Manpower within one
24 business day of notice of entry of this Order.

25 DATED this 13 day of December, 2018.

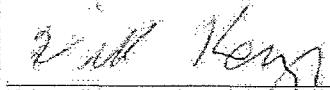
26
27 
28 DISTRICT JUDGE

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor

Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kje@kempjones.com

1 Respectfully Submitted by:

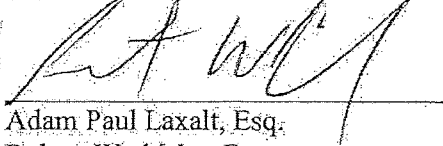
2 KEMP, JONES & COULTHARD, LLP

3
4 

5 Will Kemp, Esq. (#1205)
6 Nathanael R. Rulis, Esq. (#11259)
7 3800 Howard Hughes Parkway, 17th Floor
8 Las Vegas, Nevada 89169
9 *Attorneys for Plaintiff*

10 Approved as to content and form

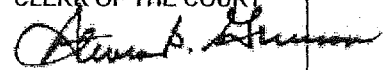
11 OFFICE OF THE ATTORNEY GENERAL

12 

13 Adam Paul Laxalt, Esq.
14 Robert Werbicky, Esq.
15 David J. Pope, Esq.
16 555 East Washington Ave., Suite 3900
17 Las Vegas, Nevada 89101
18 *Attorneys for Defendant*
19 *State of Nevada, Department of Taxation*

EXHIBIT 4

EXHIBIT 4



1 **DECL**
2 ADAM PAUL LAXALT
3 Attorney General
4 David J. Pope (Bar No. 8617)
5 Acting Chief Deputy Attorney General
6 Robert E. Werbicky (Bar No. 6166)
7 Deputy Attorney General
8 Vivienne Rakowsky (Bar No. 9160)
9 Deputy Attorney General
10 Office of the Attorney General
11 555 E. Washington Ave., Ste. 3900
12 Las Vegas, NV 89101
13 (702) 486-3420 (phone)
14 (702) 486-3416 (fax)
15 DPope@ag.nv.gov
16 VRakowsky@ag.nv.gov
17 RWerbicky@ag.nv.gov

18 *Attorneys for Defendant,*
19 *State of Nevada,*
20 *Department of Taxation*

21
22 DISTRICT COURT
23 CLARK COUNTY, NEVADA

24 MM DEVELOPMENT COMPANY, INC., a
25 Nevada corporation

26 Plaintiff,

27 vs.

28 STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES 1 through 10; and ROE
CORPORATIONS 1 through 10,

Defendants.

Case No. A-18-785818-W
Dept. No. XVIII

**DECLARATION REGARDING ANY CELL
PHONE THAT IS NOT AVAILABLE**

The STATE OF NEVADA, DEPARTMENT OF TAXATION by and through their counsel,
ADAM PAUL LAXALT, Attorney General and DAVID POPE, Acting Chief Deputy Attorney General,
ROBERT WERBICKY, Deputy Attorney General, and VIVIENNE RAKOWSKY, Deputy Attorney
General, and hereby submit this Declaration Regarding Any Cell Phone That Is Not Available pursuant
to this Court's order of December 13, 2018.

///

///

1 Attached as Exhibit A is the Declaration of Talova V. Davis, in her official capacity as
2 Cybercrime Investigator II, Investigations Division, Nevada Office of the Attorney General.

3
4 DATED this 3rd day of January, 2019.

5
6 ADAM PAUL LAXALT
7 Attorney General

8 By: /s/Vivienne Rakowsky
9 VIVIENNE RAKOWSKY (Bar No. 9160)
10 Deputy Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on the 3rd day of January, 2019, I filed the foregoing **DECLARATION REGARDING ANY CELL PHONE THAT IS NOT AVAILABLE** via this Court's electronic filing system. Parties that are registered with this Court's EFS will be served electronically.

/s/ Michele Caro

An Employee of the Office of the Attorney General

EXHIBIT "A"

EXHIBIT "A"

1 DECL
ADAM PAUL LAXALT
2 Attorney General
David J. Pope (Bar No. 8617)
3 Acting Chief Deputy Attorney General
Robert E. Werbicky (Bar No. 6166)
4 Deputy Attorney General
Vivienne Rakowsky (Bar No. 9160)
5 Deputy Attorney General
Office of the Attorney General
6 555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
7 (702) 486-3420 (phone)
(702) 486-3416 (fax)
8 DPope@ag.nv.gov
RWerbicky@ag.nv.gov
9 VRakowsky@ag.nv.gov

10 *Attorneys for Defendant,*
11 *State of Nevada,*
Department of Taxation

12
13 DISTRICT COURT
14 CLARK COUNTY, NEVADA

15 MM DEVELOPMENT COMPANY, INC., a
16 Nevada corporation

17 Plaintiff,

18 vs.

19 STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES 1 through 10; and
20 ROE CORPORATIONS 1 through 10,

21 Defendants.

Case No. A-18-785818-W
Dept. No. XVIII

22 DECLARATION OF TALOVA V. DAVIS

23 1. I, Talova V. Davis, first being duly sworn, present this Declaration regarding the status of
24 imaging cellular phones pursuant to the Court's Order dated December 13, 2018 and entered December
25 14, 2018 ("Court Order").

26 2. I have personal knowledge of, and am competent to testify, regarding these matters.

27 3. I am employed as a Cybercrime Investigator II by the Investigations Division of the
28 Nevada Office of the Attorney General, having been so employed by the State of Nevada since 2007. I

1 hereby affirm that I am a certified digital forensic specialist with extensive training and experience in the
2 preservation and examination of digital evidence.

3 4. I have been assigned the task of obtaining and forensically imaging cellular phones and
4 hard drives pursuant to the Court Order. On December 24, 2018, Nevada Office of the Attorney General
5 Chief of Investigations Roland D. Swanson II provided me with a list of names and phone numbers to
6 contact Manpower employees, asking that I begin contacting said employees on December 26, 2018.

7 5. This Court Ordered that in the event that any such cellular phone is not available, that the
8 State is to provide a sworn declaration explaining why the cellular phone is not available.

9 6. This is my sworn declaration explaining why the cellular phones below are not available
10 in compliance with the Court's Order.

11 7. At approximately 2:14 p.m. on December 26, 2018, I spoke with Manpower 1 regarding
12 the imaging of Manpower 1's personal cellular phone. Manpower 1 was willing to meet with me at 8
13 a.m. on the morning of December 27, 2018 to have the cellular phone imaged. Manpower 1 called back
14 at 8:08 a.m. on December 27, 2018 and said that after speaking with a few people, Manpower 1 is going
15 to decline having the cellular phone imaged until a subpoena requires Manpower 1 to do so.

16 8. At approximately 1:55 p.m. on December 26, 2018, I spoke with Manpower 2 regarding
17 the imaging of Manpower 2's personal cellular phone. Manpower 2 declined to have the cellular device
18 imaged, citing concerns about having personal pictures and personal identifiable information available
19 to others, even with a court order in place. Manpower 2 mentioned that the cellular phone was not used
20 for any work-related activity.

21 9. At approximately 8:33 a.m. on December 27, 2018, I left a voice mail message for
22 Manpower 3 regarding the forensic imaging of Manpower 3's cellular phone. On December 28, 2018 at
23 6:50 a.m., I received a voice mail message from Manpower 3 stating that Manpower 3 is not willing to
24 have the personal cellular phone copied as it was not used for business.

25 10. At approximately 9:05 a.m. on December 27, 2018, I left a voice mail message for
26 Manpower 4 regarding the forensic imaging of Manpower 4's cellular phone. On December 28, 2018 at
27 8:11 a.m., I received a voice mail message from Manpower 4 stating that Manpower 4 is not prepared to
28 authorize the forensic imaging of the cellular phone at this time.

1 11. At approximately 9:08 a.m. on December 27, 2018, I left a voice mail message for
2 Manpower 5 regarding the forensic imaging of Manpower 5's cellular phone. As of 11:00 a.m. on
3 December 31, 2018, I have not received any communications from Manpower 5.

4 12. At approximately 9:39 a.m. on December 27, 2018, I left a voice mail message for
5 Manpower 6 regarding the forensic imaging of Manpower 6's cellular phone. As of 11:00 a.m. on
6 December 31, 2018, I have not received any communications from Manpower 6.

7 Dated this 3rd day of January, 2019.

8 ADAM PAUL LAXALT
9 Attorney General

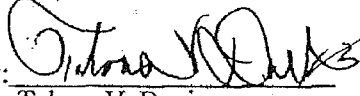
10 By: 
11 Talova V. Davis
12 Cybercrime Investigator II
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EXHIBIT 5

EXHIBIT 5

RSA000075

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Mandamus

COURT MINUTES

February 05, 2019

A-18-785818-W MM Development Company, Inc, Plaintiff(s)
vs.
State of Nevada, Department of Taxation, Defendant(s)

February 05, 2019 08:30 AM All Pending Motions

HEARD BY: Barker, David COURTROOM: Phoenix Building 11th Floor 110

COURT CLERK: Trujillo, Athena

RECORDER: Page, Robin

REPORTER:

PARTIES PRESENT:

David J. Pope	Attorney for Defendant
Nathanael R. Rulis, ESQ	Attorney for Plaintiff
Robert E. Werbicky	Attorney for Defendant
VIVIENNE RAKOWSKY, ESQ	Attorney for Defendant
William Simon Kemp	Attorney for Plaintiff

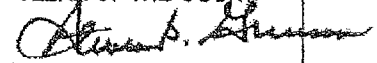
JOURNAL ENTRIES

MOTION FOR RECONSIDERATION ... MOTION FOR ORDER OF CONTEMPT AGAINST THE STATE OF NEVADA, DEPARTMENT OF TAXATION FOR FAILURE TO PRESERVE RELEVANT ELECTRONICALLY STORED INFORMATION FROM CELL PHONES AND ORDER SHORTENING TIME

Argument by Mr. Werbicky, noting that imaging was requested, however, it must be done by their criminal department. Further, Mr. Werbicky advised four out of the six Manpower employees indicated they had no opposition to the imaging of their phones, then changed their minds. Further, Mr. Werbicky noted the motion was filed when they began imaging laptops. Mr. Kemp argued against the motion, however, requested the Manpower employees be deposed. Mr. Pope reviewed the transcript and argued that depositions are premature. Court noted Mr. Kemp has requested the Motion for Contempt be WITHDRAWN: Mr. Werbicky advised there is no opposition to following normal discovery rules or for subpoena's issuing as long as they are appropriate under rule 45. Mr. Kemp argued section B of the Manpower contract allows for the imaging of employee's phones. Mr. Werbicky argued that the phones are personal property. COURT ORDERED, Motion for Reconsideration GRANTED; Motion for Order of Contempt DENIED and WITHDRAWN; Court will allow depositions for the limited purposes of Manpower employees being asked the types of phones they have, their service provider, and to explain the limits of the Court order; Mr. Kemp to prepare the order.

EXHIBIT 6

EXHIBIT 6



1 ORDR
2 AARON D. FORD
3 Attorney General
4 David J. Pope (Bar No. 8617)
5 Chief Deputy Attorney General
6 Robert E. Werbicky (Bar No. 6166)
7 Deputy Attorney General
8 Vivienne Rakowsky (Bar No. 9160)
9 Deputy Attorney General
10 Office of the Attorney General
11 555 E. Washington Ave., Ste. 3900
12 Las Vegas, NV 89101
13 (702) 486-3105 (phone)
14 (702) 486-3416 (fax)
15 dpope@ag.nv.gov
16 vrakowsky@ag.nv.gov
17 rwerbicky@ag.nv.gov
18 Attorneys for Defendants
19 State of Nevada Department of Taxation

12 DISTRICT COURT
13 CLARK COUNTY, NEVADA

14 MM DEVELOPMENT COMPANY, INC., a
15 Nevada Corporation and LIVFREE
16 WELLNESS, LLC,

17 Plaintiffs,

18 vs.

19 STATE OF NEVADA, DEPARTMENT OF
20 TAXATION; and DOES 1 through 10; and ROE
21 CORPORATIONS 1 through 10,

22 Defendants.

Case No. A-18-785818-W
Dept. No. IX

~~[PROPOSED]~~ ORDER

Date of Hearing: February 5, 2019
Time of Hearing: 8:30 a.m.

23 Plaintiffs, MM Development Company, Inc. ("MM Development") and Livfree Wellness LLC,
24 dba The Dispensary ("Livfree"), by and through counsel Will Kemp, Esq., and Nathanael R. Rulis, Esq.,
25 of the law firm Kemp, Jones & Coulthard, LLP; and Defendant State of Nevada, Department of Taxation
26 (the "Department"), by and through counsel Robert E. Werbicky, Esq., and David J. Pope, Esq., of the
27 State of Nevada, Office of the Attorney General, appeared before this Court on February 5, 2019, for the
28 hearing on Plaintiffs' Motion for Order of Contempt Against State of Nevada, Department of Taxation
for Failure to Preserve Relevant Electronically Stored Information from Cell Phones on Order Shortening
Time (the "Contempt Motion").

1 After reviewing the papers and pleadings on file herein, and hearing the arguments of counsel, the Court
2 makes the following findings and conclusions:

3 After the Department updated the Court on the status of its efforts to comply with the December
4 13, 2018 Order, the Plaintiffs withdrew the Contempt Motion;

5 During the hearing Plaintiffs submitted a verbal motion on the record for permission to conduct
6 pre-conference discovery (the "Discovery Motion") including taking the depositions of the six (6)
7 Manpower Employees;

8 The Department did not object to limited pre-conference discovery provided Plaintiffs established
9 good cause, but the Department did seek to limit the scope of any such discovery; NRCP 30(a)(2)(A)(iii)
10 provides a party must obtain leave of the court if the party seeks to take a deposition before the time
11 specified in Rule 26(d);

12 NRCP 30(a)(2) provides the court must grant such leave consistent with the allowance of NRCP
13 26(b)(1) and the limitations of NRCP 26(b)(2);

14 Further, discovery may commence before the parties have a discovery conference. *Tracfone*
15 *Wireless, Inc. v. Adams*, 304 F.R.D. 672 (S.D. Fla. 2015); *see also Semitool, Inc. v. Tokyo Electron Am.,*
16 *Inc.*, 208 F.R.D. 273 (N.D. Cal. 2002) ("Good cause may be found worthy need for expedited discovery
17 and consideration if the administration of justice outweighs the prejudice the responding party.").

18 Good cause exists to permit limited pre-conference depositions to be taken of the six (6)
19 Manpower Employees as directed and limited by this Court;

20 Based on the foregoing findings and conclusions:

21 IT IS HEREBY ORDERED that Plaintiffs' Contempt Motion is DENIED as moot;

22 IT IS FURTHER ORDERED Plaintiffs' Discovery Motion is GRANTED IN PART;

23 IT IS FURTHER ORDERED that, pursuant to Rules 30 and 45 of the Nevada Rules of Civil
24 Procedure, Plaintiffs are given leave to take limited depositions of the six (6) Manpower Employees;

25 IT IS FURTHER ORDERED that any depositions of the Manpower Employees are limited to the
26 following questions:


- 27 - "Please provide the make(s), model(s), and operating system of your personal cellular
28 telephone(s) used from July 2018 – December 2018."

1 - "Please provide the name of the service provider(s) for each personal cellular telephone used from
2 July 2018 – December 2018."

3 - "Do you understand the December 13, 2018 Order Granting in Part and Denying in Part Plaintiff's
4 Emergency Motion (the "Preservation Order") issued in this case does not permit the disclosure
5 of any of your personal information unless and until ordered by the Court?"

6 IT IS FURTHER ORDERED that if any Manpower Employee chooses to provide their personal
7 cellular phone to the Department for imaging, Plaintiffs' right to conduct the pre-conference deposition
8 of that Manpower Employee pursuant to this Order is rescinded.

9 DATED this 1st day of March, 2019.

10
11 
12 _____
13 DISTRICT COURT JUDGE

14 Respectfully Submitted by:

15 AARON D. FORD
16 Attorney General

17 By: 

18 ROBERT E. WERBICKY
19 Deputy Attorney General (Bar No. 6166)
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A-19-787540-W

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Mandamus

COURT MINUTES

March 29, 2019

A-19-787540-W Nevada Wellness Center, LLC, Plaintiff(s)
vs.
State of Nevada, Department of Taxation, Defendant(s)

March 29, 2019 09:30 AM Plaintiffs' Emergency Motion for Order Requiring the SMC, Ms. Karen Cronkita and Mr. Damon Hernandez of Dept of Taxation to Preserve and/or Immediately Turn Over Relevant Electronically Stored Information from Servers, Stand-Alone Computers, and Cell Phones on OST

HEARD BY: Truman, Erin

COURTROOM: RJC Level 5 Hearing Room

COURT CLERK: Lott, Jennifer

RECORDER: Haak, Francesca

REPORTER:

PARTIES PRESENT:

David J. Pope

Attorney for Defendant

Robert E. Werbicky

Attorney for Defendant

Theodore Parker

Attorney for Plaintiff

JOURNAL ENTRIES

Mr. Pope intends to move to consolidate cases into the first case and request the cases be treated as complex, and request the Court retain discovery issues. After speaking with counsel, Mr. Werbicky intends to Answer first, then move to consolidate. The Preservation Order was modified through Deft's Motion for Reconsideration, and Mr. Pope stated the Court determined counsel haven't violated the Order. All evidence is preserved, and everyone was given Notice of the litigation hold. Mr. Pope stated Senior Judge Barker is controlling some pre-Rule 16.1 discovery on limited depositions. Upon Commissioner's inquiry, Mr. Pope stated the Answer will be filed shortly in this case; Answers for M/M cases due near 4-9-19.

At the last appearance based on Mr. Parker's request, Commissioner gave time to ensure Service was perfected. Mr. Parker addressed the Declaration from the State employee regarding six Manpower phones. Mr. Parker stated Mr. Kemp failed to mention Ms. Cronkite and Mr. Hernandez (State employees), and Mr. Parker doesn't want anything to happen to the information. Mr. Parker requested an Order or Provisional Order to preserve information or the cases cannot be consolidated. Mr. Werbicky stated Manpower individuals are not State of Nevada employees. Argument by Mr. Werbicky; counsel stated there is no indication for the State of Nevada to damage or lose information. Mr. Parker addressed Talova Davis's Declaration. Mr. Parker requested information from whatever device was used. Argument by Mr. Parker.

Mr. Werbicky objected to imaging the phones. Judge Bailus ordered imaging on less than 24 hours Notice to the State. Mr. Werbicky provided 3-7-19 Minutes before Senior Judge Barker to Commissioner in Open Court. Arguments by counsel. Mr. Werbicky stated the Manpower issues were already dealt with, and imaging is more complex than described. Mr. Werbicky explained the process to copy images by properly authorized individuals (Sheriff resources, Cybercrime Lab in Washoe County). Upon Commissioner's inquiry, Mr. Werbicky stated two phones were imaged (Steve Gilbert and Kyle). Ms. Cronkite and Mr. Hernandez's phones were not imaged as they were not part of the Order. Mr. Pope stated there may be a facility in Southern Nevada, but it is extremely expensive, and some information

Printed Date: 4/4/2019

Page 1 of 2

Minutes Date:

March 29, 2019

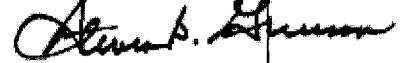
Prepared by: Jennifer Lott

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may be confidential. Arguments by counsel. Mr. Parker stated there is a local company who can image two phones for \$2500.

COMMISSIONER RECOMMENDED, motion is GRANTED, and an Order for Preservation WILL ISSUE; Mr. Parker stated sufficiently to satisfy the Sedona Principals that there is a real danger of evidence destruction based on unidentified Manpower employees; personal phones should not be imaged if they were not utilized for business purposes. COMMISSIONER RECOMMENDED limiting the response time to depositions upon written questions to each individual involved to identify themselves, and identify any and all devices they used for work purposes; 14 days response time is RECOMMENDED; the Order should not apply to a personal device if it isn't necessary to avoid privacy concerns. COMMISSIONER RECOMMENDED, Ms. Cronkite and Mr. Hernandez's work devices are subject to the Order, and any personal devices utilized for work purposes (any device that stores electronically stored information); a Protective Order will be in place, a Preservation Order will be in place, and a Confidentiality Order will be in place.

COMMISSIONER RECOMMENDED, if Plaintiff wants devices imaged, it must be done at Plaintiff's expense and at Deft's location if possible; information will be retained by Deft because of confidentiality issues; if Deft does anything with the information or there is spoliation, there are other ways to deal with it in the litigation; the party who does the imaging cannot retain any information, and it must be left with Deft. Upon Mr. Pope's inquiry, COMMISSIONER RECOMMENDED, make three copies at the expense of Plaintiff. Mr. Parker to prepare the Report and Recommendations, and Mr. Werbicky / Mr. Pope to approve as to form and content. A proper report must be timely submitted within 10 days of the hearing. Otherwise, counsel will pay a contribution.



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5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

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8 NEVADA WELLNESS CENTER,
9 LLC,

10 Plaintiff,

11 vs.

12 STATE OF NEVADA,
13 DEPARTMENT OF TAXATION,

Defendant.

CASE NO.: A-19-787540

DEPT. XVIII

14 BEFORE THE HON. ERIN TRUMAN, DISCOVERY COMMISSIONER

15 FRIDAY, MARCH 29, 2019

16 **RECORDER'S TRANSCRIPT OF HEARING**
17 **PLAINTIFF'S EMERGENCY MOTION FOR ORDER REQUIRING THE**
18 **SMC, MS. KAREN CRONKITA AND MR. DAMON HERNANDEZ OF**
19 **DEPT OF TAXATION TO PRESERVE AND/OR IMMEDIATELY TURN**
20 **OVER RELEVANT ELECTRONICALLY STORED INFORMATION**
21 **FROM SERVERS, STAND-ALONE COMPUTERS, AND CELL**
22 **PHONES ON OST**

23 APPEARANCES:

24 For the Plaintiff:

THEODORE PARKER, ESQ.

25 For the Defendant:

DAVID J. POPE, ESQ.

ROBERT E. WERBICKY, ESQ.

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

1 Las Vegas, Nevada, Friday, March 29, 2019

2 * * *

3 [Case called at 10:13 a.m.]

4 DISCOVERY COMMISSIONER: Nevada Wellness versus
5 State of Nevada, Taxation. Are you here on --

6 MR. PARKER: I think we were last, so I'm assuming that you
7 were coming before us.

8 UNIDENTIFIED SPEAKER: No. I may be an intervenor in
9 this case, so.

10 MR. WERBICKY: There you go.

11 DISCOVERY COMMISSIONER: Oh, so, okay.

12 MR. PARKER: I had no idea.

13 DISCOVERY COMMISSIONER: All right. We are back on
14 Plaintiffs' emergency motion for order requiring the preservation of
15 certain documents.

16 MR. PARKER: Good morning, Your Honor. Theodore Parker,
17 on behalf of the Plaintiff.

18 MR. POPE: Your Honor, before we get started, appearance is
19 Robert Werbicky and David Pope, on behalf of the Department of
20 Taxation. We're with the Attorney General's Office.

21 DISCOVERY COMMISSIONER: All right. What was your last
22 name again?

23 MR. POPE: Pope, P-O-P-E.

24 DISCOVERY COMMISSIONER: Okay. Thanks.

25 MR. POPE: Just for your consideration, we plan to move to

1 consolidate these cases into the first case, to ask that this be treated as
2 complex, and to have the Court retain the discovery issues; and does
3 that change your mind with regard to doing anything with regard to this
4 matter?

5 DISCOVERY COMMISSIONER: So you want it combined
6 with the -- what was the name of the other case? -- the M and M
7 Development case?

8 MR. WERBICKY: Yes.

9 MR. POPE: Yes. We haven't filed a motion yet, but we intend
10 to do that.

11 MR. WERBICKY: Well --

12 DISCOVERY COMMISSIONER: All right. Is that something
13 that you've discussed with counsel, as to whether there's been -- can be
14 a stipulation for consolidation, or --

15 MR. WERBICKY: I've discussed it briefly with Mr. Parker
16 yesterday. We need to answer first, which is our intention, and then we
17 will move to consolidate.

18 Mr. Parker indicated to me that initially that that seemed to
19 make sense. We've talked with some of the other counsel, so they
20 seem to be on board with that too.

21 DISCOVERY COMMISSIONER: As I understand that, there's
22 already an order in place in the other case, and so if you are agreeing or
23 moving to enter into the stipulation, that would render the issues moot. If
24 you're going into the other case, you're going to be governed by the
25 same protective orders --

1 MR. WERBICKY: That --

2 DISCOVERY COMMISSIONER: -- or requirements of
3 production of documents and --

4 MR. WERBICKY: The preservation --

5 DISCOVERY COMMISSIONER: -- preservation.

6 MR. WERBICKY: The preservation order, yes. Yes, Your
7 Honor, we -- that's the case. The -- that order was essentially modified
8 through our motion for reconsideration, and the Court has already
9 determined that we haven't done anything in violation of that order. So
10 we've preserved all the evidence. We've placed everyone on notice of
11 the litigation hold. And the Judge, Judge Barker in that case, Senior
12 Judge Barker, in that case, has indicated he's controlling some of the
13 preanswer discovery or pre-16.- --

14 DISCOVERY COMMISSIONER: Pre-16.1 discovery?

15 MR. WERBICKY: Pre-16.1, but it'll be a prerule 16 probably
16 discovery allowing limited depositions of what we call the Manpower
17 reports.

18 DISCOVERY COMMISSIONER: Okay. My question is,
19 because what I am --

20 And let me ask Mr. Parker. Is it something that you -- I mean,
21 I'd like to hear from you as to what your preference in this regard is.

22 My initial reaction is to -- when is the answer going to be filed?

23 MR. WERBICKY: In this case we were served on -- I'm sorry,
24 Mr. Parker. It was, I think, the 18th, so we have 45 days from that, but I
25 suspect we're going to answer sooner than that.

1 DISCOVERY COMMISSIONER: And what about the M and
2 M case; is there -- or MM case; has there been a answer filed in that
3 case as of yet?

4 MR. WERBICKY: There is no answer yet. There was a notice
5 of entry of order denying our motion to dismiss I think about the same
6 day. So our answer is due April 9th and we'll probably again answer
7 before that date.

8 DISCOVERY COMMISSIONER: All right. Would you like to
9 speak to this, Mr. Parker?

10 MR. PARKER: Yes, yes, Your Honor.

11 Your Honor, the last time we were here there was a concern
12 regarding service, and the Court, based upon our request, gave us some
13 additional time to make sure that was perfected.

14 What I'm concerned about -- and that's why I gave the Court
15 the orders, the benefit of the orders, from the -- from Judge Barker.
16 Originally the State believed that they were going to be able to get those,
17 all six of the Manpower phones, for purposes of inspection, and then you
18 saw the declaration from the State employees saying that miraculously
19 they've changed their minds and everyone's declining.

20 So now -- and I'm not -- this is not, you know, a criticism of Mr.
21 Werbicky. We've worked together a long time, and I know you've known
22 me prior just as long as I have. My concern is in the interim of
23 answering, additional things can be lost and additional minds can be
24 changed. I am concerned between now, now and the answer, what
25 happens, and that's why the motion was so important.

1 I'm also concerned, based upon my conversation with Mr.
2 Werbicky and Mr. Kemp, because we've been trading notes on this, that
3 Mr. Kemp failed to mention Ms. Cronkhite and Mr. Hernandez. I met
4 with them personally. They were involved in the Manpower link to the
5 State.

6 I don't want anything to happen to that information as well, any
7 ESI in terms of laptop, a telephone, a desktop. Now, the State would
8 have more control over those two employees because they're
9 employees, but I don't -- one of the things that concerned me -- and I'm
10 sure Your Honor picked up on this because of the question you asked
11 about when is the answer due.

12 In the declaration that -- of the State cybercrime investigator,
13 Your Honor, it mentioned how there was a concern in terms of the use of
14 private phones to use for work purposes and how they may not be
15 inclined to let that information be -- that those devices be turned over for
16 inspection. I don't want anything to happen, Your Honor, despite the
17 best efforts of the State. I don't want any of that information to be lost.

18 And so in the interim I want this Court to at least provide us
19 with some order, even if it's provisional, until everything is combined.
20 But until they answer -- and you know what the rule is. Until they
21 answer, the cases can't be consolidated. Once they answer, then the
22 oldest case will take precedence, and then that -- we'll probably all end
23 up in front of Judge Barker.

24 I agree with Mr. Werbicky. I don't -- I think that deeming the
25 case complex would probably be for the benefit of everyone. We can

1 have a case -- the case assigned for discovery purposes to the District
2 Court Judge who will handle it. But I am concerned about the interim,
3 and I am concerned that maybe some of the other participants in the --
4 who filed cases may not agree. So I'm not sure what's going to happen,
5 so I would ask that, since this is, at this point, a separate case, that
6 some protection be afforded this case until this procedural wrangling is
7 actually handled, Your Honor, so just give me that protection until they
8 answer. And then I think Mr. Werbicky and I can work it out from there.

9 DISCOVERY COMMISSIONER: Are any of the individuals at
10 issue or any of the stored information -- are they -- the individuals that
11 the order would be directed to, a hypothetical order, are any of them out
12 of the State of Nevada?

13 MR. WERBICKY: None. No, Your Honor.

14 DISCOVERY COMMISSIONER: None are out of the State.

15 MR. WERBICKY: The -- I am not sure of the Manpower
16 employees because they are not state employees, so I don't know for
17 sure whether or not they've left the State. I don't believe they have.

18 The two individuals discussed in Mr. Parker's motion are state
19 employees. They are not going to be leaving the State.

20 DISCOVERY COMMISSIONER: Okay, because -- and the
21 reason I ask is a Nevada court can't really tell somebody in another
22 state --

23 MR. WERBICKY: Right.

24 DISCOVERY COMMISSIONER: -- what to do, and so it was
25 unclear to me whether all -- or all affected individuals and information is

1 stored in the State of Nevada or held in the State of Nevada.

2 Mr. Parker.

3 MR. PARKER: I believe it to be only because of -- I met with
4 Ms. Cronkhite or Cronhite -- I don't know how she pronounces her
5 name. I can't recall. -- and Mr. Hernandez at the State office.

6 DISCOVERY COMMISSIONER: Okay.

7 MR. PARKER: And they were allowed to give me but so
8 much information, but based upon the conversation I believe they're all
9 within the State of Nevada.

10 DISCOVERY COMMISSIONER: All right. All right. Mr.
11 Werbicky.

12 MR. WERBICKY: Okay. So here we get into I guess the
13 Sedona principles and the fact that there's been no indication that any of
14 this evidence is potentially going to be lost, damaged, destroyed, or
15 anything else there. The Judge, Senior Judge Barker, indicated in one
16 of the hearings that he has found -- he's not indicating that the State did
17 anything wrong with regard to discovery preservation or anything else.

18 In fact, his original ruling on our motion for reconsideration
19 was that we had complied with everything that we could within the order
20 and adjusted the dates accordingly so that we essentially matched what
21 the order had said.

22 So there's no indication that -- oh, yeah. There's no indication
23 that the State is potentially damaging or going to lose this information.
24 Therefore, under the new Rule NRCP 1 rules -- and new NRCP 1
25 basically adopted the federal rule, and one of the reasons for the

1 adjustment of the federal rule was to kind of contain the costs associated
2 with litigation. So what is essentially being asked for is the imaging of
3 two cellphones. Now --

4 DISCOVERY COMMISSIONER: Are these the work phones
5 or the private phones?

6 MR. WERBICKY: I'm afraid you have to ask Mr. Parker that
7 question.

8 DISCOVERY COMMISSIONER: Mr. Parker.

9 MR. PARKER: Your Honor, and that's what we touched on a
10 second ago. In the order -- I'm sorry. In the declaration, Your Honor,
11 provided by Ms. Talova Davis; did you see that? It's part of my reply
12 brief as Exhibit A to the State's declaration regarding cellphones. If
13 you -- do you have it in front of you, Your Honor?

14 DISCOVERY COMMISSIONER: I think I do. Yes.

15 MR. PARKER: Okay. It's the -- let me see how I can --

16 DISCOVERY COMMISSIONER: Exhibit what?

17 MR. PARKER: It's Exhibit A to the -- to my -- if you go to
18 Exhibit --

19 DISCOVERY COMMISSIONER: Which exhibit?

20 MR. PARKER: -- 4, go to Exhibit 4 of my --

21 DISCOVERY COMMISSIONER: Okay. It's Exhibit A to --

22 MR. PARKER: -- reply.

23 DISCOVERY COMMISSIONER: -- Exhibit 4.

24 MR. PARKER: Exactly.

25 DISCOVERY COMMISSIONER: Got it.

1 MR. PARKER: And so then you see the declaration of Talova
2 Davis --

3 DISCOVERY COMMISSIONER: Yes.

4 MR. PARKER: -- Your Honor?

5 She mentions here in terms of -- this is paragraph 8, lines 16
6 through 20, she says: Manpower 2 mentioned that the cellular phone
7 was not used for any work-related activity.

8 Then a sentence right above it says: Manpower 2 declined to
9 have the cellular device imaged citing concerns about having personal
10 pictures, personal identifiable information available to others, even with a
11 court order in place.

12 Now --

13 DISCOVERY COMMISSIONER: And she says it was not
14 used for any work-related activity.

15 MR. PARKER: And my concern here is Ms. Tavola [sic] Davis
16 is apparently trying to figure out if work was being done related to this on
17 a work-related Manpower phone or a nonwork-related personal phone.
18 So the request was whatever phone it is, we need the information, and
19 so Manpower number 2 -- and they -- that's the identifiers they've used,
20 Manpower 1 through 6 -- is trying to discern between what she may
21 have used -- he or she -- what phone or device they may have used for
22 purposes of this application process that took place in September of
23 2018.

24 My concern is we need to protect the information. I don't care
25 what device it's on. And so that's the benefit. And this is something --

1 and I thought Mr. Werbicky took this from my earlier comments. This is
2 not a jab or a criticism of the State. The order protects us all -- Plaintiff,
3 the State -- because those who were a participant in this process, based
4 upon the contract that we also attached between Manpower and the
5 State, have an obligation for purposes of investigation or auditing later to
6 make that information available, be it a private phone or a work-related
7 phone, and right --

8 DISCOVERY COMMISSIONER: So since they have an
9 obligation, and it's already under the contract, why do we need --

10 MR. PARKER: Because --

11 DISCOVERY COMMISSIONER: -- additional protection?

12 MR. PARKER: Because Manpower is not the party here, and
13 that's why I said this is not me criticizing the State. I said up front the
14 State probably has more control over Ms. Cronkhite and Mr. Hernandez,
15 but the amount of control they have over Manpower is a concern, and
16 this declaration really concerned me, so when I saw it, Mr. Kemp had the
17 concern up front. When I saw the declaration, and we had the
18 discussion about it, that raised, you know, a couple of flags for me, and
19 that's why I brought it forward.

20 Now, if Mr. Werbicky simply were to sign a stipulation saying
21 that the protective order would be equally enforceable in this case, we
22 wouldn't be here. Now that we believe that that may happen in the
23 future, my concern is I need the protection until that happens because
24 they may change their mind.

25 Judge Barker considered the Sedona principles. That's why I

1 put the orders for this Court's benefit, so you could see that that was --
2 that analysis has been performed. We just need some protection until
3 this takes place, and then I think Mr. Werbicky and I will be able to work
4 together fine after that, and that's my concern, Your Honor.

5 DISCOVERY COMMISSIONER: Mr. Werbicky.

6 MR. WERBICKY: To begin, I guess I'm a little confused on
7 this because I thought really what -- I didn't realize this was a second
8 attempt at dealing with an issue that has already been resolved
9 regarding the Manpower clause. I thought we were really here about
10 Ms. Cronkhite's work phone and Ms. Hernandez's work phone.

11 DISCOVERY COMMISSIONER: And with regard to Ms.
12 Cronkhite and Hernandez, are you willing to stipulate -- enter into a
13 stipulation that this occur? 'Cause it doesn't sound like you're opposing
14 that.

15 MR. WERBICKY: That what occur?

16 DISCOVERY COMMISSIONER: What Mr. Parker has
17 requested regarding the preservation.

18 MR. WERBICKY: If it's imaging the phones, yes, I'm objecting
19 to that. If it's simply --

20 DISCOVERY COMMISSIONER: And why are you objecting
21 to that?

22 MR. WERBICKY: Because imaging is an expensive and
23 unusual process that is only authorized when there is a -- under the
24 Sedona principles and the courts that have adopted it, is only to be done
25 when there is a serious risk of losing information or a violation of the

1 discovery principles. We haven't even started discovery in this case yet
2 because we haven't even answered yet.

3 The problem with what is --

4 DISCOVERY COMMISSIONER: Judge Barker ordered the
5 imaging, correct?

6 MR. WERBICKY: No. Judge Bailus originally ordered the
7 imaging on less than 24 hours' notice to the State, so the Sedona
8 principles weren't even mentioned during the original hearing because
9 we didn't have time to prepare.

10 By January 3rd we started -- I'm sorry. By January 8th we put
11 together the Sedona principles, and on that, that's when Judge Barker
12 reviewed it and basically said, yes, I'm going to modify the order,
13 number one; number two, the State hasn't done anything wrong. And he
14 just didn't want to get rid of the preservation order because it had been
15 issued by another judge, and we had already complied with it anyway,
16 so why get rid of it? That was really the rationale associated with the
17 motion to strike.

18 If I can approach, Your Honor, I have the minutes from the
19 March 7th hearing. They're not terribly extensive, but --

20 [Mr. Werbicky handing to Mr. Parker]

21 DISCOVERY COMMISSIONER: This is before Judge
22 Barker?

23 MR. WERBICKY: Correct, Your Honor.

24 DISCOVERY COMMISSIONER: Okay. Certainly you may
25 approach.

1 [Mr. Werbicky approaches the bench; Mr. Werbicky handing to the
2 Commissioner]

3 MR. WERBICKY: Now -- and when you're ready.

4 DISCOVERY COMMISSIONER: Okay.

5 MR. WERBICKY: Now, what I'm really concerned about is
6 essentially the precedent associated with what's going on with all of this.
7 Because someone has brought a complaint in a matter that involves a
8 lot of money, suddenly imaging of cellphones is essentially mandatory.
9 It's going to be imposed by the Court. Well, I try to read these things
10 reasonably, but so does that mean I can ask for all of his officers to go
11 through the expense of having all of their cellphones imaged to make
12 sure we don't lose an unclean hands defense?

13 If everyone involved in complex -- in large litigation like this is
14 ordered to image their cellphones, first off, there's only one facility that
15 I'm aware of in the entirety of -- maybe there's two in Southern Nevada;
16 there's only one in Northern Nevada where a cellphone can even be
17 forensically imaged as requested.

18 Now, we set up a system up north through the Washoe
19 County Sheriff's Office in order to get those phones imaged under the
20 original order simply because the Court had ordered it, and we didn't
21 have time, and we -- to object to it or try and do something else. So it's
22 a Court order; we complied with it as quickly as we could, all right?

23 There's no reason to establish this kind of precedent under
24 NRCP 1 given the Sedona principles and the other cases that we've
25 been talking about where everybody involved in litigation suddenly has

1 to have their cellphones forensically imaged before an answer is even
2 issued. There's been no indication that any of the information on these
3 phones would even be relevant. There's been no indication that their
4 loss would somehow impair their case. It's all rank speculation at this
5 point. That's an entirely inappropriate basis on which to impose such --
6 frankly, a draconian order. It seems simple, just two cellphones or
7 something like that. But if you expand it out, how that is going to
8 eventually play out, then we've got 400 different entities that were
9 denied these applications.

10 Are we going to have to image everyone's phone? Are we
11 going to have to image everyone in the State in order to preserve the --
12 this evidence? That seems -- that's the slippery slope that we're starting
13 to go down, and it's not appropriate, especially when there's been no
14 indication the State has done anything wrong, these individuals have
15 done anything wrong. In fact, the only thing cited to by Mr. Parker is that
16 they complied with the law.

17 The regulation dealing with this initial meeting indicates they're
18 not to discuss any issues. All right. That's a legal requirement. So the
19 fact that they followed the law is a basis for requesting that they image
20 their personal phones and that I guess it expands to we get a second
21 bite at the apple at the Manpower employees, which has already been
22 dealt with with Judge Barker in the first place.

23 We've requested the phones; they were denied; that's -- as far
24 as I know, it is not going to change. We did everything we could to try
25 and get those phones imaged; they just said no. And --

1 DISCOVERY COMMISSIONER: But they're subject to the
2 order.

3 MR. WERBICKY: They're subject to the order. So, as a
4 consequence, we made sure that we gave them the litigation holds and
5 the requirements that they not damage anything. But the -- I don't know.

6 The transcript for -- I believe the transcript for the January
7 hearing is on record, along with the update that I provided. There's
8 multiple hearings. That one was actually quite a bit later. But there
9 were multiple hearings where we basically gave an update on what
10 happened.

11 These Manpower employees, under the RFPs that were dealt
12 with, are not State employees. Therefore, we don't have control over
13 them. All right. Manpower --

14 DISCOVERY COMMISSIONER: But the Court does.

15 MR. WERBICKY: Pardon me?

16 DISCOVERY COMMISSIONER: But the Court does.

17 MR. WERBICKY: The Court does.

18 DISCOVERY COMMISSIONER: If an order is issued, then
19 they're subject to the order.

20 MR. PARKER: That's right.

21 MR. WERBICKY: But they're not.

22 DISCOVERY COMMISSIONER: If they're in the State of
23 Nevada.

24 MR. WERBICKY: Right, but they're not here. They've had no
25 opportunity to defend themselves or to contest the order.

1 MR. POPE: Not in the case.
2 MR. WERBICKY: They're not in the case.
3 DISCOVERY COMMISSIONER: Okay.
4 MR. WERBICKY: I'm sorry. I'm sorry. What did I say?
5 MR. POPE: Not here.
6 MR. WERBICKY: I'm sorry. They're not in the case.
7 So --
8 DISCOVERY COMMISSIONER: But they're a party to the
9 contract, and -- isn't that correct, but they are covered by the contract?
10 MR. WERBICKY: The contract itself indicates that Manpower
11 is an independent contractor, and they are to hire temporary employees
12 which are not State employees. Manpower is not present either, in the
13 case either. So -- and all this was already discussed in front of Judge
14 Barker and even Judge Bailus --
15 DISCOVERY COMMISSIONER: Okay.
16 MR. WERBICKY: -- but more directly with Judge Barker. So
17 the --
18 DISCOVERY COMMISSIONER: And this case is before
19 Judge Holthus, right; isn't she the Judge on this case?
20 MR. WERBICKY: What department?
21 MR. POPE: If it's Department --
22 DISCOVERY COMMISSIONER: Judge Holthus.
23 MR. POPE: -- 18, yes.
24 MR. WERBICKY: Oh, it's 18, yes, it is. It is Judge Holthus.
25 DISCOVERY COMMISSIONER: Okay.

1 MR. WERBICKY: Yes. So I guess my point being is, as
2 before, the -- this preservation order is, number one, not necessary
3 because the State has complied with the orders of the Court. It is going
4 to preserve the evidence as required by law. Imposing this protective -- I
5 mean this preservation order when there has been no evidence of
6 wrongdoing by anyone is a violation of the Sedona principles and NRCP
7 1, the new version of NRCP 1. It shouldn't be mandated or authorized.
8 It should just -- the parties have been given their litigation holds. Under
9 the rules they are required to preserve those records. If they do not, the
10 Court may impose appropriate sanctions as a result.

11 DISCOVERY COMMISSIONER: All right. Mr. Parker.

12 MR. PARKER: Your Honor, I appreciate having the last word
13 on this since it's our motion, and the questions you've asked Mr.
14 Werbicky, I think he's done his best to try to answer 'em, but he certainly
15 hasn't answered them.

16 You've given him more than one opportunity to explain why he
17 sounds like he's agreeing, but then opposing the motion, and he's not
18 given or articulated a real good or even a colorable argument why he's
19 objecting to this. It -- this motion and the order, if it was to be granted,
20 protects the State, protects my client, and it requires those within the
21 confines of Nevada to comply with this Court's order and it prevents,
22 despite our -- everyone's best efforts, including the Court's efforts, from
23 allowing information to be lost.

24 This was -- I think the benefit of this -- and Mr. Kemp and I
25 were talking about this because he said some of these comments came

1 up during his arguments in front of Judge Bailus and then Judge Barker,
2 because the State has tried to test and object to this order once --
3 entered more than one, and Judge Barker has maintained the order
4 since the original order was granted.

5 This prevents a motion for sanctions later on. It prevents a
6 motion for spoliation later on because we are doing it up front. Now that
7 we have this declaration, which, again, bothered me the most because
8 they have an independent contractor, as Mr. Werbicky says, agreeing in
9 the contract to provide and maintain this information based upon item
10 paragraph 9C for three years, and yet, within a couple of months, we
11 have employees saying they're not going to release the information.
12 That, by itself, would make me think, if I was sitting in the State's shoes,
13 why wouldn't I want this order in every case until combined to protect
14 me.

15 The other thing that Mr. Werbicky mentioned that I did not
16 originally raise, and Your Honor raised it, and maybe that's why he said
17 something to it, or tried to address it, I don't know if Ms. Cronkhite and
18 Mr. Hernandez did some of their business on a personal phone, one not
19 paid for provided by the State, and, if so, they have to preserve that
20 information too.

21 Now, Mr. Werbicky tried to get this Court to perhaps temper its
22 position based upon costs. I didn't say that my client wasn't amenable
23 to pain for this; that was never even a part of their opposition in terms of
24 who would bear the cost. My client may be willing to actually spend the
25 money to do the ESI extraction up front. My point is let's just save the

1 information. Let's have an order that benefits the case that preserves
2 the information until this case is consolidated, and let's make sure that
3 nothing personal -- and when I say personal, something being --
4 business being transacted on a personal phone also be protected.
5 That's it. I mean, this is not an order where I thought there would be
6 much fight given what Judge Barker and Judge Bailus has already done,
7 and the evaluation of the Sedona principles.

8 And this Court, I think, has given the parties time to take a
9 look at it. The Court gave us time to make sure that service was not an
10 issue, which I appreciate. I said that I believe when I was here last.
11 And, Your Honor, we would -- I was just here two days ago on a case
12 that has turned ugly because of everything being destroyed. I don't want
13 that to happen in this case. And an order like this gives us that
14 protection for everyone, so that's what we're asking, Your Honor.

15 DISCOVERY COMMISSIONER: Pursuant to, Mr. Parker,
16 though pursuant to Sedona, what is the evidence that there's a real
17 danger that this evidence is going to be spoliated.

18 MR. PARKER: And I will say -- and I believe this is what was
19 repeated to Judge Barker in maintaining the order, as well as Judge
20 Bailus -- we do have independent -- an independent company who have
21 employees now that won't identify themselves or that have not been
22 identified who have now changed their mind based upon a crime, a
23 cyber crime investigator 2 with the State, I am concerned that we may
24 never get this information now, despite their efforts.

25 The order is in addition to what they've already said or what

1 they've tried to do. I need to be able to provide that order and make
2 sure, to the best that we can, that they understand that the Court is
3 behind this in terms of this case.

4 That order doesn't help me in my case at this point because
5 they've not answered, has not been consolidated. I need protection for
6 my client as well, and I do need to make sure, to the best that I can, that
7 any personal phones or devices used to also transmit business related
8 to this 2018 application is preserved.

9 So everything I'm asking the Court to do -- and I think fits
10 squarely within Sedona -- we have now indications that there may be a
11 problem preserving and getting information. That's why I need the
12 protection, Your Honor.

13 DISCOVERY COMMISSIONER: Okay. And how do we
14 determine -- because there's some real concerns with regard to private
15 cellphone imaging. How do we determine whether -- if private phones
16 were not utilized, then they shouldn't be in -- then they shouldn't be --

17 MR. PARKER: Absolutely.

18 DISCOVERY COMMISSIONER: -- imaged.

19 MR. PARKER: And, Your Honor, that's one of the benefits of
20 the discovery that I envision taking place. Now, there's been some
21 preconference discovery allowed by Judge Barker, and those include
22 depositions of the Manpower individuals. So we'll learn the -- through
23 those depositions -- they've been limited to the device that they were
24 using, so we'll know what device actually would've been used for
25 purposes of work, so we would -- if they say, listen, I've used the

1 personal one and a work one, we'll get the names of those devices and
2 those numbers. If for -- so that's a way of protecting.

3 I don't know, in terms of Mr. Werbicky's experience with this,
4 but I'm doing ESI extraction on a lot of cases that we're working on, and
5 I have companies I've used here, California, Chicago, and New York,
6 and there's one local that can do it very quickly. In fact, they typically
7 can get it done in a couple of days. All it is is a time, scheduling a time.
8 It takes typically one to two hours. If it's Cloud based, takes even less
9 time, and they pull the information right off the phone.

10 And what they do in terms of limiting it, making sure you don't
11 take out information that's not relevant to the case, they will identify
12 numbers so, for example, if it's a Manpower telephone going to a State
13 employee, you'll get the State employee's number, the Manpower
14 number, and you can just extract that information, be it calls, be it text
15 messages. That's how clean it is, Your Honor.

16 DISCOVERY COMMISSIONER: So we brought up a lot of
17 extra stuff, so --

18 MR. POPE: Yeah.

19 DISCOVERY COMMISSIONER: -- I'm going to give you an
20 opportunity, Mr. Werbicky, to respond, and then Mr. Parker will get the
21 last word.

22 MR. WERBICKY: All right. Thank you, Your Honor. In fact,
23 there is a lot there. First up, there's a lot in the reply that we would've
24 liked to have responded to 'cause it was brought up the first time. This
25 Manpower thing has been dealt with already.

1 The imagining that they are talking about, at least from the
2 experience that we have had to date, is much more complicated than
3 that. Up north there was a facility that we had to go to, which was the
4 Washoe County Sheriff's Office, and only the properly licensed
5 individuals could go into that facility, so that's why we got our -- the
6 criminal division of the Attorney's General's Office involved. She was
7 able to go within and image the laptops that were at issue to the forensic
8 machine and a couple of State employee phones that were ordered to
9 be imaged.

10 So those items took several days in which to image, and there
11 was no -- and there were no problems with those particular ones. We
12 were told that it could take up to a day to image a phone if there are
13 problems with it, it could take up to a day to image a laptop if there were
14 problems with. All those have already been preserved and are in the
15 Attorney General's evidence locker. So -- but that was -- all those were
16 done up north, and that's where the Manpower employees are, up north.

17 We don't know what processes we'd have to go through down
18 here in order to get the same thing done, although we'd probably again
19 have to go to a cyber crime lab.

20 MR. POPE: Your Honor --

21 DISCOVERY COMMISSIONER: Okay. So it's -- just help me
22 out here. So how many phones have already been imaged that don't
23 need to be reimaged because they've already been imaged in the other
24 case? I mean, the order could just be that that information then will
25 apply to this case as well because it's already been imaged.

1 MR. WERBICKY: There --

2 DISCOVERY COMMISSIONER: So how are -- how many are
3 we talking about that haven't been imaged?

4 MR. WERBICKY: Two State employee phones have been
5 imaged.

6 DISCOVERY COMMISSIONER: Two State employees.

7 MR. PARKER: Do we have the names, Your Honor?

8 MR. WERBICKY: Steve Gilbert and -- I'm sorry, I forgot his
9 name. It's Kyle. His -- those phones were imaged. Those work phones
10 were imaged.

11 DISCOVERY COMMISSIONER: What about Ms. Cronkhite
12 and Ms. Hernandez?

13 MR. WERBICKY: Mr. Hernandez and Ms. --

14 DISCOVERY COMMISSIONER: Oh, Mr. Hernandez. Sorry.

15 MR. WERBICKY: Yeah. No, those phones were not imaged.

16 DISCOVERY COMMISSIONER: Why not?

17 MR. WERBICKY: And they are both based down here.

18 DISCOVERY COMMISSIONER: And why were they not
19 imaged?

20 MR. WERBICKY: Because they weren't part of the order.
21 They weren't directly involved in the scoring. As that order was written,
22 it indicated we were talking about five, up to five, individuals that were
23 involved in the scoring. They weren't involved in the scoring itself. They
24 were involved in the training is my understanding.

25 So -- and, again, the only basis for having their cellphones

1 imaged in the first place is apparently this meeting with Mr. Parker where
2 they were designated to oversee the review of the scores and follow the
3 law. So --

4 Am I missing anything out of this?

5 MR. POPE: Your Honor, may I?

6 DISCOVERY COMMISSIONER: Go ahead.

7 MR. POPE: So I had a discussion with our chief investigator
8 this morning, and there may be a facility in Southern Nevada in Clark
9 County that we could use. You know, it is an expensive procedure.

10 DISCOVERY COMMISSIONER: How expensive is it --

11 MR. POPE: We don't know because --

12 DISCOVERY COMMISSIONER: Mr. Parker does apparently.

13 Mr. Parker, would you like to enlighten the Court?

14 MR. PARKER: I can help him whenever he's ready. But I
15 don't want to interrupt him. I'll --

16 MR. POPE: Thank you.

17 MR. PARKER: -- answer once he's done.

18 DISCOVERY COMMISSIONER: Okay.

19 MR. POPE: Thank you. Yeah.

20 So the primary concern is that some of this information is
21 confidential. There is currently a bill that may change some of that, but
22 we wanted to use -- at first there was a misunderstanding in Judge
23 Bailus's court when this was being discussed, and that
24 misunderstanding was all that was needed was a copy so that you could
25 essentially copy your hard drive to another hard drive. But later on then

1 it was discovered that what those Plaintiffs were really looking for was
2 this imaging, and the State does not have that resource. It has to use
3 other resources in which -- which is why we were using the Sheriff's
4 resources up in Washoe County, and we may have access to something
5 like that down here. I don't know for sure yet, but we can look into that.

6 The concern, like I was -- started saying was the
7 confidentiality of the information to contract with some other company,
8 we disclose that information instantly. There may be contracts, or
9 maybe agreements, but it's still disclosed when it's copying it within the
10 department was, you know, really ideal. But then when it turned to
11 imaging, we found the next best thing, which was using the Sheriff's
12 facilities because that is going to stay confidential as well. So I just
13 wanted to mention that.

14 It's not -- so whereas we wouldn't have the money in the
15 budget to cover the costs of this, we don't know what the cost is
16 because the primary concern was the confidentiality of the information.
17 That's really what I wanted to mention about the imaging.

18 MR. WERBICKY: And I had forgotten about that. That's why
19 the Sheriff's office was used, because we couldn't go to an outside
20 source because of our strict confidentiality laws.

21 DISCOVERY COMMISSIONER: I understand.

22 MR. WERBICKY: So we --

23 DISCOVERY COMMISSIONER: And you don't know what
24 the cost would be?

25 MR. WERBICKY: It's time and effort from the State's

1 perspective. Right? Or --

2 MR. POPE: I don't have a number, Your Honor. It's been
3 represented to me that it's extremely expensive, so.

4 DISCOVERY COMMISSIONER: All right.

5 MR. POPE: You know, with that, Manpower is not a party to
6 this case, but they could be, just to address the other issue.

7 DISCOVERY COMMISSIONER: All right. Mr. Parker.

8 MR. PARKER: I'll just start with where Mr. Pope left off. If
9 they want Manpower to be a part of this case, they have the contractual
10 relationship. They have the indemnity rights. They have the contribution
11 rights. That's their decision.

12 In terms of what's in front of this Court, let me address the
13 cost part and the convenience part. There's a local company here that
14 will come to you or you can come to them. They will extract the
15 information from a phone, typically within an hour-and-a-half. If it's on
16 the Cloud, it's even less time. And they can do it for \$2,500.

17 DISCOVERY COMMISSIONER: Per phone?

18 MR. PARKER: Per phone. In fact, I have -- I'm sorry. The
19 case that I'm dealing with them right now, there's two phones for \$2,500.
20 I'm sorry. So two phones, \$2,500.

21 Then the other thing -- so -- and I have not even asked them
22 to bear the cost at this point, so cost shouldn't be a consideration in
23 terms of preservation.

24 The other point, Your Honor, confidentiality doesn't prevent
25 preservation, and I could it in your eyes when that was mentioned this

1 Court has dealt with protective orders numerous times. You can have
2 the information extracted and still the information remain confidential and
3 protected. That shouldn't be an issue.

4 What this Court is faced with, which I keep hearing admissions
5 that seem to be a stipulation but then an objection at the end. They
6 seem to agree that we -- the order in terms of Manpower appears
7 appropriate because it's -- because one's already issued in another
8 court, it's hard for them to argue that it's not also appropriate in this
9 case, which is separate.

10 The other thing that seems at odds with some of their
11 conversation is that Ms. Hernandez and -- Mr. Hernandez and Ms.
12 Cronkhite are both here in Las Vegas. When I met with them, they gave
13 me certain information. I wanted, of course, more, but they informed me
14 that they were involved in the training of those doing the scoring. Our --

15 DISCOVERY COMMISSIONER: The Manpower employees?

16 MR. PARKER: Bingo. So I know, and I suspect I should say,
17 that communications between those two individuals and the Manpower
18 individuals would've taken place at a minimum in terms of the criteria for
19 scoring, the manner of scoring, and how to score. So even if they
20 weren't the ones actually writing down the numbers, their input had a lot
21 to do with how those scorings were performed. That information is
22 directly related to our case. It should be protected and preserved.

23 So when Mr. Werbicky got up and said, well, I thought this
24 was only an expansion, the issue is an expansion of the preservation
25 order -- it's an expansion because we didn't know, Mr. Kemp didn't

1 know, I didn't know until I met with them on January 17 -- and our motion
2 followed not long thereafter, and you can see the timing; it's pretty
3 close -- that they were involved.

4 And so, Your Honor, to the extent there was personal phones
5 or work phones utilized, I just want them -- give me an order saying don't
6 do anything bad with this; do not destroy it; don't tamper with it; don't get
7 rid of it. And until the case is consolidated, we need that protection, and
8 so that's why we're here, Your Honor.

9 I think we've addressed it. Judge Bailus, Judge Barker have
10 addressed -- have both addressed the Sedona principles. I think the
11 Court is familiar with them. You've asked the questions that I think are
12 pertinent. I've responded based upon what we have in front of us,
13 including the State's own declaration, Your Honor.

14 DISCOVERY COMMISSIONER: All right. My
15 recommendation is going to be that a motion for preservation will issue --
16 or, I'm sorry, an order for preservation be issued. I think that Mr. Parker
17 has stated sufficiently to satisfy the Sedona principles, that there is a
18 danger, a real danger of evidence destruction, based on the position
19 taken by the unidentified Manpower employees with regard to the
20 evidence.

21 With regards to Mr. Hernandez and Ms. Cronkhite, what I'm
22 concerned about though -- and I'm trying to decide what the best way to
23 handle this is -- is for each of these individuals I don't think personal
24 phones should be imaged if there was no real -- any risk that they were
25 utilized for business purposes -- if they were not utilized for business

1 purposes I should say.

2 MR. PARKER: Makes sense.

3 DISCOVERY COMMISSIONER: And so what I would
4 recommend is that we limit the response time on depositions upon
5 written questions to each individual involved to identify themselves and
6 to identify what devices they used for work purposes.

7 And I think then instead of a 30-day response time for those
8 written questions, we should maybe do a 14-day response time, so that
9 any individual that the Plaintiff could serve written questions at this point
10 to the State to identify each person who was involved in this scoring
11 process, and those persons identify what, if any, personal devices
12 information was stored on so that it -- I'm sorry. Let me restate that.
13 Any and all devices that work was performed on so that we can
14 eliminate the need to -- if no personal devices were used, then no
15 personal devices need the preservation order attended to them.

16 MR. PARKER: Makes sense.

17 DISCOVERY COMMISSIONER: And so -- because I think
18 that's -- I don't want to have an order apply to a personal device if it's not
19 necessary to avoid any privacy concerns.

20 With regard to Mr. Hernandez and Ms. Cronkhite, certainly
21 their work devices are subject to the order and any personal devices that
22 were utilized for work purposes, and when I say devices, that would be
23 any device whether it be a laptop, a computer, a desktop, or a phone, or
24 an iPad or whatever that's used for -- and has electronically stored
25 information.

1 Now, what I'm going to further order is that -- so this
2 preservation order will apply to all persons involved, and that needs to
3 be identified by the State, a protective order will be in place, a
4 preservation order will be in place, confidentiality orders will be in place.

5 And if the Plaintiff would like to have the devices imaged, then
6 that must be done at the Plaintiff's expense. It must be done at the
7 location, if possible, of the Defendants. Mr. Parker indicated that they
8 can go directly to you, and the information will be retained by the
9 Defendants because there -- because of the confidentiality issue. So the
10 document will be imaged, retrieved, and then deposited with the
11 Defendants with the order in place.

12 And then I think there -- if Defendants do anything with that
13 information, if there's any spoliation, there are certainly other ways to
14 deal with that in the litigation.

15 MR. PARKER: Sounds great.

16 DISCOVERY COMMISSIONER: So that way the
17 confidentiality and the party who does the imaging cannot retain any
18 copies or any of that. All of that needs to be left in place of the
19 Defendants, and the Defendants can store that on State property.

20 MR. PARKER: Sounds great, Your Honor.

21 DISCOVERY COMMISSIONER: Okay?

22 MR. PARKER: Thank you, Your Honor.

23 DISCOVERY COMMISSIONER: So that's going to be my
24 recommendation. I'm going to ask Mr. Parker to prepare it and circulate
25 it to counsel for approval as to form and content.

1 MR. PARKER: Thank you, Your Honor.

2 DISCOVERY COMMISSIONER: And then I guess we'll wait
3 to see what happens with regard to consolidation.

4 MR. PARKER: Sounds great, Your Honor. Thank you so
5 much.

6 DISCOVERY COMMISSIONER: And I --

7 MR. POPE: Thank you, Your Honor.

8 DISCOVERY COMMISSIONER: -- made it clear that it was at
9 Plaintiff's expense --

10 MR. PARKER: Yes.

11 DISCOVERY COMMISSIONER: -- if this preservation and
12 imaging would be done with the information maintained and kept by
13 Defendants.

14 MR. PARKER: Yes, Your Honor. Thank you.

15 MR. POPE: One question.

16 MR. PARKER: Sorry we took so long.

17 DISCOVERY COMMISSIONER: That's all right.

18 MR. POPE: Is there a certain number of copies that we
19 should do, which is -- I mean, if they elect to do it, and are going to pay
20 for it, should they make the three copies that we've had to do in the
21 other case so that there would be one for the Court, one for us, and one
22 for them, or --

23 DISCOVERY COMMISSIONER: That would stand to reason.
24 Yes.

25 MR. PARKER: That's fine, Your Honor.

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DISCOVERY COMMISSIONER: So three copies at the
expense of Plaintiffs.

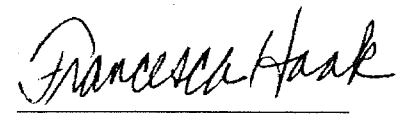
MR. PARKER: That's fine, Your Honor.

MR. WERBICKY: Thank you, Your Honor.

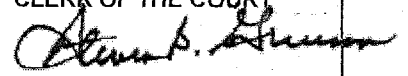
DISCOVERY COMMISSIONER: Thank you.

[Hearing concluded at 10:19 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the
audio-video recording of this proceeding in the above-entitled case.



FRANCESCA HAAK
Court Recorder/Transcriber



1 **RESP**
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 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 NEVADA WELLNESS CENTER, LLC, a
14 Nevada Limited Liability Company,

15 Plaintiff,

16 v.

17 STATE OF NEVADA, DEPARTMENT OF
18 TAXATION; and DOES I through X,
19 inclusive; and ROE CORPORATIONS I
20 through X, inclusive,

21 Defendants.

CASE NO.: A-19-787540-W
DEPT. NO.: XVIII

**RESPONSE TO WRITTEN
OBJECTIONS TO DISCOVERY
COMMISSIONERS' REPORT AND
RECOMMENDATIONS**

22 COMES NOW, Plaintiff, NEVADA WELLNESS CENTER, LLC (hereinafter "Plaintiff"),
23 by and through its attorney of record, THEODORE PARKER, III, ESQ. of the law firm of PARKER,
24 NELSON & ASSOCIATES, CHTD., and hereby files this Response to Written Objections to
25 Discovery Commissioners' Report and Recommendations.

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1 This Response is made and based upon the pleadings and papers on file herein, the points and
2 authorities included herewith, and such oral argument as the Court may entertain at the time of the
3 hearing of this matter.

4 DATED this 31st, day of May, 2019.

5 PARKER, NELSON & ASSOCIATES, CHTD.

6
7 /s/Theodore Parker, III, Esq.
8 THEODORE PARKER, III, ESQ.
9 Nevada Bar No. 4716
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128
Attorneys for Plaintiff

10 **MEMORANDUM OF POINTS & AUTHORITIES**

11 **I.**

12 **INTRODUCTION**

13 In 2018, Plaintiff submitted applications for recreational marijuana retail store licenses to
14 own and operate such stores in the following jurisdictions: unincorporated Clark County, Las Vegas,
15 North Las Vegas, and Reno. Defendant was responsible for allocating the finite number of licenses
16 by ranking applications in accord with the applicable statutes.

17 Plaintiff has previously gone through the 2015 licensing procedure, which had utilized
18 substantially similar factors in evaluating the applications, with the exception that in 2018 an
19 additional factor was added; diversity consideration. Plaintiff was the only 100% minority owned
20 applicant. In 2015, Plaintiff was ranked the highest in Las Vegas. Despite Plaintiff's previously high
21 rankings, on December 5, 2018, Plaintiff was informed all of its applications were denied and
22 instead. As a result, Plaintiff filed the instant action on January 15, 2019, for declaratory relief and
23 injunctive relief, and alleging violations of procedural and substantive due process, and equal
24 protection.

25 Plaintiff eventually learned Defendant allocated the evaluation and ranking duty to a third-
26 party, Manpower. On February 27, 2019, Plaintiff filed an Emergency Motion for an Order seeking
27 to preserve relevant electronically stored information related to the claims and defenses in the instant
28

1 litigation. (See Plaintiff's Emergency Motion, filed February 27, 2019, a true and correct copy
2 attached hereto as Exhibit "A".) Plaintiff incorporates said Motion as though fully stated herein. As
3 Defendant hired an outside third-party to evaluate and rate the marijuana licensing applications,
4 Plaintiff had a legitimate concern that electronic records of said third-party employed by Defendant
5 may be destroyed. Plaintiff was also concerned as Defendant refused to provide information to
6 Plaintiff regarding the training of the evaluators or any questions regarding the scoring of the
7 applications. (See Exhibit "A".)

8 Defendant filed an Opposition on March 7, 2019. (See Opposition to Emergency Motion,
9 filed March 7, 2019, a true and correct copy attached hereto as Exhibit "B".) Defendant's Opposition
10 boiled down to one argument – a preservation order was not justified.¹ However, it became evidence
11 that Plaintiff's fears were justified as the people who evaluated and rated the applications refused
12 to turn over their electronically stored information to Defendant for preservation (in breach of the
13 contract with Defendant).

14 Plaintiff noted these concerns in its Reply. (See Plaintiff's Reply in Support of Emergency
15 Motion, filed March 25, 2019, a true and correct copy attached hereto as Exhibit "C".) The
16 Discovery Commissioner, as did Judge Bailus in a similar case, agreed with Plaintiff's arguments
17 and issued a Discovery Commissioner's Report and Recommendation requiring the preservation of
18 evidence. (See Discovery Commissioner's Report and Recommendations ("DCCR"), filed May 10,
19 2019, a true and correct copy attached hereto as Exhibit "D" and Exhibit "C" at Exhibit "3" (Order
20 in Case No. A-18-785818-W, requiring Defendant to preserve the same evidence required to be
21 preserved by the DCCR).) As Defendant is already under an obligation in a different case to preserve
22 the same evidence at issue here, Defendant's position in the instant matter is flummoxing at best.²

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25 ¹While Defendant noted some concerns with confidentiality or privacy, this can be handled through
26 confidentiality and/or protection orders – and was as the DCCR at issue provides for this before the electronic
information can be shared with Plaintiff.

27 ²See also Transcript of Proceedings attached hereto as Exhibit "E", dated February 5, 2019, at p. 25-36,
28 allowing depositions of Manpower employees related to relevant information stored on their cell phones in order to
preserve said relevant information.

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II.

ARGUMENT

A. APPLICABLE LAW

1. NRCP 16.3

NRCP 16.3 provides in relevant part:

(2) Objections. Within 14 days after being served with a report, any party may file and serve written objections to the recommendations. Written authorities may be filed with an objection but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within 7 days after being served with the objections.

(3) Review. Upon receipt of a discovery commissioner's report, any objections, and any response, the court may:

(A) affirm, reverse, or modify the discovery commissioner's ruling without a hearing;

(B) set the matter for a hearing; or

(C) remand the matter to the discovery commissioner or further action.

2. Possession, Custody, or Control

NRCP 34 requires parties to produce discoverable items within their "possession, custody, or control." NRCP 34(a)(1). The 'phrase' "possession, custody, or control" is disjunctive and only one of the numerated requirements need be met." Kiser v. Pride Communs., Inc., 2011 U.S. Dist. LEXIS 124124, 10-12 (D. Nev. Oct. 26, 2011)(citing Soto v. City of Concord, 162 F.R.D. 603, 619 (N.D.Cal. 1995)(quoting Cumis Ins. Society, Inc. v. South-Coast Bank, 610 F.Supp. 193, 196 (N.D. Ind. 1985)). Thus, "actual possession" is not required. Soto, 162 F.R.D. at 619. Rather, Nevada Courts have agreed with a majority of jurisdictions that a "party may be ordered to produce a document in the possession of a non-party entity if that party has a legal right to obtain the document or has control over the entity who is in possession of the document." Kiser, 2011 U.S. Dist. LEXIS 124124, at 10-12 (D. Nev. Oct. 26, 2011) citing Soto, 162 F.R.D. at 619 (internal citation omitted).

Courts have broadly interpreted "control" in the context of document production. See 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

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

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

18 B. ARGUMENT

19 1. Defendant has possession, custody, and/or control of the discovery at issue

20 The State of Nevada entered into a Contract with Manpower related to the review and
21 scoring of the applications at issue. (See Contract for Services of Independent Contractor, a true and
22 correct copy attached hereto as Exhibit "A".) By its own terms, the Contract is effective from April
23 1, 2017 through March 31, 2021. Under paragraph 9, there is an "Inspection & Audit" right which
24 allows the State to inspect, examine, review, and audit and copy relevant books, records (written
25 electronic, computer related or otherwise), including without limitation...documentation related to
26 the work product...". (Id. at p. 3.)

27 Paragraph 9 of the Contract clearly grants Defendant, a Department of the State of Nevada,
28 a legal right to obtain the items Plaintiff has requested. Defendant has "control" over the entity

1 whom Defendant ~~claims~~ has current possession of the discovery sought to be preserved. Certainly,
2 Defendant has the authority under the Contract to obtain the requested discovery upon demand. As
3 the Contract states, the State of Nevada can, "at any reasonable time" inspect or copy, without notice.

4 Defendant ignores this portion of the Contract and instead claims it has no control or
5 authority over Manpower; the same contractor Defendant admits to hiring, training, and utilizing to
6 evaluate and rate the marijuana dispensary license applications. Defendant is being disingenuous
7 with the Court. Defendant has access to and the right to demand any documents, electronic or
8 otherwise, associated with work performed for the State of Nevada. As shown below, the items
9 Defendant was ordered to preserve, are only those that were either: utilized in evaluating and rating
10 the marijuana dispensary license applications or utilized in training individuals or utilized in hiring
11 individuals.³⁴ It is disingenuous for Defendant to now claim it has no control over Manpower and
12 production of electronic information stored by Manpower employees. As shown, Defendant can
13 access, and subsequently preserve, this information.

14 **2. The Discovery Commissioner's Report and Recommendations are specific**
15 **and clear**

16 The May 10, 2019 Discovery Commissioner's Report and Recommendations ("DCCR")
17 require Defendant to:

- 18 1. Preserve communications made with Manpower related to the hiring of personnel by
19 Manpower for the September 2018 application period or the training of any Manpower employees;
20 2. Preserve any personal or work devices **that were utilized for work purposes**, in
21 Defendant's possession;

22 _____
23 ³Defendant plays coy with this Court and asks whether personnel who merely forwarded documents or
24 organized meetings would be subject to turning over their personal cell phones. (See Objection at p. 7:13-19.) As
25 expressly stated in the DCCR in multiple places, only personal cell phones **that were used for work purposes** are
subject to the DCCR.

26 ⁴ It should also be noted that this argument was not raised below, but could have been as Defendant was
27 aware Plaintiff was seeking electronic devices utilized by Manpower and concerns over the preservation of this
28 evidence was, in part, the grounds of Plaintiff's initial Motion. (See Exhibit "A" and "B"). Thus, pursuant to Valley
Health Sys., LLC v. Eighth Jud. Dist. Court, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011) and the Advisory
Committee Note to the 2019 Amendments to NRCp 16.3, these arguments are barred and must be disregarded by the
Court.

1 3. Preserve any server, standalone computers (including laptops, iPads, or thumb drives), or
2 cellular devices...used in the evaluation and rating process for marijuana dispensary license
3 applications as part of the September 2018 application period;

4 4. Provide a list of State personnel and Manpower personnel that assisted in the evaluation
5 and rating of all applications for dispensary licenses, trained or assisted in the training of the
6 Manpower personnel, and/or evaluated such license applications received in the September 2018
7 application period;

8 5. Provide a list of cell phone numbers known to Defendant sufficient to allow the
9 identification of the cell phone used for work purposes; and

10 6. Defendant may designate up to 6 persons Defendant believes were primarily involved in
11 the processing of all applications and/or the evaluation of such applications.

12 Defendant, based on the Objection filed, only takes issue with the use of the word "assisted"
13 and the fact that some personal cell phones, **but only if said phones were used for work purposes**,
14 must be provided for imaging. If a cell employee cell phone was not used for work done in relation
15 to the hiring, training, application intake, evaluation, etc. related to the September 2018 application
16 period, then the cell phone need not be copied. The DCCR is narrowly tailored in this regard to
17 preserve relevant evidence while balancing the needs of the case. Further, it should be noted that
18 pursuant to the DCCR, Plaintiff is not entitled to access the cell phone data until Plaintiff and
19 Defendant agree to terms providing for the protection of confidential data. Thus, any privacy or
20 confidentiality concerns can and will be addressed prior to production of the information. The DCCR
21 is narrowly tailored to ensure specific evidence is preserved.

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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 31st, day of May, 2019, I served a true and
4 correct copy of the foregoing **RESPONSE TO WRITTEN OBJECTIONS TO DISCOVERY**
5 **COMMISSIONERS' REPORT AND RECOMMENDATIONS** on the party(s) set forth below
6 by:

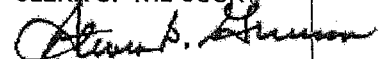
- 7 ☐ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the
8 United States Mail, at Las Vegas, NV, postage prepaid, following ordinary business practices.
9 ☐ Facsimile transmission, pursuant to the amendment to the Eighth Judicial District Court Rule 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-
serve (Odyssey) filing system.

14 Aaron D. Ford, Esq.
15 Attorney General
16 Robert E. Werbicky, Esq.
17 Deputy Attorney General
18 Office of the Attorney General
19 555 E. Washington Avenue, Suite 3900
20 Las Vegas, NV 89101
21 (702) 486-3105
22 Fax: (702) 486-3416
23 Email: rwerbicky@ag.nv.gov
24 *Attorneys for Defendant,*
25 *State of Nevada, Department of Taxation*

26 
27 _____
28 An employee of PARKER, NELSON & ASSOCIATES, CHTD.

EXHIBIT “A”

RSA000125



1 **MOT**
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 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 NEVADA WELLNESS CENTER, LLC, a
14 Nevada Limited Liability Company

15 Plaintiff,

16 vs.

17 STATE OF NEVADA, DEPARTMENT OF
18 TAXATION; and DOES I through X; and
19 ROE CORPORATIONS I through X,
20 inclusive.

21 Defendants.

22 Case No.: A-19-787540-W
23 Dept. No.: XVIII

24 **PLAINTIFFS' EMERGENCY MOTION**
25 **FOR ORDER REQUIRING THE SMC,**
26 **MS. KAREN CRONKITA AND MR.**
27 **DAMON HERNANDEZ OF**
28 **DEPARTMENT OF TAXATION TO**
PRESERVE AND/OR IMMEDIATELY
TURN OVER RELEVANT
ELECTRONICALLY STORED
INFORMATION FROM SERVERS,
STAND-ALONE COMPUTERS, AND
CELL PHONES ON ORDER
SHORTENING TIME

3/8/19
930 AM

29 NOW APPEARS Plaintiff, NEVADA WELLNESS CENTER, by and through its
30 counsel of record, Theodore Parker, III., and hereby moves the Court to enter an order requiring
31 the out-of-state marijuana consultant employed by Defendants (the State Marijuana or "SMC")
32 to preserve relevant electronically stored information from servers, stand-alone computers,
33 and/or cell phones. Thirty-one licenses with an estimated street value of \$465 million dollars
34 were awarded on December 5, 2019¹.

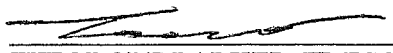
35 Plaintiff is informed and believes that the SMC did all of the processing and rating of the
36 licensees' applications at an out-of-state office. The proposed order is required to ensure the

37 ¹ See December 11, 2018 Review Journal, Section B, p. 6B ("Dispensary licenses in Clark County sell on
38 the secondary market for between \$10 million and \$20 million said John Lamb, president of the Las Vegas Medical

1 preservation of electronic data that is of utmost significance to prove critical facts regarding the
2 unreasonable and unconstitutional denial of Plaintiff's applications for recreational marijuana
3 retail stores in Clark County, Nevada. Plaintiff also seeks an Order that Defendant preserve all
4 electronically stored information from servers, stand-alone computer and for all cell phones of
5 Ms. Karen Cronkita and Damon Hernandez, Chief Investigator with the Department of
6 Taxation.

7 DATED this 7th day of February, 2019.

8 PARKER, NELSON & ASSOCIATES, CHTD.

9
10 
11 THEODORE PARKER, III, ESQ.
12 Nevada Bar No.: 4716
13 2460 Professional Court, Suite 200
14 Las Vegas, Nevada 89128
15 Telephone: (702) 868-8000
16 Facsimile: (702) 868-8001
17 Email: tparker@pnlaw.net
18 *Attorneys for Plaintiff*

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28 Marijuana Association.")

1 ORDER SHORTENING TIME

2 It appearing to the satisfaction of the Court, and good cause appearing therefore, IT IS
3 HEREBY ORDERED that the time for hearing on PLAINTIFFS' EMERGENCY MOTION
4 FOR ORDER REQUIRING THE SMC, MS. KAREN CRONKITA AND MR. DAMON
5 HERNANDEZ OF DEPARTMENT OF TAXATION TO PRESERVE AND/OR
6 IMMEDIATELY TURN OVER RELEVANT ELECTRONICALLY STORED
7 INFORMATION FROM SERVERS, STAND-ALONE COMPUTERS, AND CELL
8 PHONES be and the same is hereby shortened to the 8th day of March, 2019, at the

9 hour of 930 a.m. in ~~Department XVIII~~ in front of the
Discovery Commissioner

10 DATED this 26 day of February, 2019.

11 Ainlee Olman
12 DISTRICT COURT JUDGE
13 acting DISCOVERY COMMISSIONER

14 Respectfully submitted by:
15 PARKER, NELSON & ASSOCIATES, CHTD.

16 THEODORE PARKER, III, ESQ.
17 Nevada Bar No.: 4716
18 2460 Professional Court, Suite 200
19 Las Vegas, Nevada 89128
20 Telephone: (702) 868-8000
21 Facsimile: (702) 868-8001
22 Email: tparker@pnalaw.net
23 Attorneys for Plaintiff
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1 DECLARATION OF THEODORE PARKER, III, ESQ. IN SUPPORT OF PLAINTIFFS'
2 EMERGENCY MOTION FOR ORDER REQUIRING THE SMC, MS. KAREN
3 CRONKITA AND MR. DAMON HERNANDEZ OF DEPARTMENT OF TAXATION
4 TO PRESERVE AND/OR IMMEDIATELY TURN OVER RELEVANT
5 ELECTRONICALLY STORED INFORMATION FROM SERVERS, STAND-ALONE
6 COMPUTERS, AND CELL PHONES, STAND-ALONE COMPUTERS, AND CELL
7 PHONES ON ORDER SHORTENING TIME

8 STATE OF NEVADA)
9) ss.
10 COUNTY OF CLARK)

11 THEODORE PARKER, III, ESQ., being first duly sworn, under oath, deposes and says
12 that:

13 1. Declarant is an attorney licensed to practice law in the State of Nevada and
14 partner with the law firm of PARKER, NELSON & ASSOCIATES, counsel for Plaintiffs in
15 this matter;

16 2. Declarant is informed and believes that the Nevada Department of Taxation
17 retained an out-of-state consultant to rank the recently-filed marijuana applications. The Nevada
18 Department of Taxation has thus far refused to provide the applicants with any information
19 about their rankings. The estimated value of the thirty-one Clark County licenses is
20 approximately \$465 million.

21 3. On January 19, 2019, Declarant and owners of Nevada Wellness Center met with
22 Ms. Cronkita and Mr. Hernandez. During the meeting Declarant was informed that Ms.
23 Cronkita and Mr. Hernandez would not provide information on training the evaluators or the
24 method of scoring.

25 4. Moreover, Ms. Cronkita and Mr. Hernandez informed Declarant that they were
26 instructed not to answer any questions regarding how the scoring was done. Ms. Cronkita and
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1 Mr. Hernandez also refused to tell Declarant who instructed them to not answer any such
2 questions.

3 5. It is essential to immediately preserve the electronic data of the out-of-state
4 consultant in order to avoid irreparably prejudicing Plaintiff.

5 6. This matter cannot be heard in the ordinary course because some of this data is
6 on readily disposable electronic instruments.

7 7. It is essential to immediately preserve any electronically stored data relative to
8 communication between Ms. Cronkita and Mr. Hernandez and the out-of-state consultant.
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10 7. I make this declaration under penalty of perjury.
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14 THEODORE PARKER, III, ESQ.
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I

STATEMENT OF FACTS

In 2018, Plaintiff, NEVADA WELLNESS CENTER, LLC, submitted applications for recreational marijuana retail store licenses to own and operate recreational marijuana retail stores in the following jurisdictions: unincorporated Clark County, Nevada; Las Vegas, Nevada; North Las Vegas, Nevada; and Reno, Nevada. Under Nevada law, the State of Nevada's Department of Taxation (the "Department") was responsible for allocating the new licenses of recreational marijuana retail stores to jurisdictions within each county and was required to rank the applications in accordance with applicable regulations and statutes. The highest ranking applications were to be awarded licenses. Upon information and belief, the Department delegated these responsibilities to an unidentified State Marijuana Consultant ("SMC") that offices outside of Nevada. The applications were supposed to be ranked by specified criteria set forth below.

Prior to the 2018 application process with the Department, Plaintiff was previously scored and ranked in the 2015 licensing procedure, pursuant to NRS 453A, in conjunction with a medical marijuana establishment permit application. **In 2015, Plaintiff received a score of 198.62 and was ranked as the highest applicant for a medical marijuana dispensary in Las Vegas, Nevada** and Plaintiff was the seventh-highest ranked applicant for its license in the City of Henderson, Nevada. A copy of the 2015 Medical Marijuana Dispensaries Scores and Rankings by Jurisdiction is attached as Exhibit 1. The factors used for the 2015 rankings were substantially similar to the factors to be used by the Department for the 2018 rankings for the allocated licenses. The only additional factor was the diversity consideration. Plaintiff is the only one hundred percent (100%) minority owned applicant.

On or about December 5, 2018, despite its prior exceptional ranking, Plaintiff was informed by the Department that **all** of its applications to operate recreational marijuana retail stores were denied. Plaintiff is informed and believes that the Department improperly granted "conditional" licenses to applicants that were ranked substantially lower than the highest rated Plaintiff on the 2015 rankings. Because substantially the same criteria were supposed to be

1 used for the 2015 rankings and the 2018 rankings, it is stunning that Plaintiff went from first to
2 a ranking that did not qualify for a license and that three applicants that were dozens of spots
3 below Plaintiff in the 2015 rankings were awarded licenses.

4 According to press reports and public filings, the following applicants were given
5 licenses in Clark County:

- 6 1. Essence/Green Thumb—8 licenses
- 7 2. Tap Roots—7 licenses
- 8 3. Green Growth Brands—7 licenses

9 The entire industry is a shocked both because disparity between the 2015 rankings and the 2018
10 rankings and because it was not anticipated that any single applicant could get more than 2 or 3
11 licenses. To quote the Las Vegas Medical Marijuana Association, Vegas Medical Marijuana
12 Association, "distribution should have been more disbursed."²

13 As a result, on January 15, 2019, Plaintiff initiated the present action for declaratory
14 relief, injunctive relief, and constitutional violations of procedural due process, substantive due
15 process, and equal protection. Plaintiff also sought a petition for judicial review and petition for
16 writ of mandamus. Plaintiff is informed and believes that the SMC's electronic devices,
17 including computer servers, stand-alone computers, hard drives, laptops, tablets, thumb drives,
18 cell phones, and similar devices holding electronically stored information contain critical
19 evidence regarding Plaintiff's claims. This evidence will show how the rankings were made. If
20 approved, an expert computer consultant who can download this electronically stored
21 information if the devices and passwords are provided should be retained/appointed.
22 Downloading this data—essentially, making copies of the relevant devices—will ensure this
23 potentially critical evidence is preserved and available in this case. A copy of the proposed
24 order requested by Plaintiff is attached as Exhibit 2.

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27 ² Essence issued a press release on December 11, 2018 stating it was awarded 8 licenses. The Review
28 Journal reported on December 11, 2018 that Tap Roots got 7 licenses and Green Growth 7 licenses. December 11,
2018 Review Journal, Section B, p. 6B.

1 It is equally important that their members of the Department of Taxation working with
2 SMC be ordered to preserve all electronically stored information relative to its communication
3 of SMC and the manner in which these applicators were evaluated.

4 As set forth in the proposed order, Plaintiff requests the preservation and/or immediate
5 production of electronically stored information:

- 6 - Within 10 days of the entry of the order, the SMC shall make available to Plaintiff for
7 copying any servers or stand-alone computers, including external hard drives, laptops,
8 tablets, thumb drives, and similar devices containing electronically stored information;
- 9 - Plaintiff's counsel, the Department's counsel, and their respective computer consultants
10 shall meet and confer to discuss the best way to facilitate the copying process;
- 11 - If the SMC has a pre-existing organizational chart, it shall provide the same to Plaintiff's
12 counsel within three business days of the entry of the order;
- 13 - Within three business days of the entry of the order, the SMC shall provide a list of all
14 personnel who assisted in the processing and/or evaluation of applications for dispensary
15 licenses and a list of the cell phone numbers, including but not limited to personal cell
16 phone numbers, for each such person;
- 17 - The SMC shall also designate up to five persons from this list that the SMC believes
18 were primarily involved in the processing and/or evaluation of license applications;
- 19 - Within three business days of receiving the forgoing list, Plaintiff shall be allowed to
20 take the telephonic deposition of the Rule 30(b)(6) representative for the SMC to
21 identify the names and job descriptions of all those involved on behalf of the SMC in
22 assisting in the processing and/or evaluating of applications for dispensary licenses (the
23 purpose of the 30(b)(6) deposition is to identify persons whose cell phone data may
24 contain relevant, discoverable materials to ensure that all such data is preserved;
- 25 - Within 10 business days of the entry of the order, the SMC shall make available for
26 copying all cell phones (business and personal) of each person that assisted in the
27 processing and/or evaluation of dispensary applications;
- 28 - In the event that the SMC claims that a cell phone is not available, it shall file a sworn
declaration from the person whose cell phone is unavailable explaining why such phone
is unavailable (Plaintiff will have the option of conducting a telephonic deposition of
any employees claiming that their cell phone is unavailable);
- Neither Plaintiff's counsel nor Plaintiff or its agents or employees shall access the cell
phone data until the Department and Plaintiff agree on a procedure to protect non-
discoverable, confidential information on the cell phone (if the parties cannot agree, they
will submit their dispute to the Court);
- Plaintiff's counsel are **not** restricted from accessing the server data, including data from
any stand-alone computers, tablets, external hard drives, thumb drives, or similar
devices but shall maintain all such data as confidential for attorneys' eyes only
(including review by Plaintiff's General Counsel) pending the issuance of a
confidentiality order, if a Confidentiality Order is requested by Plaintiff, the Department,
or the SMC.

- While the ruler of governing discovery require Defendant to preserve and maintain all electronically stored information (ESI) related to this case, Plaintiff seeks an Order which specifically requires Ms. Cronkita and Mr. Hernandez to preserve such ESI related to their communication with SMC.

II

ARGUMENT

A. Despite the common law duty of preservation, critical evidence is often lost and/or destroyed.

Bass-Davis held that there is a common law duty to “preserve evidence” when a “party is on notice when litigation is reasonably foreseeable . . .,” holding:

In other words, when presented with a spoliation allegation, the threshold question should be whether the alleged spoliator was under any obligation to preserve the missing or destroyed evidence. The duty to preserve springs from a variety of sources, **including ethical obligations**, statutes, regulations, and common law. Courts, including this court, that adhere to a common-law duty to preserve evidence have held that a party is required to preserve documents, tangible items, and information relevant to litigation that are reasonably calculated to lead to the discovery of admissible evidence. Thus, the prelitigation duty to preserve evidence is imposed once a party is on “notice” of a potential legal claim. While few courts have expounded on the concept of notice, those that have conclude that **a party is on notice when litigation is reasonably foreseeable.**

Bass-Davis v. Davis, 122 Nev. 442, 449-50, 134 P.3d 103, 108 (2006) (Bold added). Our High Court cited the following decisions for the bolded proposition. Blinzer v. Marriott Intern., Inc., 81 F.3d 1148 (1st Cir. 1996); Rice v. U.S., 917 F.Supp. 17, 20 (D.D.C. 1996); Shaffer v. RWP Group, Inc., 169 F.R.D. 19, 24 (E.D.N.Y. 1996). Like Bass-Davis, all of these cases held that it was the reasonable prospect of potential litigation—not actual litigation—that triggered the obligation to preserve evidence.

Despite the clear duty to preserve evidence, there have been dozens of Nevada cases where a litigant did not preserve relevant evidence—either through inadvertence or intentionally. See, e.g., Foster v. Dingwall, 126 Nev. ____, 227 P.3d 1042 (2010); Bahena v. Goodyear Tire & Rubber Co., 126 Nev. Adv. Op. 26, 235 P.3d 592 (2010); Stubli v. Big D. Intern. Trucks, Inc., 810 P.2d 785 (1991); Young v. Johnny Ribeiro Building, 106 Nev. 88, 787

1 P.2d 777 (1990). In each of the foregoing cases, an order to preserve and turn over relevant
2 evidence could have avoided acrimonious sanctions debates.

3 In this case, there are serious concerns about the preservation of the evidence. First, the
4 defendant does not have the evidence—it is out of state in the possession of SMC. Second,
5 some types of the evidence have mysteriously disappeared in like cases, e.s., Tom Brady deleted
6 cell phone messages in the NFL deflate-gate investigation. Losing any of the critical electronic
7 records of the SMC would irreparably prejudice Plaintiff's ability to prove its case.

8 **B. Plaintiff is entitled to an order requiring the preservation and immediate**
9 **production of relevant electronically stored information from computer**
10 **servers and cell phones.**

11 Bass-Davis v. Davis, 122 Nev. 442, 449-50, 134 P.3d 103, 108 (2006) holds that
12 “documents, tangible items, and information relevant to litigation that are reasonably calculated
13 to lead to the discovery of admissible evidence” must be preserved and produced. In this case,
14 the electronic data described above is both relevant to the litigation and potentially unavailable
15 at a future date without immediate preservation. Using the requested cell phones as an example,
16 the NFL deflategate investigation of Tom Brady highlights how critical cell phone data can
17 disappear. See NFL Mgt. Council v. NFL Players Assoc., 820 F.3d 527, 544 (2016) (“Finally,
18 any reasonable litigant would understand that the destruction of evidence, revealed just days
19 before the start of arbitration proceedings, would be an important issue. It is well established
20 that the law permits a trier of fact to infer that a party who deliberately destroys relevant
21 evidence that party had an obligation to produce did so in order to conceal damaging
22 information from the adjudicator.”) The proposed preservation order will ensure that such
23 electronic data does not disappear in this case.

24 **C. The parameters of Plaintiff's requested preservation and turn-over order**
25 **are reasonable.**

26 Plaintiff is not requesting anything that it is not otherwise entitled to receive in the
27 regular course of this litigation. Given the \$465 million stakes of this litigation and the reality
28 that electronically stored information is regularly lost or deleted, Plaintiff simply seeks an order
ensuring that this information is preserved and available. Plaintiff has proposed safeguards

1 protecting potentially confidential or privileged information on all cell phones and is willing to
2 cooperate with the Department to protect the reasonable interests of all involved. This is not a
3 novel request, as Plaintiff's counsel have had similar requests granted by other courts in the
4 Eighth Judicial District.

5 **III**

6 **CONCLUSION**

7 Plaintiff has filed a lawsuit against the Department relating to the unreasonable and
8 unconstitutional denial of its applications for recreational marijuana retail stores in Clark
9 County, Nevada. The thirty-one licenses in dispute have an estimated value of \$465 million
10 dollars. Defendant hired an out-of-state marijuana consultant ("SMC) to do all the ratings of
11 hundreds of applicants. The SMC's electronic devices, including computer servers, stand-alone
12 computers, hard drives, laptops, tablets, thumb drives, cell phones, and similar devices holding
13 electronically stored information contain critical evidence regarding Plaintiff's claims. The
14 proposed electronic data preservation and turn-over order is required to ensure that potentially
15 significant electronically stored information is not lost. Accordingly, and for all of the forgoing
16 reasons, the instant motion should be granted.

17 DATED this 17th day of February, 2019.

18 **PARKER, NELSON & ASSOCIATES, CHTD.**

19 
20 THEODORE PARKER, III, ESQ.

21 Nevada Bar No.: 4716

22 2460 Professional Court, Suite 200

23 Las Vegas, Nevada 89128

24 Telephone: (702) 868-8000

25 Facsimile: (702) 868-8001

26 Email: tparker@pnalaw.net

27 *Attorneys for Plaintiff*
28

EXHIBIT “1”

RSA000137

MEDICAL MARIJUANA DISPENSARIES

Scores and Rankings by Jurisdiction

*Revised 12/21/2015 3pm

*Results not shown below reflect the confidentiality of NRS 453A.700 and applicant did not provide a consent to release.

CARSON CITY			
Rank	Business Name	Score	Provisional License Yes / No
1	Nevada Organic LLC	209.83	Y
2	CONSENT TO RELEASE NOT PROVIDED		Y
3	NNV Service III, LLC	193.35	N
4	NNV Services II, LLC	193.01	N
5	5Seat Investments LLC	186.66	N
6	CapWell, LLC	178.3	N
7	BioNeva Innovations of Carson City, LLC	161.36	N
8	CONSENT TO RELEASE NOT PROVIDED		N
9	The MedMen of Nevada 2, LLC	150.99	N
10	CONSENT TO RELEASE NOT PROVIDED		N
11	Green Grasshopper	15.67	N

CHURCHILL COUNTY			
Rank	Business Name	Score	Provisional License Yes / No
1	CONSENT TO RELEASE NOT PROVIDED		Y

CLARK COUNTY- HENDERSON			
Rank	Business Name	Score	Provisional License Yes / No
1	Unifree Wellness, LLC	208.3	Y
2	Integral Associates II, LLC	204.03	Y
3	Clear River, LLC	201.6	Y
4	CONSENT TO RELEASE NOT PROVIDED		Y
5	WaveSeer of Nevada	199.38	Y
6	Henderson Organic Remedies LLC	194	N
7	Nevada Wellness Center	193.62	N
8	NuLeaf Henderson Dispensary, LLC	192.37	N
9	The Clinic Nevada, LLC	191.01	N
10	Gravitas Henderson LLC	182.4	N
11	Sagebrush Wellness, LLC	172.66	N
12	Serenity Wellness Center, LLC	169.13	N
13	360 Global Sciences, Inc.	164.71	N
14	CONSENT TO RELEASE NOT PROVIDED		N
15	BioNeva Innovations of Henderson, LLC	163.03	N
16	CONSENT TO RELEASE NOT PROVIDED		N
17	The MedMen of Nevada 2, LLC	161	N
18	CONSENT TO RELEASE NOT PROVIDED		N
19	Twelve Twelve, LLC	147.76	N
20	Green Life Dispensary, Inc.	144.93	N
21	Agua Street LLC	142.27	N
22	CONSENT TO RELEASE NOT PROVIDED		N
23	Via Vida LLC	128.69	N
24	Unifern	125.63	N
25	Unifern	124	N
26	Greenway Health Community, LLC	112.23	N
27	CONSENT TO RELEASE NOT PROVIDED		N

CLARK COUNTY- LAS VEGAS			
Rank	Business Name	Score	Provisional License Yes / No
1	Nevada Wellness Center	198.62	Y
2	Medifarm, LLC	197.72	Y
3	NuLeaf CLV Dispensary, LLC	189.71	N***
4	CONSENT TO RELEASE NOT PROVIDED		Y
5	Silver Sage Wellness, LLC	187.01	Y
6	Paradise Wellness	186.84	Y
7	Clark NMSD, LLC DBA NuVeda	185.45	Y
8	CONSENT TO RELEASE NOT PROVIDED		Y
9	CONSENT TO RELEASE NOT PROVIDED		Y
10	Desert Aire Wellness	172.33	Y
11	Serenity Wellness Center, LLC	171.8	Y
12	Nevada Wellness Project, LLC	169	Y
13	Acres Medical, LLC	167.3	Y**
14	CONSENT TO RELEASE NOT PROVIDED		N
15	Samantha's Remedies	163.26	N
16	Nevada Cares, LLC	161.56	N
17	CONSENT TO RELEASE NOT PROVIDED		N
18	CONSENT TO RELEASE NOT PROVIDED		N
19	CONSENT TO RELEASE NOT PROVIDED		N
20	THC Nevada LLC	154.67	N
21	CONSENT TO RELEASE NOT PROVIDED		N
22	Red Rock Wellness LLC	153.96	N
23	CONSENT TO RELEASE NOT PROVIDED		N
24	CONSENT TO RELEASE NOT PROVIDED		N
25	CONSENT TO RELEASE NOT PROVIDED		N
26	CONSENT TO RELEASE NOT PROVIDED		N
27	CONSENT TO RELEASE NOT PROVIDED		N
28	QualCan of Las Vegas, LLC	151.29	N
29	Cannabis Renaissance Group LLC	150.65	N
30	CONSENT TO RELEASE NOT PROVIDED		N

*Relocated provisional registration issued pursuant to Senate Bill 276 from the 2015 Legislative Session.

**Provisional registration issued per court order.

***Provisional registration rescinded/withdrawn per court order.

MEDICAL MARIJUANA DISPENSARIES

Scores and Rankings by Jurisdiction

*Revised 12/21/2015 3pm

31	CONSENT TO RELEASE NOT PROVIDED		N
32	The MedMen of Nevada 2, LLC	148.33	N
33	CONSENT TO RELEASE NOT PROVIDED		N
34	Physis One LLC	143.82	N
35	Buffalo Center Medical Advocates	142.5	N
36	Primo Dispensary	137.33	N
37	CONSENT TO RELEASE NOT PROVIDED		N
38	Diversified Modalities Retail Ltd.	124.66	N
39	Green Leaf Farms Holdings Inc.	115.27	N
40	M'Life Wellness, LLC	113.67	N
41	CONSENT TO RELEASE NOT PROVIDED		N
42	Blossum Group, LLC	111.67	N
43	CONSENT TO RELEASE NOT PROVIDED		N
44	CONSENT TO RELEASE NOT PROVIDED		N
45	CONSENT TO RELEASE NOT PROVIDED		N
46	Valley Healing Group Inc.	96.53	N
47	CONSENT TO RELEASE NOT PROVIDED		N
48	CONSENT TO RELEASE NOT PROVIDED		N
49	CONSENT TO RELEASE NOT PROVIDED		N

CLARK COUNTY- MESQUITE			
Rank	Business Name	Score	Provisional License Yes / No
1	CONSENT TO RELEASE NOT PROVIDED		Y

CLARK COUNTY- NORTH LAS VEGAS			
Rank	Business Name	Score	Provisional License Yes / No
1	Waveceer of Las Vegas	197.71	Y
2	Tryke Companies SO NV, LLC	192.97	Y
3	Cheyenne Medical, LLC	191.07	Y
4	Clark NMSD, LLC DBA NuVeda	187.1	Y
5	Green Therapeutics LLC	178.33	N
6	NLV-1 LLC	164.2	N
7	360 Global Sciences, Inc.	163.37	N
8	Mountainside Health Center NV LLC	160.98	N
9	NLV Health and Wellness LLC	154	N
10	CONSENT TO RELEASE NOT PROVIDED		N
11	CONSENT TO RELEASE NOT PROVIDED		N
12	CONSENT TO RELEASE NOT PROVIDED		N
13	NLVD, LLC	137.94	N
14	Lone Mountain Partners, LLC	133.82	N
15	CONSENT TO RELEASE NOT PROVIDED		N
16	CONSENT TO RELEASE NOT PROVIDED		N
17	CONSENT TO RELEASE NOT PROVIDED		N
18	Greenway Health Community North, LLC	110.23	N
19	CONSENT TO RELEASE NOT PROVIDED		N
20	CONSENT TO RELEASE NOT PROVIDED		N
21	Medical Cannabis Healing LLC	78.01	N

CLARK COUNTY- UNINCORPORATED CLARK COUNTY			
Rank	Business Name	Score	Provisional License Yes / No
1	Tryke Companies SO NV, LLC	212.97	Y
2	CONSENT TO RELEASE NOT PROVIDED		Y
3	CONSENT TO RELEASE NOT PROVIDED		Y
4	MM Development Company, LLC	203.58	Y
5	Livfree Wellness, LLC	201.64	Y
6	Medifarm, LLC	201.04	Y
7	Medifarm, LLC	200.71	Y
8	Clear River, LLC	197.46	Y
9	CONSENT TO RELEASE NOT PROVIDED		Y
10	CONSENT TO RELEASE NOT PROVIDED		Y
11	The Clinic Nevada, LLC	190.68	Y
12	NuLeaf Clark Dispensary, LLC	189.03	Y
13	CONSENT TO RELEASE NOT PROVIDED		Y
14	CONSENT TO RELEASE NOT PROVIDED		Y
15	CONSENT TO RELEASE NOT PROVIDED		Y
16	Euphoria Wellness LLC	176.32	Y
17	Gravitas Nevada LTD	176.03	Y
18	CONSENT TO RELEASE NOT PROVIDED		Y
19	Just Quality LLC	172.86	Y*
20	Just Quality LLC	171.19	N
21	CONSENT TO RELEASE NOT PROVIDED		N
22	CONSENT TO RELEASE NOT PROVIDED		Y*
23	Polaris Dispensary, LLC	163.67	N
24	CONSENT TO RELEASE NOT PROVIDED		Y*
25	CONSENT TO RELEASE NOT PROVIDED		Y*
26	CONSENT TO RELEASE NOT PROVIDED		N
27	The MedMen of Nevada	151.67	Y*
28	QualCar, LLC	150.95	N
29	CONSENT TO RELEASE NOT PROVIDED		Y*
30	CONSENT TO RELEASE NOT PROVIDED		N
31	Las Vegas Wellness Center, Inc.	143.56	N
32	Global Harmony, LLC	141.26	Y*
33	Nevada Medical Marijuana Dispensary, Inc.	137.18	Y*
34	Camelot NV LLC	132.32	N
35	CONSENT TO RELEASE NOT PROVIDED		N

*Reallocated provisional registration issued pursuant to Senate Bill 276 from the 2015 Legislative Session.

**Provisional registration issued per court order.

***Provisional registration rescinded/withdrawn per court order.

RSA000139

MEDICAL MARIJUANA DISPENSARIES

Scores and Rankings by Jurisdiction

*Revised 12/21/2015 3pm

36	CONSENT TO RELEASE NOT PROVIDED	N
37	NXTGEN Wellness, LLC	117.01 N

NYE COUNTY			
Rank	Business Name	Score	Provisional License Yes / No
1	CONSENT TO RELEASE NOT PROVIDED		Y
2	MM Development Company, LLC	206.93	N
3	Nye Natural Medicinal Solutions, LLC	186.1	N
4	Options Medical Center Pahrump, LLC	166.96	N
5	NCMM, LLC	136.95	N
6	CONSENT TO RELEASE NOT PROVIDED		N

STOREY COUNTY			
Rank	Business Name	Score	Provisional License Yes / No
1	CONSENT TO RELEASE NOT PROVIDED		Y

WASHOE COUNTY- RENO			
Rank	Business Name	Score	Provisional License Yes / No
1	Livfree Wellness Reno, LLC	207	Y
2	CONSENT TO RELEASE NOT PROVIDED		Y
3	MediFarm I, LLC	203.68	Y*
4	The Clinic Nevada, LLC	196.33	Y*
5	CONSENT TO RELEASE NOT PROVIDED		N
6	The Cannavative Group, LLC	193.37	N
7	NNV Services IV, LLC	191.99	N
8	CONSENT TO RELEASE NOT PROVIDED		N
9	NuLeaf Reno Dispensary, LLC	189.37	N
10	CapWell, LLC	171.23	N
11	NeVWA, LLC	156.66	N
12	The MediMen of Nevada 2, LLC	154.99	N
13	The Canopy Reno, Inc.	153.41	N
14	Naturally Nevada LLC	150.73	N
15	CONSENT TO RELEASE NOT PROVIDED		N
16	A New Leaf Wellness Center, LLC	146.6	N
17	High Sierra Holistics	122.05	N
18	CONSENT TO RELEASE NOT PROVIDED		N
19	Wells and Taylor, LLC	88.59	N
20	Herbal Care, LLC	83.91	N
21	CONSENT TO RELEASE NOT PROVIDED		N
22	CONSENT TO RELEASE NOT PROVIDED		N
23	Green Tree Therapy, LLC	62.69	N
24	CONSENT TO RELEASE NOT PROVIDED		N
25	Green Grasshopper	21.67	N

WASHOE COUNTY- SPARKS			
Rank	Business Name	Score	Provisional License Yes / No
1	Silver State Relief, LLC	225.19	Y
2	Tryke Companies Reno, LLC	202.03	Y
3	Greenleaf Wellness, Inc.	194	Y*
4	NNV Services IV, LLC	191	N
5	The MediMen of Nevada 2, LLC	152.33	N
6	Common Sense Botanicals	143.97	N
7	CONSENT TO RELEASE NOT PROVIDED		N
8	CONSENT TO RELEASE NOT PROVIDED		N
9	CONSENT TO RELEASE NOT PROVIDED		N

WASHOE COUNTY- UNINCORPORATED WASHOE			
Rank	Business Name	Score	Provisional License Yes / No
1	Nevada Organix LLC	212.49	Y
2	Tryke Companies Reno, LLC	204.69	Y
3	NuLeaf Incline Dispensary, LLC	191.7	Y
4	The Clinic Nevada, LLC	191.01	Y
5	SSeat Investments LLC	188.34	Y
6	Washoe Dispensary, LLC	173.67	Y*
7	BioNeva Innovations of Washoe County, LLC	163.04	N
8	CONSENT TO RELEASE NOT PROVIDED		N
9	CONSENT TO RELEASE NOT PROVIDED		N
10	CONSENT TO RELEASE NOT PROVIDED		N
11	CONSENT TO RELEASE NOT PROVIDED		N

*Reallocated provisional registration issued pursuant to Senate Bill 276 from the 2015 Legislative Session.

**Provisional registration issued per court order.

***Provisional registration rescinded/withdrawn per court order.

RSA000140

EXHIBIT "2"

RSA000141

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kic@kempjones.com

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

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 NEVADA WELLNESS CENTER, LLC a
Nevada Limited Liability Company,

Case No.: A-19-787540-W
Dept. No.: XVIII

11 Plaintiff,

12 vs.

13 STATE OF NEVADA, DEPARTMENT OF
14 TAXATION; and DOES I through X; and
15 ROE CORPORATIONS I through X,
16 inclusive.

17 Defendants.

**ORDER GRANTING EMERGENCY
MOTION FOR ORDER REQUIRING
THE SMC TO PRESERVE AND/OR
IMMEDIATELY TURN OVER
RELEVANT ELECTRONICALLY
STORED INFORMATION FROM
SERVERS, STAND-ALONE
COMPUTERS, AND CELL PHONES**

19 Plaintiff, NEVADA WELLNESS CENTER, having filed an Emergency Motion For
20 Preservation Of Electronic Data and having given the counsel for Department of Taxation
21 notice of such request, and it appearance that the Department of Taxation retained a consultant
22 to evaluate and rate marijuana dispensary license applications (hereinafter referred to as the
23 SMC or "State Marijuana Consultant"), and good cause appearing for the preservation of
24 electronic data of the SMC, it is hereby ORDERED, ADJUDGED and DECREED as follows:

25 ORDERED that the SMC ("State Marijuana Consultant") shall make any servers or any
26 standalone computers (including laptops, iPads or thumb drives) in its possession available for
27 copying by Plaintiff in the next 10 business days after execution of this order. To allow Plaintiff
28

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

1 and the State (i.e., the Nevada Department of Taxation) to determine the most efficient way to
2 allow the EDI expert for Plaintiff to make such copies, the SMC shall make its primary IT
3 person available for a conference call with counsel for the Plaintiff, counsel for the State (and
4 counsel for the SMC if desired by the SMC) to identify in general the types of servers
5 (including standalone computers and laptops) that will be subject to the copying protocol and
6 types and amount of data maintained on such servers (including standalone computers and
7 laptops). The conference call shall be held no later than 5 business days after execution of this
8 order.

9 ORDERED that the SMC shall provide Plaintiff a list of personnel that assisted in the
10 processing of all applications for dispensary licenses and/or evaluated such license applications
11 and provide a list of the cell phone numbers (including but not limited to personal cell phone
12 numbers) for each such person within 3 business days of after execution of this order. At the
13 same time, the SMC shall also designate up 5 persons on such list that the SMC believes were
14 primarily involved on behalf of the SMC in the processing of all applications for dispensary
15 licenses and/or the evaluation of such license applications. If the SMC has a pre-existing
16 organizational chart, it shall provide the same to Plaintiff at such time but the SMC is not
17 obligated to create an organizational chart. Within 3 business days after receiving the foregoing
18 list from the SMC, Plaintiffs shall be allowed to take the telephonic deposition of the person
19 most knowledgeable (hereinafter "PMK") for the SMC to identify the names and job
20 descriptions of all persons (including temporary employees, if any) that were involved on behalf
21 of SMC in assisting in the processing of applications for dispensary licenses and/or evaluating
22 such licenses. The purpose of the PMK deposition is to identify persons whose cell phone data
23 may contain relevant discoverable materials to ensure that all such data is preserved.

24 ORDERED that the SMC shall make all cell phones of each such person that assisted in
25 the processing of applications for dispensary licenses and/or evaluated such license applications
26 available for copying in the 10 business days after execution of this order at a location
27 convenient to SMC. The SMC shall be required to produce both business and personal cell
28 phones for each such person. In the event any such cell phones are not available, the SMC shall

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

1 file a sworn declaration from the person whose cell phone is not available explaining why such
2 cell phone is not available within 10 business days after execution of this order. If Plaintiff so
3 desires, Plaintiff may conduct a telephonic deposition or any person claiming that a cell phone
4 is not available to be copied to explore the validity of the reason that the cell phone is
5 supposedly unavailable.

6 ORDERED that neither Plaintiff's counsel nor Plaintiff or their agents or employees
7 shall access the cell phone data until the State and Plaintiff agrees to a procedure to protect non-
8 discoverable confidential data or the Court allows such access by subsequent order. The SMC
9 is authorized to inform any such persons whose cell phone data is copied that any and all
10 personal information will either be returned or destroyed at a later date. Plaintiff's counsel and
11 Plaintiff and their agents or employees are not restricted from accessing server data or any data
12 from standalone computers (including laptops, iPads and thumb drives) but shall maintain all
13 such data as confidential for attorneys' eyes only (including review by General Counsel for
14 Plaintiff) pending issuance of a confidentiality order, if a confidentiality order is requested by
15 Plaintiff, the State or SMC.

16 ORDERED that the SMC is directed to maintain any and all documents in its possession
17 regarding the processing of applications for dispensary licenses and/or evaluation of such
18 license applications, including but not limited to the following: (1) any and all communications
19 between the SMC and the State; (2) any and all directions provided by the State to the SMC
20 regarding the processing of applications or the evaluation of the applications; (3) any and all
21 communications between the SMC and any applicant (or with the attorneys or consultants for an
22 applicant) regarding any subject matter; (4) the contract, if any, between the SMC and the State
23 and all invoices, if any, sent by the SMC to the State; (5) any and all preliminary rankings of
24 applicants by jurisdiction or otherwise by SMC that pre-date the final ranking; (6) any and all
25 work papers (including notes) used by the SMC in the processing of applications for dispensary
26 licenses and/or evaluation of such license applications; (7) any and all spread sheets created by
27 the SMC regarding the applications for dispensary licenses; and (8) any and all notes of formal
28 or informal meetings among SMC personnel regarding the processing of applications for

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

1 dispensary licenses and/or evaluation of such license applications. The State shall not be
2 required to produce the documents set forth in categories 1 through 8 at an expedited pace but
3 shall be required to identify the same with specificity at the Rule 16.1 conference, and

4 ORDERED that the State shall serve a copy of this Order upon the SMC within one
5 business day of its execution.

6 DATED this ____ day of February, 2019.
7

8 DISTRICT JUDGE
9

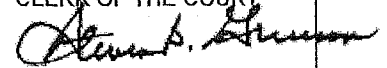
10
11 Respectfully submitted by:

12 **PARKER, NELSON & ASSOCIATES, CHTD.**
13

14 THEODORE PARKER, III., ESQ.
15 Nevada Bar No. 4716
16 2460 Professional Court, Suite 200
17 Las Vegas, Nevada 89128
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EXHIBIT “B”

RSA000146



OPPS
AARON D. FORD
Attorney General
Robert E. Werbicky (Bar No. 6166)
Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3105 (phone)
(702) 486-3416 (fax)
rwerbicky@ag.nv.gov
Attorneys for Defendants
State of Nevada Department of Taxation

DISTRICT COURT
CLARK COUNTY, NEVADA

NEVADA WELLNESS CENTER, LLC, a
Nevada Limited Liability Company,

Plaintiff,

vs.

STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES I through X; and ROE
CORPORATIONS I through X, inclusive.

Defendants.

Case No. A-19-787540-W
Dept. No. XVIII

**OPPOSITION TO EMERGENCY MOTION
FOR ORDER REQUIRING THE SMC, MS.
KAREN CRONKITA AND MR. DAMON
HERNANDEZ OF DEPARTMENT OF
TAXATION TO PRESERVE AND/OR
IMMEDIATELY TURN OVER RELEVANT
ELECTRONICALLY STORED
INFORMATION FROM SERVERS, STAND-
ALONE COMPUTERS, AND CELL PHONES
ON ORDER SHORTENING TIME**

Date of Hearing: March 8, 2019
Time of Hearing: 9:30 a.m.

The STATE OF NEVADA, DEPARTMENT OF TAXATION by and through their counsel,
AARON D. FORD, Attorney General and ROBERT WERBICKY, Deputy Attorney General, hereby
make a SPECIAL APPEARANCE and files its Opposition to Plaintiff's Emergency Motion for Order
Requiring the SMC, Ms. Karen Cronkita [sic] and Mr. Damon Hernandez of Department of Taxation to
Preserve and/or Immediately Turn Over Relevant Electronically Stored Information From Servers,
Stand-alone Computers, and Cell Phones on Order Shortening Time.

This opposition is based on the attached Points and Authorities, all papers and pleadings on file
herein, and any argument allowed at a hearing on this matter.

...

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

A. The Applications for Retail Marijuana Stores

As is well known, once recreational marijuana usage became legal in Nevada, the Legislature limited the number of store licenses that could be issued. NRS 453D.210. In 2014 there were 66 Marijuana Retail Store licenses available. There were 198 applications submitted for these 66 licenses. In this application period, one out of every three applications resulted in a license being issued.

On July 5, 2018 the Department posted its intent to accept applications in September 2018. From September 7, 2018 until September 20, 2018 the Department of Taxation Marijuana Enforcement Division accepted applications for Marijuana Retail Store licenses. In this application period, by statute, there were only 64 licenses available state-wide. Only 61 conditional licenses were issued.¹ Some of the 61 licenses were issued in jurisdictions that don't currently allow for marijuana sales.²

The coveted licenses were in Clark County where only 31 licenses were available. Ten (10) licenses were allotted to Unincorporated Clark County, ten (10) were allotted to the City of Las Vegas, six (6) were allotted to the City of Henderson,³ and five (5) were allotted to the City of North Las Vegas. Zero (0) licenses were available in Mesquite, Nevada.

The Department had a contract with a company called Manpower to provide personnel for temporary employment. The Department used this contract to secure six (6) temporary workers to grade the 462 applications. These employees are usually referred to as the Manpower Employees. After training, the Manpower Employees graded the applications. These grades were put onto a spreadsheet and totaled. The spreadsheet was submitted to the Department to ensure there were no math errors and then rank the applications based on the total scores. The Department then awarded the conditional licenses based on the total score until the number of licenses in any jurisdiction was exhausted.

¹ Churchill County had one license allocated, but the Department didn't receive any applications for Churchill County. Pershing County had two licenses allocated, but the Department only received one application for Pershing County. Lincoln County had two licenses allocated, but the Department only received one application.

² The Department does not take the local jurisdiction's position on legality when issuing license. If awarded a license in such a jurisdiction, the licensee has 12 month to convince the jurisdiction to change their mind and become operational.

³ At the time, the City of Henderson had a moratorium on the issuance of new licenses by the city.

1 On December 5, 2018 the Department notified the applicants individually whether they were
2 awarded a license or not. Given the limited number of licenses available approximately 87% (or 401 of
3 462) applications) were denied. The competition was even fiercer in Clark County. In those jurisdictions
4 312 applications were submitted but only 31 conditional licenses issued. Thus, over 90% of the
5 applications were rejected.

6 As such, Nevada Wellness Center, LLC was just one of the hundreds of disappointed applicants
7 who were not awarded a licenses in 2018.

8 **B. The Score Review Meeting**

9 Pursuant to regulation NAC 453D.274(2) Nevada Wellness Center, LLC requested a review of
10 the scoring information. This review occurred on or about January 19, 2019.⁴ Ms. Karalin Cronkhite
11 and Mr. Damon Hernandez were the two Department of Taxation employees designated to conduct the
12 score review.

13 NRS 453D.274(3) strictly limits the scope of the score review. It is not appropriate for an
14 applicant to ask questions about the process during this review. In fact, the regulation specifically
15 prohibits the Department employees from discussing the scoring process. NRS 453D.274(3) provides,
16 in part:

17 The employee designated by the Department to conduct the review shall
18 not discuss or comment on the scores, the review of the application by the
Department or any other application submitted to the Department.

19 The score review only allows the applicant to see the scores received in the various categories that make
20 up the total score issued.

21 **C. The Instant Motion**

22 The Plaintiff is seeking an emergency preservation order which was filed on February 27, 2019.
23 The Plaintiff's only factual basis for seeking a preservation order is contained in the affidavit of Theodore
24 Parker, III, Esq.. He states:

25 3. On January 19, 2019, Declarant and owners of Nevada Wellness
26 Center met with Ms. Cronkita [sic] and Mr. Hernandez. During the
meeting Declarant was informed that Ms. Cronkita [sic] and Mr.

27
28 ⁴ The Plaintiff filed the instant litigation on January 15, 2019. The Complaint still has not been properly served.

1 Hernandez would not provide information on training the evaluators or the
2 method of scoring.

3 4. Moreover, Ms. Cronkita [sic] and Mr. Hernandez informed
4 Declarant that they were instructed not to answer any questions regarding
5 how the scoring was done. Ms. Cronkita [sic] and Mr. Hernandez also
6 refused to tell Declarant who instructed them to not answer any such
7 questions.

8 Affidavit of Theodore Parker, III, Esq., p. 4, ln. 20 – p. 5, ln. 3.

9 As noted, these employees are prohibited by law from discussing these issues. Thus, Plaintiff is
10 requesting a preservation order solely on the basis that Department employees **followed the law**.

11 **II. Legal Argument**

12 **A. The Plaintiff is not entitled to a preservation order.**

13 The Sedona Principles and Sedona commentaries⁵ thereto are the leading authorities on electronic
14 document retrieval and production. *Ford Motor Co. v. Edgewood Properties, Inc.*, 257 F.R.D. 418, 424
15 (D.N.J. 2009); *William A. Gross Const. Assc., Inc. v. American Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136
16 (S.D.N.Y.2009) (“[t]his Court strongly endorses The Sedona Conference Cooperation Proclamation”);
17 *John B. v. Goetz*, 531 F.3d 448 (6th Cir.2008) (following principles); *Aguilar v. Immigration and*
18 *Customs Enforc. Div. of U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350 (S.D.N.Y.2008) (same).

19 Comment 5 f of the Sedona Principles deals with preservation orders and provides, in part:

20 In general, courts should not issue a preservation order over
21 objection unless the party requesting such an order demonstrates its
22 necessity, which may require an evidentiary hearing in some
23 circumstances. Because all litigants are obligated to preserve relevant
24 information in their possession, custody, or control, **a party seeking a
25 preservation order must first demonstrate a real danger of evidence
26 destruction, the lack of any other available remedy, and that a
27 preservation order is an appropriate exercise of the court’s discretion
28 and is tailored to require only preservation of information relevant to
the claims and defenses.**

Such orders violate the principle that responding parties are
responsible for preserving and producing their own ESI. See Principle 6.
More generally, preservation orders should rarely be issued over

⁵ *The Sedona Principles*, Third Edition: Best Practices, Recommendations & Principles for Addressing
Electronic Document Production, 19 Sedona Conf. J. 1 (2018). The copyright notice indicates the Journal
is available on a complementary basis to courthouses.

1 objection, and only after a full and fair opportunity to present
2 evidence and argument. This is particularly important when dealing with
3 ESI that may be transitory, not reasonably accessible, or not susceptible to
4 reasonable preservation measures. The 2006 Advisory Committee Note to
5 Rule 26(f) instructs that "the requirement that the parties discuss
6 preservation does not imply that courts should routinely enter preservation
7 orders. A preservation order entered over objections should be narrowly
8 tailored. Ex parte preservation orders should issue only in exceptional
9 circumstances."

10 (emphasis added).

11 The Plaintiff has not provided any evidence demonstrating a real danger of evidence destruction,
12 that no other remedy is available, or such an order would be appropriate. The Department is objecting
13 and Plaintiff did not provide any relevant evidence in support of its request.

14 The Sedona Principals also discuss the obligation to preserve evidence generally. Sedona
15 Principle 5 provides:

16 The obligation to preserve electronically stored information requires
17 reasonable and good faith efforts to retain information that is expected to
18 be relevant to claims or defenses in reasonably anticipated or pending
19 litigation. However, it is unreasonable to expect parties to take every
20 conceivable step or disproportionate steps to preserve each instance of
21 relevant electronically stored information.

22 Comment 5.e. provides:

23 The preservation obligation for ESI does not impose heroic or unduly
24 burdensome requirements on parties. Rather, the obligation to preserve
25 normally requires reasonable and good faith efforts. As discussed in
26 Comment 3.a., the identification of data sources that may be subject to
27 preservation and production should be discussed among the parties early
28 in the case. If the parties are unable to agree on the scope of preservation,
they should raise the issue with the court at the Rule 16(b) conference. See
also Comment 4.b.

An obligation to undertake extraordinary efforts should be imposed only
when a court, after consideration of proportionality principles, determines
that there is a substantial likelihood that the ESI exists; that it is directly
relevant to a claim or defense and would not remain in existence absent
intervention; that the ESI (or its substantial equivalent) cannot be found in
another, more accessible data source; and that its preservation is likely to
materially advance the resolution of the litigation in a just, efficient, and
relatively inexpensive manner.

There is no need for a preservation order because there is no indication the Department is destroying or
losing data. Indeed, the Department is already preserving potentially relevant data.

1 Further, the Sedona Principles clearly show the Plaintiff is demanding discovery far out of
2 proportion to legitimate discovery purposes. Sedona Principle 2 provides:

3 When balancing the cost, burden, and need for electronically stored
4 information, courts and parties should apply the proportionality standard
5 embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which
6 requires consideration of the importance of the issues at stake in the action,
7 the amount in controversy, the parties' relative access to relevant
information, the parties' resources, the importance of the discovery in
resolving the issues, and whether the burden or expense of the proposed
discovery outweighs its likely benefit.

8 Comment 2 d further provides:

9 Evaluating the need to produce ESI requires that a balance be struck
10 between the burdens and need for ESI, taking into account the
technological feasibility and realistic costs involved.

11 Discovery burdens should be proportional to the amount in controversy
12 and the nature of the case, including consideration of the importance of
13 issues at stake in the litigation. See Comment 2.a. In fact, Rule
26(g)(1)(B)(iii) requires counsel to certify that discovery requests are
14 proportional. **If proportionality is not observed, discovery costs may
prevent the just, speedy, and inexpensive determination of litigation as
Rule 1 contemplates.**

15
16 Costs cannot be calculated solely in terms of the expense of computer
17 technicians to retrieve the ESI, but must factor in other litigation costs,
18 including the accessibility of the ESI, the interruption and disruption of
routine business processes and IG practices, and the costs of reviewing the
19 ESI. These burdens on information technology personnel and the resources
20 required to review ESI for relevance, privilege, confidentiality, and privacy
should be considered in any calculus of whether to allow discovery, and,
21 if so, under what terms. **In addition, the non-monetary costs (such as the
invasion of privacy rights, risks to business and legal confidences, and
risks to privileges) should be considered.**

22 (emphasis added). Thus, the relevance of the phone data to the Plaintiff's allegations should be examined
23 before a preservation order is issued. Further, the non-monetary impact of the Plaintiffs' requests should
24 also be explored.

25 **B. The Plaintiff has not met its burden.**

26 **1. The Plaintiff has not shown any likely information on the phones is relevant to**
27 **their allegations.**

28 ...

1 The Plaintiff's motion does not establish what specific electronic information may support any
2 allegation made in its Complaint or in the Motion. In fact, the alleged basis for the preservation and/or
3 turnover is the fact the Department **complied with the law**. Obviously, this is absurd. The Plaintiff has
4 failed to provide anything but rank, unsubstantiated speculation as to what exists on the cell phones or
5 other electronic devices. Given the allegations in the Complaint, the request made by Plaintiff is
6 completely out of proportion to the burdens imposed.

7 **2. The burdens imposed by Plaintiffs' requests.**

8 **i. Forensic imaging is only very rarely employed.**

9 Forensic imaging of devices an extraordinary step. An oft quoted Sedona principle is:

10 [c]ivil litigation should not be approached as if information systems were
11 crime scenes that justify forensic investigation at every opportunity to
12 identify and preserve every detail.... [M]aking forensic image backups of
13 computers is only the first step of an expensive, complex, and difficult
14 process of data analysis that can divert litigation into side issues and
satellite disputes involving the interpretation of potentially ambiguous
forensic evidence.

15 *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir. 2008) (quoting The Sedona Principles: Best Practices,
16 Recommendations & Principles for Addressing Electronic Production, Second Edition, 34, 47 (2007),
17 available at <https://thesedonaconference.org/publication/The%20Sedona%20Principles>).⁶

18 The *Goetz* went on to hold forensic imaging is only to be employed very rarely. The *Goetz* court
19 held a lower court "committed a clear error in judgment" in compelling forensic imaging. The court
20 explained:

21 There is less clarity, however, surrounding the question of a district court's
22 authority to compel the forensic imaging and production of computer hard
23 drives as a means by which to preserve relevant electronic evidence.
24 Because litigants are generally responsible for preserving relevant
25 information on their own, such procedures, if at all appropriate, should be
26 employed in a very limited set of circumstances. Cf. *The Sedona*
27 *Principles, supra*, at 33 (noting that, because all litigants are obligated to
preserve relevant information in their possession, preservation orders
generally must be premised on a demonstration that a real danger of
evidence destruction exists, a lack of any other available remedy, and a
showing that the preservation order is an appropriate exercise of the court's

28 ⁶ *Goetz* seems to be cited heavily in electronic discovery cases in federal courts.

1 discretion). In this case, the district court ordered the forensic imaging
2 predominantly for preservation purposes, explaining that “[t]hese Orders
3 were to protect against the Defendants’ destruction of responsive
4 information in light of the Defendants’ persistent refusals to produce ESI
5 in violation of the Court’s orders.” In so doing, the district court committed
6 a clear error in judgment.

7 *Goetz, supra*, 531 F.3d at 459 (6th Cir. 2008). After the *Goetz* court noted a party may voluntarily chose
8 to forensically image information, it went on to explain:

9 Nevertheless, “[c]ourts have been cautious in requiring the mirror imaging
10 of computers where the request is extremely broad in nature and the
11 connection between the computers and the claims in the lawsuit are unduly
12 vague or unsubstantiated in nature.” *Balboa Threadworks*, 2006 WL
13 763668, at *3; *see also Balfour Beatty Rail, Inc. v. Vaccarello*, No. 3:06-
14 CV-551-J-20MCR, 2007 WL 169628, at *2-*3 (M.D.Fla. Jan.18, 2007);
15 *Diepenhorst v. City of Battle Creek*, No. 1:05-CV-734, 2006 WL
16 1851243, at *2-*4 (W.D. Mich. June 30, 2006). As the Tenth Circuit has
17 noted, albeit in an unpublished opinion, mere skepticism that an opposing
18 party has not produced all relevant information is not sufficient to warrant
19 drastic electronic discovery measures. *See McCurdy Group, LLC v. Am.*
20 *Biomedical Group, Inc.*, 9 Fed.Appx. 822, 831 (10th Cir.2001).

21 *Goetz, supra*, 531 F.3d at 459–60. As noted above, the connection between the phones and the claims
22 made by Plaintiff is extremely vague and entirely unsubstantiated. The Plaintiff’s request for imaging is
23 extremely broad as well as intrusive in nature.

24 Mere skepticism that a party has not produced relevant information is not a proper basis for
25 forensic imaging or does it even warrant a preservation order. The case of *Matrix Partners VIII, LLP v.*
26 *Nat. Res. Recovery, Inc.*, No. 1:08-CV-547-TH, 2009 WL 10677430 (E.D. Tex. June 5, 2009) provides:

27 As previously stated, compelled forensic imaging is a drastic measure that
28 “should be employed in a very limited set of circumstances.” *John B. [v.*
29 *Goetz]*, 531 F.3d at 459. And, mere skepticism that a party has not
30 produced all relevant information is insufficient to justify such a procedure.
31 *Id.* at 460. Such skepticism is the basis for Matrix’s request to compel
32 forensic mirror imaging of the computer hard drives belonging to
33 Defendants Dan Bochsler, Jim Lowden, Tracy Edwards, and Don Dean.
34 Accordingly, Matrix’s broad request to compel forensic imaging will be
35 denied.

36 *Id.* at 5. This case is just one of many denying forensic imaging based on mere skepticism that not all
37 information was provided.

1 In *Advante Int'l Corp. v. Intel Learning Tech.*, No. C 05 01022 JW(RS), 2006 WL 1806151
2 (N.D. Cal. June 29, 2006) the court indicated specific, concrete evidence of concealment or destruction
3 of evidence to warrant an order of forensic imaging:

4 The mere fact that this case involves electronic data does not change the
5 basic concepts or rules of the discovery process. Had Intel made the same
6 basic accusations in an earlier age, its claims of incomplete document
7 production, inconsistencies, or even perjury and destruction of evidence,
8 would not automatically entitle it to an order permitting it to enter
9 Advante's offices to rummage through filing cabinets and desks. The relief
10 Intel is asking for here is no different and no more warranted.
11 Furthermore, notwithstanding the breadth of accusations Intel has
12 leveled, it has not presented specific, concrete evidence of concealment or
13 destruction of evidence sufficient to conclude that a forensic examination
14 of the vast scope it proposes is warranted at this juncture, even under an
15 examination protocol that would protect the other parties' legitimate
16 privacy and other interests.

17 *Id.* at 1.

18 **ii. Confidentiality concerns**

19 As noted in the Sedona Principles confidentiality and privilege concerns must be taken into
20 account. The Division of Marijuana Enforcement is a division in the Department of Taxation. The
21 Department has strict confidentiality laws given its access to financial and other proprietary information.
22 NRS 360.255(1) provides, in relevant part:

23 Except as otherwise provided in this section and NRS 239.0115 and
24 360.250, the records and files of the Department concerning the
25 administration or collection of any tax, fee, assessment or other amount
26 required by law to be collected are confidential and privileged. The
27 Department, an employee of the Department and any other person engaged
28 in the administration or collection of any tax, fee, assessment or other
amount required by law to be collected or charged with the custody of any
such records or files:

(a) Shall not disclose any information obtained from those records or
files; and

(b) May not be required to produce any of the records or files for the
inspection of any person or governmental entity or for use in any action or
proceeding.

NRS 360.255(5) provides:

As used in this section:

(a) "Records" or "files" means any records and files related to an
investigation or audit, financial information, correspondence, advisory

1 opinions, decisions of a hearing officer in an administrative hearing and
2 any other information specifically related to a taxpayer.

3 (b) "Taxpayer" means a person who pays any tax, fee, assessment or
4 other amount required by law to the Department.

5 The statutes required all license holders to also be medical marijuana certificate holder (called dual
6 licensing), so the marijuana companies are taxpayers as defined by the statute. The applicants pay a
7 mandatory fee to the Department as part of the application process. The applications submitted contain
8 vast amounts of financial and proprietary information that companies would certainly not want in the
9 hands of competitors.

10 As noted, all applicants held a medical marijuana certificate. NRS 453A.700(1) provides:

11 Except as otherwise provided in this section, NRS 239.0115 and subsection
12 4 of NRS 453A.210, the Division and **the Department shall not disclose:**

13 (a) The contents of any tool used by the Department to evaluate an
14 applicant or its affiliate.

15 (b) **Any information, documents or communications provided to**
16 **the Department by an applicant or its affiliate pursuant to the**
17 **provisions of this chapter,** without the prior written consent of the
18 applicant or affiliate or pursuant to a lawful court order after timely notice
19 of the proceedings has been given to the applicant or affiliate.

20 (c) The name or any other identifying information of:

21 (1) An attending provider of health care; or

22 (2) A person who has applied for or to whom the Division or its
23 designee has issued a registry identification card or letter of approval.

24 - Except as otherwise provided in NRS 239.0115, **the items of**
25 **information described in this subsection are confidential, not subject**
26 **to subpoena or discovery and not subject to inspection by the general**
27 **public.**

28 (emphasis added). Given this prohibition, the Plaintiff cannot point to any specific items of information
which it would be permitted to obtain. Thus, the preservation order just causes a meaningless expense
and waste of time and effort.⁷

NRS Chapter 453D was instituted by referendum, so it cannot be altered until 2020. NRS
453D.200 mandated the Department institute regulation. NAC 453D.185 provides:

Except as otherwise provided in this section and NRS 239.0115, the
Department will and any designee of the Department shall maintain the
confidentiality of and shall not disclose the name or any other identifying
information of any person who facilitates or delivers services pursuant to

⁷ The Department will seek reimbursement from the Plaintiffs.

1 this chapter or chapter 453D of NRS. Except as otherwise provided in NRS
2 239.0115, the name and any other identifying information of any person
3 who facilitates or delivers services pursuant to this chapter or chapter 453D
of NRS are confidential, not subject to subpoena or discovery and not
subject to inspection by the general public.

4 As noted, all the applicants are dual licensees which already facilitate or deliver services.⁸ Thus, even
5 disclosing the name of an applicant is likely prohibited.

6 These strict rules of confidentiality should be taken into account when establishing discovery,
7 including any preservation order. As noted, the Plaintiff cannot point to any relevant, specific evidence
8 that are on the phones or the electronic devices. It is even less likely they can point to any specific,
9 relevant information that would is not purely speculative and would not be covered by the confidentiality
10 rules mentioned above.

11 **iii. Privacy concerns**

12 As noted above, the Department employees properly followed the law during the score review.
13 To use these lawful acts and omission to serve as a basis for requiring the forensic imaging and/or
14 turnover of cell phone data is both absurd and an invasion of personal privacy rights. There is no
15 allegation of wrong-doing, let alone the type of misconduct necessary before a preservation order can be
16 issued.

17 **iv. Other considerations.**

18 Typically, discovery does not even begin until a NRCP 16.1 Conference is held and an early case
19 conference is filed. NRCP 26. The Plaintiff should not even be engaged in discovery this early in the
20 case. The Department has not even been properly served, let alone answered or otherwise plead so as to
21 narrow the issues or dispose of the case entirely.

22 As the Department already noted, it has a duty to preserve evidence in its control by statute as
23 well as by common law, rules, and ethical obligations. It has every intension of preserving relevant
24 evidence over which it has control. The Plaintiff has not shown that evidence relevant to their claims
25 exists in the cell phones or any other electronic devise. Neither has it shown a likelihood relevant
26 evidence was deleted or otherwise damaged.

27 _____
28 ⁸ Some may not yet provide services pursuant to NRS 453D, but likely a majority (such as Plaintiffs) do
already facilitate or deliver services.

1 The Plaintiffs have not established any evidence relevant to their claims exists on the phones.
2 The Plaintiffs have not established the Department will not produce relevant evidence once the discovery
3 process begins. There is no evidence information has been lost or destroyed by the Department, or anyone
4 else. There is no basis for imposing sanctions because Plaintiffs have not met their burdens.

5 **III. Conclusion**

6 For the reasons specified above, the Plaintiff's Motion should be denied in its entirety, the
7 Department should be awarded attorney's fees for having to defend a baseless motion, and for such other
8 relief as the Court deems appropriate under the circumstances.

9 Dated: March 7, 2019.

10 AARON D. FORD
11 Attorney General

12 By: /s/ Robert E. Werbicky
13 ROBERT E. WERBICKY
14 Deputy Attorney General (Bar No. 6166)
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/s/ Danielle Wright
Danielle Wright, an employee of the
Office of the Nevada Attorney General

EXHIBIT “C”

RSA000160



1 **RIS**
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 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 NEVADA WELLNESS CENTER, LLC, a
14 Nevada Limited Liability Company,

15 Plaintiff,

16 v.

17 STATE OF NEVADA, DEPARTMENT OF
18 TAXATION; and DOES I through X,
19 inclusive; and ROE CORPORATIONS I
20 through X, inclusive,

21 Defendants.

CASE NO.: A-19-787540-W
DEPT. NO.: XVIII

Date of Hearing: March 29, 2019
Time of Hearing: 9:30 a.m.

DISCOVERY COMMISSIONER

22 **PLAINTIFF'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR ORDER**
23 **REQUIRING THE SMC, MS. KARA CRONKHITE AND MR. DAMON HERNANDEZ**
24 **OF DEPARTMENT OF TAXATION TO PRESERVE AND/OR IMMEDIATELY TURN**
25 **OVER RELEVANT ELECTRONICALLY STORED INFORMATION FROM SERVERS,**
26 **STAND-ALONE COMPUTERS, AND CELL PHONES ON**
27 **ORDER SHORTENING TIME**

28 COMES NOW, Plaintiff, NEVADA WELLNESS CENTER, LLC (hereinafter "Plaintiff"),
by and through its attorney of record, THEODORE PARKER, III, ESQ. of the law firm of PARKER,
NELSON & ASSOCIATES, CHTD., and hereby files this Reply in Support of Emergency Motion
for Order Requiring the SMC, Ms. Kara Cronkhite and Mr. Damon Hernandez of Department of
Taxation to Preserve and/or Immediately Turn over Relevant Electronically Stored Information from
Servers, Stand-Alone Computers, and Cell Phones on Order Shortening Time,

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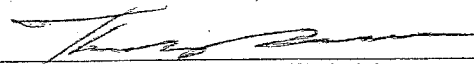
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1 This Reply is made and based upon the pleadings and papers on file herein, the points and
2 authorities included herewith, and such oral argument as the Court may entertain at the time of the
3 hearing of this matter.

4 DATED this 25th day of March, 2019.

5 PARKER, NELSON & ASSOCIATES, CHTD.

6
7 
THEODORE PARKER, III, ESQ.
Nevada Bar No. 4716
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128

9 *Attorneys for Plaintiff*

10
11 **MEMORANDUM OF POINTS & AUTHORITIES**

12 **I.**

13 **STATEMENT OF FACTS**

14 On March 8, 2019 this matter came on for hearing. The day before the hearing, the State of
15 Nevada, Department of Taxation filed an Opposition within which it claimed that service had not
16 been perfected. Following the hearing, Plaintiff's counsel provided proof to the State of Nevada,
17 Department of Taxation's counsel, Robert E. Werbicky, Esq., that service was properly perfected
18 and provided a copy of the Affidavit of Service. Attached as **Exhibit 1** is a copy of the
19 correspondence sent to Mr. Werbicky, along with the Affidavit of Service. Since then, further efforts
20 towards service have been made making this issue moot.

21 With regards to the substance of Plaintiff's motion, it is important for the Court to understand
22 the status of a very similar order filed before the Honorable Judge Bailus, which was also heard and
23 ruled upon by the Honorable Judge David Barker.

24 The Contract between the State of Nevada and Manpower related to the review and scoring
25 of the applications for marijuana licenses is attached hereto as **Exhibit 2**. The Contract was effective
26 from April 1, 2017 through March 31, 2021. Under paragraph 9 there is an "Inspection & Audit"
27 right which allows the State to inspect, examine, review and audit and copy relevant books, records
28 (written, electronic, computer related or otherwise), including, without limitation, relevant

1 accounting procedures and practices of Contractor or its subcontractors, financial statement and
2 supporting documentation, and copying at any office or location of Contractor where such records
3 may be found, with or without notice by the State Auditor, ...¹ It is this right that the State
4 contractually has to inspect that Nevada Wellness Center would like to utilize for purposes of this
5 litigation.

6 On December 13, 2018, MM Development Company, Inc. received an Order Granting In Part
7 and Denying In Part Emergency Motion for Order Requiring the SMC to Preserve and/or
8 Immediately Turn over Relevant Electronically Stored Information from Servers, Stand-Alone
9 Computers, and Cell Phones. A copy of this Order is attached as **Exhibit 3**. MM Development
10 Company, Inc. sought and was granted the same relief that Nevada Wellness Center is seeking. The
11 State of Nevada filed an almost identical opposition to this motion, but the Court ordered that the
12 State shall preserve the server or any standalone computers (including laptops, iPads or thumb
13 drives) in its possession and used in the evaluation and rating of marijuana dispensary license
14 applications as part of the September 2018 application period. The Court also ordered that the State
15 shall provide Plaintiff a list of Department personnel including Manpower personnel that primarily
16 assisted in the evaluation and rating of all applications for dispensary licenses and evaluated such
17 license applications received in the September 2018 application period. The Court ordered that the
18 State shall make all cell phones (personal and business) of each such person that assisted in the
19 processing of applications for dispensary licenses and/or evaluated such license applications
20 available for copying in the 10 business days after notice of entry of this order. The Court ordered
21 that neither Plaintiff's counsel nor Plaintiff or their agents or employees shall access the cell phone
22 data until the State and Plaintiff agrees to a procedure to protect non-discoverable confidential data
23 or the Court allows such access by subsequent order. Finally, the Court ordered that the State was
24 directed to maintain any and all documents in its possession regarding the processing of applications
25 for dispensary licenses and/or evaluation of such license applications, for the September 2018
26 application period. Finally, the Order indicated that the State shall serve a copy of the Order upon

27
28 ¹ See Section 9B.

1 Manpower within one business day of notice of entry of the order.

2 On January 3, 2019, the State of Nevada, Department of Taxation filed a Declaration
3 regarding any cell phone that is not available. This Declaration, attached as **Exhibit 4**, from Talova
4 V. Davis, indicates that the six (6) Manpower representatives involved after agreeing to provide their
5 phones, have determined that they will not make their phones available for forensic imaging. Ms.
6 Davis is a Cybercrime Investigator II employed by the Investigations Divisions of the Nevada Office
7 of the Attorney General. It is based upon this Declaration that it became even more important that
8 Nevada Wellness Center file this motion to protect and preserve information contained on these
9 phones in addition to laptops, computers, thumb drives, and desktops.

10 On February 5, 2019, the District Court heard the State's Motion for Reconsideration related
11 to an Order of Contempt Against the State of Nevada for Failure to Preserve Relevant Electronically
12 Stored Information from Cell Phones on an Order Shortening Time. The Minutes, which are
13 attached as **Exhibit 5**, indicate that Mr. Werbicky was advised originally that four of the six
14 Manpower employees indicated they had no opposition to the imaging of their phones, then changed
15 their minds. Further, Mr. Werbicky noted that the motion was filed when they began imaging
16 laptops. Mr. Kemp, on behalf of MM Development Company, Inc., argued against the motion,
17 however, requested the Manpower employees be deposed. The Court, by virtue of the hearing,
18 allowed for depositions for limited purposes of Manpower employees.

19 Attached as **Exhibit 6** is a copy of the Order electronically filed on March 7, 2019. The
20 Court ordered that pursuant to Rules 30 and 45 of the Nevada Rules of Civil Procedure, Plaintiffs
21 are given leave to take limited depositions of the six (6) Manpower employees. The depositions
22 were limited to the following questions: (1) "Please provide the make(s), model(s), and operating
23 system of your personal cellular telephone(s) used from July 2018 - December 2018."; (2) "Please
24 provide the name of the service provider(s) for each personal cellular telephone used from July 2018
25 - December 2018."; and (3) "Do you understand the December 13, 2018 Order Granting in Part and
26 Denying in Part Plaintiff's Emergency Motion (the "Preservation Order") issued in this case does
27 not permit the disclosure of any of your personal information unless and until ordered by the Court?"


28 ///

1 Based upon the attached documents, it is clear that the District Court has granted the identical
2 motion filed on behalf of Nevada Wellness Center. Moreover, the limitations of the Order and the
3 ability to take depositions at this point have also been decided by the District Court. Given these
4 orders and the obligations that have been recognized by the District Court, Nevada Wellness Center
5 requests that the Discovery Commissioner grant a similar order allowing for the identical rights
6 granted by the District Court in the MM Development Company, Inc. v. State of Nevada,
7 Department of Taxation case.

8 DATED this 25th day of March, 2019.

9 Respectfully submitted,

10 PARKER, NELSON & ASSOCIATES, CHTD.

11 
12 THEODORE PARKER, III, ESQ.
13 Nevada Bar No. 4716
14 2460 Professional Court, Suite 200
15 Las Vegas, Nevada 89128

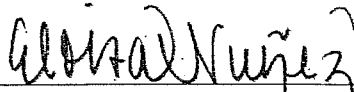
16 *Attorneys for Plaintiff*
17
18
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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of the law office of PARKER, NELSON & ASSOCIATES, CHTD., and that on this 25th day of March, 2019, I served a true and correct copy of the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF EMERGENCY MOTION FOR ORDER REQUIRING THE SMC, MS. KARA CRONKHITE AND MR. DAMON HERNANDEZ OF DEPARTMENT OF TAXATION TO PRESERVE AND/OR IMMEDIATELY TURN OVER RELEVANT ELECTRONICALLY STORED INFORMATION FROM SERVERS, STAND-ALONE COMPUTERS, AND CELL PHONES ON ORDER SHORTENING TIME** on the party(s) set forth below by:

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

Aaron D. Ford, Esq.
Attorney General
Robert E. Werbicky, Esq.
Deputy Attorney General
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101
(702) 486-3105
Fax: (702) 486-3416
Email: rwerbicky@ag.nv.gov
*Attorneys for Defendant,
State of Nevada, Department of Taxation*



An employee of PARKER, NELSON & ASSOCIATES, CHTD.

EXHIBIT 1

EXHIBIT 1

Theodore Parker III
tparker@pnalaw.net
Admitted in Nevada & South Carolina

Todd N. Nelson
1965-2002



Jacqueline Dixon Phillips
jdixon@pnalaw.net
Admitted in South Carolina

Yadira Rios Gibson
Of Counsel
yrios@pnalaw.net
Admitted in Nevada, California & Illinois

Shana D. Weir
sweir@pnalaw.net
Admitted in Nevada

Carlton D. Bowers
cbowers@pnalaw.net
Admitted in South Carolina

Thomas B. Fritchard
tfritchard@pnalaw.net
Admitted in South Carolina

Casey D. Gish
Of Counsel
cgish@pnalaw.net
Admitted in Nevada & California

Mahogany A. Turfley
mturfley@pnalaw.net
Admitted in Nevada

Jennifer A. DeCarmen
jdecarmen@pnalaw.net
Admitted in Nevada

March 14, 2019

VIA E-MAIL: rwerbicky@ag.nv.gov

Robert E. Werbicky, Esq.
Deputy Attorney General
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, NV 89101

**Re: Nevada Wellness Center, LLC v. State of Nevada Department of Taxation
Case No.: A-19-787540-W**

Dear Mr. Werbicky:

As discussed during the hearing on Friday, March 8, 2019, please find enclosed proof of service. We perfected service in the exact same manner as MM Development Company, LLC.¹ As a result, I believe service was perfected on Wednesday, January 16, 2019. As a result, your answer was due on March 6, 2019. Consequently, please file your answer on behalf of the Department of Taxation as any NRS 12(b)(5) motion would be now untimely.

If after reviewing this correspondence you have any questions or concerns, please do not hesitate to contact me. Thank you again for your cooperation and assistance in this matter.

Sincerely,

PARKER NELSON & ASSOCIATES, CHTD.

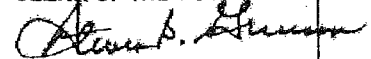
Theodore Parker, III, Esq.

TP/en
Enclosures

¹ The Affidavit/Declaration of Service filed electronically on behalf of MM Development Company, LLC indicates that Ms. Tina Padovano, Administrative Assistant at the Department of Taxation was served at 1550 E. College Pkwy #115, Carson City, NV 89706. The Affidavit of Service filed on behalf of Nevada Wellness Center also indicates that Ms. Tina Padovano was served at 1550 E. College Pkwy #115, Carson City, NV 89706.

Electronically Issued
1/15/2019 8:39 AM

Electronically Filed
1/22/2019 3:42 PM
Steven D. Grierson
CLERK OF THE COURT



SUMM
THEODORE PARKER, III, ESQ.
Nevada Bar No. 4716
PARKER, NELSON & ASSOCIATES, CHTD.
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128
Telephone: (702) 868-8000
Facsimile: (702) 868-8001
Email: tparker@pnalaw.net

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA WELLNESS CENTER, LLC, a
Nevada Limited Liability Company,

Plaintiff,

v.

STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES I through X,
inclusive; and ROE CORPORATIONS I
through X, inclusive,

Defendants.

CASE NO.: A-19-787540-W
DEPT. NO.: Department 18

SUMMONS

NOTICE: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ
THE INFORMATION BELOW.

TO THE DEFENDANT: A civil Complaint has been filed by Plaintiff against you for the
relief set forth in the Complaint.

State of Nevada, Department of Taxation
1550 College Parkway, Suite 115
Carson City, NV 89706-7937

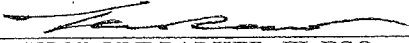
1. If you intend to defend this lawsuit, within 20 days after this Summons is served on
you exclusive of the day of service, you must do the following:
a. File with the Clerk of this Court, whose address is shown below, a formal
written response to the Complaint in accordance with the rules of the court.
b. Serve a copy of your response upon the attorney whose name and address is
shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiffs
and this Court may enter a judgment against you for the relief demanded in the Complaint, which
could result in the taking of money or property or other relief requested in the Complaint.

1 3. If you intend to seek the advice of an attorney in this matter, you should do so
2 promptly so that your response may be filed on time.

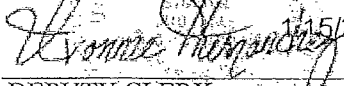
3 Issued at direction of:

4 **PARKER NELSON & ASSOCIATES, CHTD.**

5 By: 
6 THEODORE PARKER, III, ESQ.
7 Nevada Bar No. 4716
8 2460 Professional Court, Suite 200
9 Las Vegas, Nevada 89128

10 *Attorney for Plaintiff*

CLERK OF COURT

By:  11/15/2019
DEPUTY CLERK Ivonne Hernandez
County Courthouse
200 Lewis Avenue
Las Vegas, Nevada 89155

Attorney or Party without Attorney: Parker, Nelson & Associates, Chtd. Theodore Parker, III, Esq. (SBN 4716) 2460 Professional Court Suite 200 Las Vegas, NV 89128 Telephone No: (702) 868-8000 Attorney For: Plaintiff			For Court Use Only		
Ref. No. or File No.: NV WELLNESS CENTER/DEPT					
Insert name of Court, and Judicial District and Branch Court: District Court Clark County Nevada					
Plaintiff: NEVADA WELLNESS CENTER, LLC, a Nevada Limited Liability Company, Defendant: STATE OF NEVADA, DEPARTMENT OF TAXATION, et al.					
AFFIDAVIT OF SERVICE		Hearing Date:	Time:	Dept/Div:	Case Number: A-19-787540-W

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the Summons, Complaint and Petition for Judicial Review or Writ of Mandamus
3.
 - a. Party served: State of Nevada, Department of Taxation
 - b. Person served: Tina Padovano - Executive Assistant, A person of suitable age and discretion, authorized to accept service at address shown in item 4.
4. Address where the party was served: 1550 College Parkway, Suite 115
Carson City, NV 89706
5. I served the party:
 - a. by personal service, I personally delivered the documents listed in item 2 to the party or person authorized to receive process for the party (1) on: Wed, Jan 16 2019 (2) at: 01:55 PM

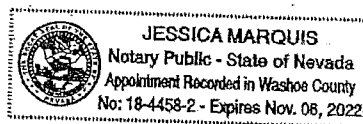
Fee for Service: \$0.00

I Declare under penalty of perjury under the laws of the State of NEVADA that the foregoing is true and correct.

6. Person Who Served Papers:
 - a. Toni Ruckman (R-052005, Washoe)
 - b. FIRST LEGAL
NEVADA PUP'S LICENSE 1452
2920 N. GREEN VALLEY PARKWAY, SUITE 514
HENDERSON, NV 89014
 - c. (702) 671-4002

19 Jan 19 Toni Ruckman
(Date) (Signature)

7. STATE OF NEVADA, COUNTY OF Washoe
 Subscribed and sworn to (or affirmed) before on this 19 day of Jan, 2019 by Toni Ruckman (R-052005, Washoe)
 proved to me on the basis of satisfactory evidence to be the person who appeared before me.



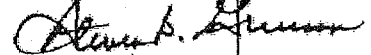
Jessica Marquis
(Notary Signature)



AFFIDAVIT OF SERVICE

2980520
(55104735)

RSA000171



CODE AFF.

WILL KEMP, ESQ.

Nevada Bar No. 01205

3800 Howard Hughes Pkwy, 17th floor

Las Vegas, Nevada 89169

Telephone: (702) 385-6000

Facsimile: (702) 385-6001

Attorney for: Plaintiff

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

MM DEVELOPMENT COMPANY, LLC, a Nevada
limited liability company,

Plaintiff(s)/Petitioner(s),

vs.

STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES 1 through 10; and ROE
CORPORATIONS 1 through 10.

Defendant(s)/Respondent(s)

Case No.: A-18-785818-W
Dept. No.: 18

**AFFIDAVIT/DECLARATION OF
SERVICE**

STATE OF NEVADA)
COUNTY OF CARSON CITY) ss:

I, James P. Thomas, being duly sworn or under penalty of perjury, state that at all times relevant, I was over 18 years of age and not a party to or interested in the above-captioned case; that I received a copy of the following document(s): Summons, and Complaint, on December 12, 2018, and that I served the Defendant, State of Nevada, Department of Taxation, on December 12, 2018 at the hour of 2:00 P.M. by the following method:

1. For personal service per NRCP 4(d)(6): Delivering and leaving a copy with Defendant at (insert address at which documents were served) _____.

2. For substitute service per NRCP 4(d)(6): Delivering and leaving a copy with (insert name or physical description of person served) _____, a person of suitable age and discretion residing at Defendant's dwelling house or usual place of abode, at (insert address _____).

1 where documents were served)

2 3. For service on a business entity per NCRC 4(d)(1) or (2): Delivering and leaving a copy with
3 Tina Padovano, Administrative Assistant, pursuant to NRS 14.020 as a person of suitable age and discretion
4 at the below address, which address is the address of the State of Nevada, Department of Taxation at 1550
5 E. College Pkwy #115, Carson City, NV 89706.

6 4. For other method of service authorized by NCRC 4 or other rule or statute:

7
8 (Check one of the following boxes, date and sign, insert the address and phone number of the person performing service, and have this
affidavit notarized or sign the unsworn declaration per NRS 53.045.)

9 ☒ I am a licensed process server or an employee of a licensed process server; my license or registration
10 number is: 845.

11 ☐ I am not required to be licensed under chapter 648 of the Nevada Revised Statutes or another
12 provision of law because I am not engaged in the business of serving legal process within the State of
Nevada.

13 ☐ Residential/ ☒ Business Address: 1627 Salmon Drive
Carson City, Nevada 89701
14 Telephone: (775) 392-3237

15 **Per NRS 53.045**

16 (a) If executed in the State of Nevada: "I declare under penalty of perjury that the foregoing is true and
correct."

17 Executed on: December 12, 2018,
(Date)


(Signature of Person Making Service)

18 (b) If executed outside of the State of Nevada: "I declare under penalty of perjury under the law of the
State of Nevada that the foregoing is true and correct."

19 Executed on: _____

(Date)

(Signature of Person Making Service)

EXHIBIT 2

EXHIBIT 2

For Purchasing Use Only:
RFP/Contract #3296/18404

CONTRACT FOR SERVICES OF INDEPENDENT CONTRACTOR

A Contract Between the State of Nevada
Acting by and Through Its

Various State Agencies
Monitored By: Department of Administration
Purchasing Division
515 E Masser Street, Room 300
Carson City NV 89701
Contact: Annette Morfin, Purchasing Officer
Phone: (775) 684-0185 Fax: (775) 684-0188
Email: amorfin@admin.nv.gov

and

Manpower
63 Keystone Ave. #202
Reno NV 89503
Contact: Patrick Harrigan
Phone: (775) 328-6020 Fax: (775) 328-6030
Email: pharrigan@mpreno.com

WHEREAS, NRS 333.700 authorizes elective officers, heads of departments, boards, commissions or institutions to engage, subject to the approval of the Board of Examiners (BOE), services of persons as independent contractors; and

WHEREAS, it is deemed that the service of Contractor is both necessary and in the best interests of the State of Nevada.

NOW, THEREFORE, in consideration of the aforesaid premises, the parties mutually agree as follows:

1. **REQUIRED APPROVAL.** This Contract shall not become effective until and unless approved by the Nevada State Board of Examiners.
2. **DEFINITIONS.**
 - A. "State" — means the State of Nevada and any State agency identified herein, its officers, employees and immune contractors as defined in NRS 41.0307.
 - B. "Independent Contractor" — means a person or entity that performs services and/or provides goods for the State under the terms and conditions set forth in this Contract.
 - C. "Fiscal Year" — is defined as the period beginning July 1st and ending June 30th of the following year.
 - D. "Current State Employee" — means a person who is an employee of an agency of the State.
 - E. "Former State Employee" — means a person who was an employee of any agency of the State at any time within the preceding 24 months.
3. **CONTRACT TERM:** This Contract shall be effective as noted below, unless sooner terminated by either party as specified in *Section 10, Contract Termination*. Contract is subject to Board of Examiners' approval (anticipated to be March 14, 2017).

Effective from:	April 1, 2017	To:	March 31, 2021
-----------------	---------------	-----	----------------

4. **NOTICE.** Unless otherwise specified, termination shall not be effective until 30 calendar days after a party has served written notice of termination for default, or notice of termination without cause upon the other party. All notices or other communications required or permitted to be given under this Contract shall be in writing and shall be deemed to have been duly given if delivered personally in hand, by telephonic facsimile with simultaneous regular mail, or mailed certified mail, return receipt requested, posted prepaid on the date posted, and addressed to the other party at the address specified above.
5. **INCORPORATED DOCUMENTS.** The parties agree that this Contract, inclusive of the following attachments, specifically describes the scope of work. This Contract incorporates the following attachments in descending order of constructive precedence:

ATTACHMENT AA:	REQUEST FOR PROPOSAL 3296 AND AMENDMENT #1
ATTACHMENT BB:	INSURANCE SCHEDULE
ATTACHMENT CC:	CONTRACTOR'S RESPONSE

A Contractor's attachment shall not contradict or supersede any State specifications, terms or conditions without written evidence of mutual assent to such change appearing in this Contract.

6. **CONSIDERATION.** The parties agree that Contractor will provide the services specified in *Section 5, Incorporated Documents* at a cost as noted below:

Total Contract or installments payable at:	Invoices will be done on a weekly basis to avoid possible timecard fraud. Invoices will be paid upon receipt of invoice and using agency's approval, invoices will be paid within 30 days. Agency Recruitment Invoices: will be paid per temporary employee hourly pay rate plus 24% Agency Recruitment Administrative Markup Fee. Contractor Recruitment Invoices: will be paid per temporary employee hourly pay rate plus 34% Contractor Recruitment Administrative Markup Fee. Both markup fees include a 20.89% for SUTA, FUTA, FICA, Modified Business Tax, General Liability, Bonding and Works Compensation (Self-Insured). Health Insurance, Employer Sponsored Health Insurance, Training, General Management, Administration and Operations Expenses are included in the markup rate. Manpower is compliant with the Patient Protection and Affordable Care Act (PPACA). Temporary employees may be required to drive State vehicles and contractor must maintain the \$1,000,000.00 automobile liability on their insurance policy to cover this requirement. There will be no fee incurred to the State should the temp employee accept a permanent position to the State regardless of the timeframe.
--	---

Total Contract Not to Exceed:	\$7,000,000.00 for the contract term.
-------------------------------	---------------------------------------

The contractual authority, as identified by the not to exceed amount, does not obligate the State of Nevada to expend funds or purchase goods or services up to that amount; the purchase amount will be controlled by the individual using agency's purchase orders or other authorized means of requisition for services and/or goods, as submitted to and accepted by the contractor.

The State does not agree to reimburse Contractor for expenses unless otherwise specified in the incorporated attachments. Any intervening end to a biennial appropriation period shall be deemed an automatic renewal (not changing the overall Contract term) or a termination as the result of legislative appropriate may require.

7. **ASSENT.** The parties agree that the terms and conditions listed on incorporated attachments of this Contract are also specifically a part of this Contract and are limited only by their respective order of precedence and any limitations specified.

8. **BILLING SUBMISSION: TIMELINESS.** The parties agree that timeliness of billing is of the essence to the Contract and recognize that the State is on a fiscal year. All billings for dates of service prior to July 1 must be submitted to the state no later than the first Friday in August of the same calendar year. A billing submitted after the first Friday in August, which forces the State to process the billing as a state claim pursuant to NRS 353.097, will subject the Contractor to an administrative fee not to exceed one hundred dollars (\$100.00). The parties hereby agree this is a reasonable estimate of the additional costs to the state of processing the billing as a state claim and that this amount will be deducted from the state claim payment due to the Contractor.
9. **INSPECTION & AUDIT.**
- A. Books and Records. Contractor agrees to keep and maintain under generally accepted accounting principles (GAAP) full, true and complete records, contracts, books, and documents as are necessary to fully disclose to the State or United States Government, or their authorized representatives, upon audits or reviews, sufficient information to determine compliance with all State and federal regulations and statutes.
 - B. Inspection & Audit. Contractor agrees that the relevant books, records (written, electronic, computer related or otherwise), including, without limitation, relevant accounting procedures and practices of Contractor or its subcontractors, financial statements and supporting documentation, and documentation related to the work product shall be subject, at any reasonable time, to inspection, examination, review, audit, and copying at any office or location of Contractor where such records may be found, with or without notice by the State Auditor, the relevant State agency or its contracted examiners; the department of Administration, Budget Division, the Nevada State Attorney General's Office or its Fraud Control Units, the state Legislative Auditor, and with regard to any federal funding, the relevant federal agency, the Comptroller General, the General Accounting Office, the Office of the Inspector General, or any of their authorized representatives. All subcontracts shall reflect requirements of this Section.
 - C. Period of Retention. All books, records, reports, and statements relevant to this Contract must be retained a minimum three (3) years, and for five (5) years if any federal funds are used pursuant to the Contract. The retention period runs from the date of payment for the relevant goods or services by the state, or from the date of termination of the Contract, whichever is later. Retention time shall be extended when an audit is scheduled or in progress for a period reasonably necessary to complete an audit and/or to complete any administrative and judicial litigation which may ensue.
10. **CONTRACT TERMINATION.**
- A. Termination Without Cause. Any discretionary or vested right of renewal notwithstanding, this Contract may be terminated upon written notice by mutual consent of both parties, or unilaterally by either party without cause.
 - B. State Termination for Non-Appropriation. The continuation of this Contract beyond the current biennium is subject to and contingent upon sufficient funds being appropriated, budgeted, and otherwise made available by the state Legislature and/or federal sources. The State may terminate this Contract, and Contractor waives any and all claims(s) for damages, effective immediately upon receipt of written notice (or any date specified therein) if for any reason for the contracting Agency's funding from State and/or federal sources is not appropriated or is withdrawn, limited, or impaired.
 - C. Cause Termination for Default or Breach. A default or breach may be declared with or without termination. This Contract may be terminated by either party upon written notice of default or breach to the other party as follows:
 - 1) If Contractor fails to provide or satisfactorily perform any of the conditions, work, deliverables, goods, or services called for by this Contract within the time requirements specified in this Contract or within any granted extension of those time requirements; or
 - 2) If any State, county, city, or federal license, authorization, waiver, permit, qualification or certification required by statute, ordinance, law, or regulation to be held by Contractor to provide the goods or services required by this Contract is for any reason denied, revoked, debarred, excluded, terminated, suspended, lapsed, or not renewed; or
 - 3) If Contractor becomes insolvent, subject to receivership, or becomes voluntarily or involuntarily subject to the jurisdiction of the bankruptcy court; or
 - 4) If the State materially breaches any material duty under this Contract and any such breach impairs Contractor's ability to perform; or

- 5) If it is found by the State that any quid pro quo or gratuities in the form of money, services, entertainment, gifts, or otherwise were offered or given by Contractor, or any agent or representative of Contractor, to any officer or employee of the State of Nevada with a view toward securing a contract or securing favorable treatment with respect to awarding, extending, amending, or making any determination with respect to the performing of such contract; or
 - 6) If it is found by the State that Contractor has failed to disclose any material conflict of interest relative to the performance of this Contract.
- D. Time to Correct. Termination upon declared default or breach may be exercised only after service of formal written notice as specified in *Section 4, Notice*, and the subsequent failure of the defaulting party within fifteen (15) calendar days of receipt of that notice to provide evidence, satisfactory to the aggrieved party, showing that the declared default or breach has been corrected.
- E. Winding Up Affairs Upon Termination. In the event of termination of this Contract for any reason, the parties agree that the provisions of this Section survive termination:
- 1) The parties shall account for and properly present to each other all claims for fees and expenses and pay those which are undisputed and otherwise not subject to set off under this Contract. Neither party may withhold performance of winding up provisions solely based on nonpayment of fees or expenses accrued up to the time of termination;
 - 2) Contractor shall satisfactorily complete work in progress at the agreed rate (or a pro rata basis if necessary) if so requested by the Contracting Agency;
 - 3) Contractor shall execute any documents and take any actions necessary to effectuate an assignment of this Contract if so requested by the Contracting Agency;
 - 4) Contractor shall preserve, protect and promptly deliver into State possession all proprietary information in accordance with *Section 21, State Ownership of Proprietary Information*.
11. **REMEDIES.** Except as otherwise provided for by law or this Contract, the rights and remedies of the parties shall not be exclusive and are in addition to any other rights and remedies provided by law or equity, including, without limitation, actual damages, and to a prevailing party reasonable attorneys' fees and costs. It is specifically agreed that reasonable attorneys' fees shall include without limitation one hundred and twenty-five dollars (\$125.00) per hour for State-employed attorneys. The State may set off consideration against any unpaid obligation of Contractor to any State agency in accordance with NRS 353C.190. In the event that the Contractor voluntarily or involuntarily becomes subject to the jurisdiction of the Bankruptcy Court, the State may set off consideration against any unpaid obligation of Contractor to the State or its agencies, to the extent allowed by bankruptcy law, without regard to whether the procedures of NRS 353C.190 have been utilized.
12. **LIMITED LIABILITY.** The State will not waive and intends to assert available NRS Chapter 41 liability limitations in all cases. Contract liability of both parties shall not be subject to punitive damages. Liquidated damages shall not apply unless otherwise specified in the incorporated attachments. Damages for any State breach shall never exceed the amount of funds appropriated for payment under this Contract, but not yet paid to Contractor, for the fiscal year budget in existence at the time of the breach. Damages for any Contractor breach shall not exceed one hundred and fifty percent (150%) of the Contract maximum "not to exceed" value. Contractor's tort liability shall not be limited.
13. **FORCE MAJEURE.** Neither party shall be deemed to be in violation of this Contract if it is prevented from performing any of its obligations hereunder due to strikes, failure of public transportation, civil or military authority, act of public enemy, accidents, fires, explosions, or acts of God, including without limitation, earthquakes, floods, winds, or storms. In such an event the intervening cause must not be through the fault of the party asserting such an excuse, and the excused party is obligated to promptly perform in accordance with the terms of the Contract after the intervening cause ceases.
14. **INDEMNIFICATION.** To the fullest extent permitted by law Contractor shall indemnify, hold harmless and defend, not excluding the State's right to participate, the State from and against all liability, claims, actions, damages, losses, and expenses, including, without limitation, reasonable attorneys' fees and costs, arising out of any alleged negligent or willful acts or omissions of Contractor, its officers, employees and agents.

15. **INDEPENDENT CONTRACTOR.** Contractor is associated with the state only for the purposes and to the extent specified in this Contract, and in respect to performance of the contracted services pursuant to this Contract, Contractor is and shall be an independent contractor and, subject only to the terms of this Contract, shall have the sole right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this Contract. Nothing contained in this Contract shall be deemed or construed to create a partnership or joint venture, to create relationships of an employer-employee or principal-agent, or to otherwise create any liability for the state whatsoever with respect to the indebtedness, liabilities, and obligations of Contractor or any other party. Contractor shall be solely responsible for, and the State shall have no obligation with respect to: (1) withholding of income taxes, FICA or any other taxes or fees; (2) industrial insurance coverage; (3) participation in any group insurance plans available to employees of the state; (4) participation or contributions by either Contractor or the State to the Public Employees Retirement System; (5) accumulation of vacation leave or sick leave; or (6) unemployment compensation coverage provided by the State. Contractor shall indemnify and hold State harmless from, and defend State against, any and all coverage provided by the State. Contractor shall indemnify and hold State harmless from, and defend State against, any and all losses, damages, claims, costs, penalties, liabilities, and expenses arising or incurred because of, incident to, or otherwise with respect to any such taxes or fees. Neither Contractor nor its employees, agents, nor representatives shall be considered employees, agents, or representatives of the State and Contractor shall evaluate the nature of services and the term of the Contract negotiated in order to determine "independent contractor" status, and shall monitor the work relationship throughout the term of the Contract to ensure that the independent contractor relationship remains as such. To assist in determining the appropriate status (employee or independent contractor), Contractor represents as follows:

QUESTION		CONTRACTOR'S INITIALS	
		YES	NO
1.	Does the Contracting Agency have the right to require control of when, where and how the independent contractor is to work?	PH	
2.	Will the Contracting Agency be providing training to the independent contractor?	PH	
3.	Will the Contracting Agency be furnishing the independent contractor with worker's space, equipment, tools, supplies or travel expenses?	PH	
4.	Are any of the workers who assist the independent contractor in performance of his/her duties employees of the State of Nevada?		PH
5.	Does the arrangement with the independent contractor contemplate continuing or recurring work (even if the services are seasonal, part-time, or of short duration)?	PH	
6.	Will the State of Nevada incur an employment liability if the independent contractor is terminated for failure to perform?		PH
7.	Is the independent contractor restricted from offering his/her services to the general public while engaged in this work relationship with the State?		PH

16. **INSURANCE SCHEDULE.** Unless expressly waived in writing by the State, Contractor, as an independent contractor and not an employee of the state, must carry policies of insurance and pay all taxes and fees incident hereunto. Policies shall meet the terms and conditions as specified within this Contract along with the additional limits and provisions as described in *Attachment BB*, incorporated hereto by attachment. The State shall have no liability except as specifically provided in the Contract.

The Contractor shall not commence work before:

- 1.) Contractor has provided the required evidence of insurance to the Contracting Agency of the State, and
- 2.) The State has approved the insurance policies provided by the Contractor.

Prior to approval of the insurance policies by the State shall be a condition precedent to any payment of consideration under this Contract and the State's approval of any changes to insurance coverage during the course of performance shall constitute an ongoing condition subsequent to this Contract. Any failure of the State to timely approve shall not constitute a waiver of the condition.

A. Insurance Coverage. The Contractor shall, at the Contractor's sole expense, procure, maintain and keep in force for the duration of the Contract insurance conforming to the minimum limits as specified in *Attachment BB*, incorporated hereto by attachment. Unless specifically stated herein or otherwise agreed to by the State, the required insurance shall be in effect prior to the commencement of work by the Contractor and shall continue in force as appropriate until:

- 1) Final acceptance by the State of the completion of this Contract; or
- 2) Such time as the insurance is no longer required by the State under the terms of this Contract; whichever occurs later.

Any insurance or self-insurance available to the State shall be in excess of and non-contributing with, any insurance required from Contractor. Contractor's insurance policies shall apply on a primary basis. Until such time as the insurance is no longer required by the State, Contractor shall provide the State with renewal or replacement evidence of insurance no less than thirty (30) days before the expiration or replacement of the required insurance. If at any time during the period when insurance is required by the Contract, an insurer or surety shall fail to comply with the requirements of this Contract, as soon as Contractor has knowledge of any such failure, Contractor shall immediately notify the State and immediately replace such insurance or bond with an insurer meeting the requirements.

B. General Requirements.

- 1) Additional Insured: By endorsement to the general liability insurance policy, the State of Nevada, its officers, employees and immune contractors as defined in NRS 41.0307 shall be named as additional insureds for all liability arising from the Contract.
- 2) Waiver of Subrogation: Each insurance policy shall provide for a waiver of subrogation against the State of Nevada, its officers, employees and immune contractors as defined in NRS 41.0307 for losses arising from work/materials/equipment performed or provided by or on behalf of the Contractor.
- 3) Cross Liability: All required liability policies shall provide cross-liability coverage as would be achieved under the standard ISO separation of insureds clause.
- 4) Deductibles and Self-Insured Retentions: Insurance maintained by Contractor shall apply on a first dollar basis without application of a deductible or self-insured retention unless otherwise specifically agreed to by the State. Such approval shall not relieve Contractor from the obligation to pay any deductible or self-insured retention. Any deductible or self-insured retention shall not exceed fifty thousand dollars (\$50,000.00) per occurrence, unless otherwise approved by the Risk Management Division.
- 5) Policy Cancellation: Except for ten (10) days notice for non-payment of premiums, each insurance policy shall be endorsed to state that, without thirty (30) days prior written notice to the State of Nevada, c/o Contracting Agency, the policy shall not be canceled, non-renewed or coverage and/or limits reduced or materially altered, and shall provide that notices required by this Section shall be sent by certified mail to the address shown on page one (1) of this contract.
- 6) Approved Insurer: Each insurance policy shall be:
 - a) Issued by insurance companies authorized to do business in the State of Nevada or eligible surplus lines insurers acceptable to the State and having agents in Nevada upon whom service of process may be made; and
 - b) Currently rated by A.M. Best as "A-VII" or better.

C. Evidence of Insurance.

Prior to the start of any work, Contractor must provide the following documents to the contracting State agency:

- 1) Certificate of Insurance: The Acor 25 Certificate of Insurance form or a form substantially similar must be submitted to the State to evidence the insurance policies and coverages required of Contractor. The certificate must name the State of Nevada, its officers, employees and immune contractors as defined in NRS 41.0307 as the certificate holder. The certificate should be signed by a person authorized by the insurer to bind coverage on its behalf. The State project/Contract number; description and Contract effective dates shall be noted on the

certificate, and upon renewal of the policies listed, Contractor shall furnish the State with replacement certificates as described within *Section 16A, Insurance Coverage*.

Mail all required insurance documents to the State Contracting Agency identified on Page one of the Contract.


- 2) Additional Insured Endorsement: An Additional Insured Endorsement (CG 20 10 11 85 or CG 20-26 11 85), signed by an authorized insurance company representative, must be submitted to the State to evidence the endorsement of the State as an additional insured per *Section 16 B, General Requirements*.
 - 3) Schedule of Underlying Insurance Policies: If Umbrella or Excess policy is evidenced to comply with minimum limits, a copy of the underlying Schedule from the Umbrella or Excess insurance policy may be required.
 - 4) Review and Approval: Documents specified above must be submitted for review and approval by the State prior to the commencement of work by Contractor. Neither approval by the State nor failure to disapprove the insurance furnished by Contractor shall relieve Contractor of Contractor's full responsibility to provide the insurance required by this Contract. Compliance with the insurance requirements of this Contract shall not limit the liability of Contractor or its subcontractors, employees or agents to the State or others, and shall be in addition to and not in lieu of any other remedy available to the State under this Contract or otherwise. The State reserves the right to request and review a copy of any required insurance policy or endorsement to assure compliance with these requirements.
17. **COMPLIANCE WITH LEGAL OBLIGATIONS**. Contractor shall procure and maintain for the duration of this Contract any State, county, city or federal license, authorization, waiver, permit qualification or certification required by statute, ordinance, law, or regulation to be held by Contractor to provide the goods or services required by this Contract. Contractor will be responsible to pay all taxes, assessments, fees, premiums, permits, and licenses required by law. Real property and personal property taxes are the responsibility of Contractor in accordance with NRS 361.157 and NRS 361.159. Contractor agrees to be responsible for payment of any such government obligations not paid by its subcontractors during performance of this Contract. The State may set-off against consideration due any delinquent government obligation in accordance with NRS 353C.190.
 18. **WAIVER OF BREACH**. Failure to declare a breach or the actual waiver of any particular breach of the Contract or its material or nonmaterial terms by either party shall not operate as a waiver by such party of any of its rights or remedies as to any other breach.
 19. **SEVERABILITY**. If any provision contained in this Contract is held to be unenforceable by a court of law or equity, this Contract shall be construed as if such provision did not exist and the non-enforceability of such provision shall not be held to render any other provision or provisions of this Contract unenforceable.
 20. **ASSIGNMENT/DELEGATION**. To the extent that any assignment of any right under this Contract changes the duty of either party, increases the burden or risk involved, impairs the chances of obtaining the performance of this Contract, attempts to operate as a novation, or includes a waiver or abrogation of any defense to payment by State, such offending portion of the assignment shall be void, and shall be a breach of this Contract. Contractor shall neither assign, transfer nor delegate any rights, obligations nor duties under this Contract without the prior written consent of the State.
 21. **STATE OWNERSHIP OF PROPRIETARY INFORMATION**. Any reports, histories, studies, tests, manuals, instructions, photographs, negatives, blue prints, plans, maps, data, system designs, computer code (which is intended to be consideration under the Contract), or any other documents or drawings, prepare or in the course of preparation by Contractor (or its subcontractors) in performance of its obligations under this Contract shall be the exclusive property of the State and all such materials shall be delivered into State possession by Contractor upon completion, termination, or cancellation of this Contract. Contractor shall not use, willingly allow, or cause to have such materials used for any purpose other than performance of Contractor's obligations under this Contract without the prior written consent of the State. Notwithstanding the foregoing, the State shall have no proprietary interest in any materials licensed for use by the State that are subject to patent, trademark, or copyright protection.
 22. **PUBLIC RECORDS**. Pursuant to NRS 239.010, information or documents received from Contractor may be open to public inspection and copying. The State has a legal obligation to disclose such information unless a particular record is made confidential by law or a common law balancing of interests. Contractor may label specific parts of an individual document as a "trade secret" or "confidential" in accordance with NRS 333.333, provided that Contractor thereby agrees to indemnify and defend the State for honoring such a designation. The failure to so label any document that is released by the State shall constitute a complete waiver of any and all claims for damages caused by any release of the records.

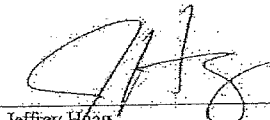
23. **CONFIDENTIALITY.** Contractor shall keep confidential all information, in whatever form, produced, prepared, observed or received by Contractor to the extent that such information is confidential by law or otherwise required by this Contract.
24. **FEDERAL FUNDING.** In the event federal funds are used for payment of all or part of this Contract:
- A. Contractor certifies, by signing this Contract, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by any federal department or agency. This certification is made pursuant to the regulations implementing Executive Order 12549, Debarment and Suspension, 28 C.F.R. pt 67, Section 67.510, as published as pt. VII of the May 26, 1988, Federal Register (pp. 19160-19211), and any relevant program-specific regulations. This provision shall be required of every subcontractor receiving any payment in whole or in part from federal funds.
 - B. Contractor and its subcontracts shall comply with all terms, conditions, and requirements of the Americans with Disabilities Act of 1990 (P.L. 101-136), 42 U.S.C. 12101, as amended, and regulations adopted there under contained in 28 C.F.R. 26.101-36.999, inclusive, and any relevant program-specific regulations.
 - C. Contractor and its subcontractors shall comply with the requirements of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, P.L. 93-112, as amended, and any relevant program-specific regulations, and shall not discriminate against any employee or offeror for employment because of race, national origin, creed, color, sex, religion, age, disability or handicap condition (including AIDS and AIDS-related conditions.)
25. **LOBBYING.** The parties agree, whether expressly prohibited by federal law, or otherwise, that no funding associated with this Contract will be used for any purpose associated with or related to lobbying or influencing or attempting to lobby or influence for any purpose the following:
- A. Any federal, State, county or local agency, legislature, commission, council or board;
 - B. Any federal, State, county or local legislator, commission member, council member, board member, or other elected official; or
 - C. Any officer or employee of any federal, State, county or local agency; legislature, commission, council or board.
26. **WARRANTIES.**
- A. General Warranty. Contractor warrants that all services, deliverables, and/or work products under this Contract shall be completed in a workmanlike manner consistent with standards in the trade, profession, or industry, shall conform to or exceed the specifications set forth in the incorporated attachments; and shall be fit for ordinary use, of good quality, with no material defects.
 - B. System Compliance. Contractor warrants that any information system application(s) shall not experience abnormally ending and/or invalid and/or incorrect results from the application(s) in the operating and testing of the business of the State.
27. **PROPER AUTHORITY.** The parties hereto represent and warrant that the person executing this Contract on behalf of each party has full power and authority to enter into this Contract. Contractor acknowledges that as required by statute or regulation this Contract is effective only after approval by the State Board of Examiners and only for the period of time specified in the Contract. Any services performed by Contractor before this Contract is effective or after it ceases to be effective are performed at the sole risk of Contractor.
28. **NOTIFICATION OF UTILIZATION OF CURRENT OR FORMER STATE EMPLOYEES.** Contractor has disclosed to the State all persons that the Contractor will utilize to perform services under this Contract who are Current State Employees or Former State Employees. Contractor will not utilize any of its employees who are Current State Employees or Former State Employees to perform services under this Contract without first notifying the Contracting Agency of the identity of such persons and the services that each such person will perform, and receiving from the Contracting Agency approval for the use of such persons.
29. **ASSIGNMENT OF ANTITRUST CLAIMS.** Contractor irrevocably assigns to the State any claim for relief or cause of action which the Contractor now has or which may accrue to the Contractor in the future by reason of any violation of State of Nevada or federal antitrust laws in connection with any goods or services provided to the Contractor for the purpose of carrying out the Contractor's obligations under this Contract, including, at the State's option, the right to

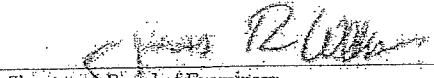
control any such litigation on such claim for relief or cause of action. Contractor shall require any subcontractors hired to perform any of Contractor's obligations under this Contract to irrevocably assign to the State, as third party beneficiary, any right, title or interest that has accrued or which may accrue in the future by reason of any violation of State of Nevada or federal antitrust laws in connection with any goods or services provided to the subcontractor for the purpose of carrying out the subcontractor's obligations to the Contractor in pursuance of this Contract, including, at the State's option, the right to control any such litigation on such claim or relief or cause of action.

30. **GOVERNING LAW; JURISDICTION.** This Contract and the rights and obligations of the parties hereto shall be governed by, and construed according to, the laws of the State of Nevada, without giving effect to any principle of conflict-of-law that would require the application of the law of any other jurisdiction. The parties consent to the exclusive jurisdiction of the First Judicial District Court, Carson City, Nevada for enforcement of this Contract.
31. **ENTIRE CONTRACT AND MODIFICATION.** This Contract and its integrated attachment(s) constitute the entire agreement of the parties and as such are intended to be the complete and exclusive statement of the promises, representations, negotiations, discussions, and other agreements that may have been made in connection with the subject matter hereof. Unless an integrated attachment to this Contract specifically displays a mutual intent to amend a particular part of this Contract, general conflicts in language between any such attachment and this Contract shall be construed consistent with the terms of this Contract. Unless otherwise expressly authorized by the terms of this Contract, no modification or amendment to this Contract shall be binding upon the parties unless the same is in writing and signed by the respective parties hereto and approved by the Office of the Attorney General and the State Board of Examiners.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be signed and intend to be legally bound thereby.


 1/26/17 General Manager
Independent Contractor's Signature Date Independent Contractor's Title

 1-30-2017
Jeffrey Hoag Date Administrator, Nevada State Purchasing

 APPROVED BY BOARD OF EXAMINERS
Signature Board of Examiners

On: 2/14/17
Date

Approved as to form by:

 On: 30 Jan 17
Deputy Attorney General for Attorney General Date

ATTACHMENT BB
INSURANCE SCHEDULE



ATTACHMENT BB INSURANCE SCHEDULE

INSURANCE REQUIREMENTS:

Contractor and subcontractors shall procure and maintain until all of their obligations have been discharged, including any warranty periods under this Contract are satisfied, insurance against claims for injury to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors.

The insurance requirements herein are minimum requirements for this Contract and in no way limit the indemnity covenants contained in this Contract. The State in no way warrants that the minimum limits contained herein are sufficient to protect the Contractor from liabilities that might arise out of the performance of the work under this contract by the Contractor, his agents, representatives, employees or subcontractors and Contractor is free to purchase additional insurance as may be determined necessary.

- A. MINIMUM SCOPE AND LIMITS OF INSURANCE: Contractor shall provide coverage with limits of liability not less than those stated below. An excess liability policy or umbrella liability policy may be used to meet the minimum liability requirements provided that the coverage is written on a "following form" basis.

1. Commercial General Liability – Occurrence Form

Policy shall include bodily injury, property damage and broad form contractual liability coverage.

• General Aggregate	\$2,000,000
• Products – Completed Operations Aggregate	\$1,000,000
• Personal and Advertising Injury	\$1,000,000
• Each Occurrence	\$1,000,000

- a. The policy shall be endorsed to include the following additional insured language: "The State of Nevada shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the Contractor".

2. Automobile Liability

Bodily Injury and Property Damage for any owned, hired, and non-owned vehicles used in the performance of this Contract.

Combined Single Limit (CSL)	\$1,000,000
-----------------------------	-------------

- a. The policy shall be endorsed to include the following additional insured language: "The State of Nevada shall be named as an additional insured with respect to liability arising out of the activities performed by, or on behalf of the Contractor, including automobiles owned, leased, hired or borrowed by the Contractor".

3. Worker's Compensation and Employers' Liability

Workers' Compensation	Statutory
Employers' Liability	
Each Accident	\$100,000
Disease – Each Employee	\$100,000
Disease – Policy Limit	\$500,000

- a. Policy shall contain a waiver of subrogation against the State of Nevada.
- b. This requirement shall not apply when a contractor or subcontractor is exempt under N.R.S., AND when such contractor or subcontractor executes the appropriate sole proprietor waiver form.

- B. ADDITIONAL INSURANCE REQUIREMENTS: The policies shall include, or be endorsed to include, the following provisions:

1. On insurance policies where the State of Nevada is named as an additional insured, the State of Nevada shall be an additional insured to the full limits of liability purchased by the Contractor even if those limits of liability are in excess of those required by this Contract.
 2. The Contractor's insurance coverage shall be primary insurance and non-contributory with respect to all other available sources.
- C. **NOTICE OF CANCELLATION:** Contractor shall for each insurance policy required by the insurance provisions of this Contract shall not be suspended, voided or canceled except after providing thirty (30) days prior written notice been given to the State, except when cancellation is for non-payment of premium, then ten (10) days prior notice may be given. Such notice shall be sent directly to Annette Morfin, Purchasing Officer, Nevada State Purchasing Division, 515 East Musser Street, Suite 300, Carson City, NV 89701. Should contractor fail to provide State timely notice, contractor will be considered in breach and subject to cure provisions set forth within this contract.
- D. **ACCEPTABILITY OF INSURERS:** Insurance is to be placed with insurers duly licensed or authorized to do business in the state of Nevada and with an "A.M. Best" rating of not less than A-VII. The State in no way warrants that the above-required minimum insurer rating is sufficient to protect the Contractor from potential insurer insolvency.
- E. **VERIFICATION OF COVERAGE:** Contractor shall furnish the State with certificates of insurance (ACORD form or equivalent approved by the State) as required by this Contract. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

All certificates and any required endorsements are to be received and approved by the State before work commences. Each insurance policy required by this Contract must be in effect at or prior to commencement of work under this Contract and remain in effect for the duration of the project. Failure to maintain the insurance policies as required by this Contract or to provide evidence of renewal is a material breach of contract.

All certificates required by this Contract shall be sent directly to Annette Morfin, Purchasing Officer, Nevada State Purchasing Division, 515 East Musser Street, Suite 300, Carson City, NV 89701. The State project/contract number and project description shall be noted on the certificate of insurance. The State reserves the right to require complete, certified copies of all insurance policies required by this Contract at any time.

- F. **SUBCONTRACTORS:** Contractors' certificate(s) shall include all subcontractors as additional insureds under its policies or Contractor shall furnish to the State separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to the minimum requirements identified above.
- G. **APPROVAL:** Any modification or variation from the insurance requirements in this Contract shall be made by the Attorney General's Office or the Risk Manager, whose decision shall be final. Such action will not require a formal Contract amendment, but may be made by administrative action.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be signed and intend to be legally bound thereby.

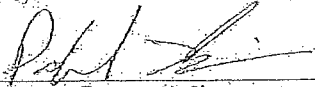
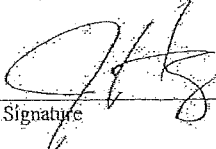
 Independent Contractor's Signature	1/26/17 Date	General Manager Independent Contractor's Title
 Signature	1-30-2017 Date	Administrator Title

EXHIBIT 3

EXHIBIT 3

Steven D. Grierson

1 Will Kemp, Esq. (#1205)
2 Nathanael R. Rulis, Esq. (#11259)
3 n.rulis@kempjones.com
4 KEMP, JONES & COULTHARD, LLP
5 3800 Howard Hughes Parkway, 17th Floor
6 Las Vegas, Nevada 89169
7 Telephone: (702) 385-6000
8 Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

9 MM DEVELOPMENT COMPANY, INC., a
10 Nevada corporation,

Case No.: A-18-785818-W
Dept. No.: XVIII

11 Plaintiff,

12 vs.

13 STATE OF NEVADA, DEPARTMENT OF
14 TAXATION; and DOES 1 through 10; and
15 ROE CORPORATIONS 1 through 10.

16 Defendants.

ORDER GRANTING IN PART AND
DENYING IN PART EMERGENCY
MOTION FOR ORDER REQUIRING
THE SMC TO PRESERVE AND/OR
IMMEDIATELY TURN OVER
RELEVANT ELECTRONICALLY
STORED INFORMATION FROM
SERVERS, STAND-ALONE
COMPUTERS, AND CELL PHONES

Date of Hearing: 12/13/18
Time of Hearing: 10:00 a.m.

17
18 Plaintiff MM Development having filed an Emergency Motion For Preservation Of
19 Electronic Data and having given the counsel for Department of Taxation notice of such
20 request, the Court conducting a hearing on December 13, 2018 at 10:00 a.m., Plaintiff appearing
21 by Will Kemp, Esq., and Nathanael R. Rulis, Esq., of the law firm of Kemp, Jones & Coulthard,
22 LLP; the State of Nevada, Department of Taxation (the "State") appearing by Robert Werbicky,
23 Esq., and David J. Pope, Esq., and it appearing that the State used employees retained by an
24 outside employment agency (i.e. Manpower) to evaluate and rate marijuana dispensary license
25 applications (hereinafter referred to as "Manpower"), and good cause appearing for the
26 preservation of electronic data of the State and Manpower, the Motion is GRANTED IN PART
27
28

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

KEMP JONES & COULTHARD, LLP

3800 Howard Hughes Parkway

Seventeenth Floor

Las Vegas, Nevada 89169

(702) 385-6000 • Fax (702) 385-6001

kjc@kempjones.com

1 regarding preservation and DENIED IN PART regarding immediate turnover and it is hereby
2 ORDERED, ADJUDGED and DECREED as follows:

3 ORDERED that the State shall preserve server or any standalone computers (including
4 laptops, iPads or thumb drives) in its possession and used in the evaluation and rating of
5 marijuana dispensary license applications as part of the September 2018 application period (the
6 "ESI" or "electronically-stored information"). The State shall also preserve communication
7 made with Manpower related to the hiring of the personnel by Manpower for the September
8 2018 application period. The State shall make the ESI available for copying by the State in the
9 presence of a computer expert retained by Plaintiff in the next 10 business days after notice of
10 entry of this order. The State shall make 3 copies of the hard drive of the ESI with one copy
11 being preserved by the State as a master copy retained by the State and one additional copy
12 retained by the State, and one copy provided to the Court under seal. To allow Plaintiff and the
13 State (i.e., the Nevada Department of Taxation) to determine the most efficient way to allow the
14 State to make such copies, the State shall make their primary IT persons available for a
15 conference call with the ESI expert for Plaintiff and counsel for the Plaintiff, counsel for the
16 State (and counsel and IT manager for Manpower if desired by Manpower) to identify in
17 general the types of servers (including standalone computers and laptops) that will be subject to
18 the copying protocol and types and amount of data maintained on such servers (including
19 standalone computers and laptops). The conference call shall be held no later than 5 business
20 days after notice of entry of this order.

21 ORDERED that the State shall provide Plaintiffs a list of Department personnel
22 including Manpower personnel that primarily assisted in the evaluation and rating of all
23 applications for dispensary licenses and/or evaluated such license applications received in the
24 September 2018 application period and provide a list of any full or partial cell phone numbers
25 known to the Department sufficient to allow the identification of the cell phone (including but
26 not limited to personal cell phone numbers) for each such person within 5 business days of after
27 notice of entry of this order. At the same time, the State may use reasonable identifiers, e.g.
28 "Manpower Employee 1," instead of names if the State so desires. At the same time the State

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Seventeenth Floor

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(702) 385-6000 • Fax: (702) 385-6001

kjc@kempjones.com

1 may designate up to 6 persons on a list that the State believes were primarily involved on behalf
2 of Manpower and/or the State in the processing of all applications for dispensary licenses and/or
3 the evaluation of such license applications. If the State has a pre-existing organizational chart
4 of the Manpower employees, it shall provide the same to Plaintiff at such time but the State is
5 not obligated to create an organizational chart. Again, the State may use reasonable identifiers
6 instead of names. Within 10 business days after receiving the foregoing list from the State,
7 Plaintiffs shall be allowed to take the telephonic deposition of the PMK for the State to identify
8 the names (or reasonable identifiers) and job descriptions of all persons (including temporary
9 employees, if any) that were involved on behalf of State in assisting in the evaluation and rating
10 of applications for dispensary licenses and/or evaluating such licenses for the September 2018
11 application period. The purpose of the PMK deposition is to reasonably identify persons whose
12 cell phone data may contain relevant discoverable materials to ensure that all such data is
13 preserved. At its option, the State may provide a written response in lieu of the PMK
14 deposition.

15 ORDERED that the State shall make all cell phones (personal and/or business) of each
16 such person that assisted in the processing of applications for dispensary licenses and/or
17 evaluated such license applications, including but not limited to Steve F. Gilbert and a Northern
18 Nevada State employee, available for copying in the 10 business days after notice of entry of
19 this order at a location convenient to State and Manpower, and that the State, in the presence of
20 Plaintiff's computer expert, shall make 3 copies of the data from each cell phone with one copy
21 being preserved as a master copy, one copy provided to counsel for the State and one copy
22 provided to the Court under seal. In the event any such cell phones are not available, the State
23 shall file a sworn declaration regarding any cell phone that is not available explaining why such
24 cell phone is not available within 10 business days after notice of entry of this order.

25 ORDERED that neither Plaintiff's counsel nor Plaintiff or their agents or employees
26 shall access the cell phone data until the State and Plaintiff agrees to a procedure to protect non-
27 discoverable confidential data or the Court allows such access by subsequent order. The State is
28 authorized to inform any such persons whose cell phone data is copied that any and all personal

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
(702) 385-6000 • Fax (702) 385-6001
kjc@kempjones.com

1 information will either be returned or destroyed at a later date. Plaintiff's counsel and Plaintiff
2 and their agents or employees are restricted from accessing ESI data except as authorized by a
3 confidentiality order or other order of the Court.

4 ORDERED that the State is directed to maintain any and all documents in its possession
5 regarding the processing of applications for dispensary licenses and/or evaluation of such
6 license applications, for the September 2018 application period including but not limited to the
7 following: (1) any and all communications between Manpower and the State; (2) any and all
8 directions provided by the State to Manpower regarding the processing of applications or the
9 evaluation of the applications and any requests for information from Manpower; (3) any and all
10 communications between Manpower or State employees and any applicant (or with the
11 attorneys or consultants for an applicant) regarding any subject matter; (4) the contract, if any,
12 between Manpower and the State and all invoices, if any, sent by Manpower to the State; (5)
13 any and all preliminary rankings of applicants by jurisdiction or otherwise by Manpower or the
14 State that pre-date the final ranking; (6) any and all work papers (including notes) used by
15 Manpower or the State in the processing of applications for dispensary licenses and/or
16 evaluation of such license applications; (7) any and all spread sheets created by Manpower or
17 the State regarding the applications for dispensary licenses; and (8) any and all notes of formal
18 or informal meetings among Manpower or the State personnel regarding the processing of
19 applications for dispensary licenses and/or evaluation of such license applications. The State
20 shall not be required to produce the documents set forth in categories 1 through 8 at an
21 expedited pace but shall be required to identify the same with specificity at the Rule 16.1
22 conference subject to all privileges and objections by the State to such production.

23 ORDERED that the State shall serve a copy of this Order upon Manpower within one
24 business day of notice of entry of this Order.

25 DATED this 13th day of December, 2018

26
27 
28 DISTRICT JUDGE

KEMP, JONES & COULTHARD, LLP

3800 Howard Hughes Parkway

Seventeenth Floor

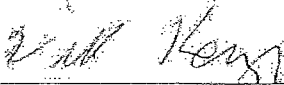
Las Vegas, Nevada 89169

(702) 385-6000 • Fax (702) 385-6001

kjc@kempjones.com

1 Respectfully Submitted by:

2 KEMP, JONES & COULTHARD, LLP

3 

4 Will Kemp, Esq. (#1205)

5 Nathanael R. Rulis, Esq. (#11259)

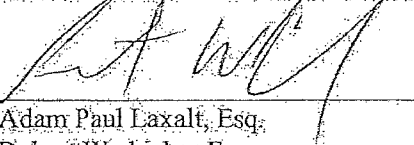
6 3800 Howard Hughes Parkway, 17th Floor

7 Las Vegas, Nevada 89169

8 *Attorneys for Plaintiff*

9 Approved as to content and form

10 OFFICE OF THE ATTORNEY GENERAL

11 

12 Adam Paul Laxalt, Esq.

13 Robert Werbicky, Esq.

14 David J. Pope, Esq.

15 555 East Washington Ave., Suite 3900

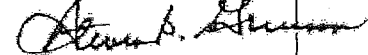
16 Las Vegas, Nevada 89101

17 *Attorneys for Defendant*

18 *State of Nevada, Department of Taxation*

EXHIBIT 4

EXHIBIT 4



1 **DECL**
2 ADAM PAUL LAXALT
3 Attorney General
4 David J. Pope (Bar No. 8617)
5 Acting Chief Deputy Attorney General
6 Robert E. Werbicky (Bar No. 6166)
7 Deputy Attorney General
8 Vivienne Rakowsky (Bar No. 9160)
9 Deputy Attorney General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
(702) 486-3420 (phone)
(702) 486-3416 (fax)
DPope@ag.nv.gov
VRakowsky@ag.nv.gov
RWerbicky@ag.nv.gov

10 *Attorneys for Defendant,*
11 *State of Nevada,*
Department of Taxation

12
13 DISTRICT COURT
14 CLARK COUNTY, NEVADA

15 MM DEVELOPMENT COMPANY, INC., a
16 Nevada corporation

17 Plaintiff,

18 vs.

19 STATE OF NEVADA, DEPARTMENT OF
20 TAXATION; and DOES 1 through 10; and ROE
CORPORATIONS 1 through 10,

21 Defendants.

Case No. A-18-785818-W
Dept. No. XVIII

DECLARATION REGARDING ANY CELL
PHONE THAT IS NOT AVAILABLE

22 The STATE OF NEVADA, DEPARTMENT OF TAXATION by and through their counsel,
23 ADAM PAUL LAXALT, Attorney General and DAVID POPE, Acting Chief Deputy Attorney General,
24 ROBERT WERBICKY, Deputy Attorney General, and VIVIENNE RAKOWSKY, Deputy Attorney
25 General, and hereby submit this Declaration Regarding Any Cell Phone That Is Not Available pursuant
26 to this Court's order of December 13, 2018.

27 ///

28 ///

1 Attached as Exhibit A is the Declaration of Talova V. Davis, in her official capacity as
2 Cybercrime Investigator II, Investigations Division, Nevada Office of the Attorney General.

3
4 DATED this 3rd day of January, 2019.

5
6 ADAM PAUL LAXALT
Attorney General

7
8 By: /s/Vivienne Rakowsky
9 VIVIENNE RAKOWSKY (Bar No. 9160)
Deputy Attorney General
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on the 3rd day of January, 2019, I filed the foregoing **DECLARATION REGARDING ANY CELL PHONE THAT IS NOT AVAILABLE** via this Court's electronic filing system. Parties that are registered with this Court's EFS will be served electronically.

/s/ Michele Caro

An Employee of the Office of the Attorney General

EXHIBIT "A"

EXHIBIT "A"

1 DECL
ADAM PAUL LAXALT
2 Attorney General
David J. Pope (Bar No. 8617)
3 Acting Chief Deputy Attorney General
Robert E. Werbicky (Bar No. 6166)
4 Deputy Attorney General
Vivienne Rakowsky (Bar No. 9160)
5 Deputy Attorney General
Office of the Attorney General
6 555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
7 (702) 486-3420 (phone)
(702) 486-3416 (fax)
8 DPope@ag.nv.gov
RWerbicky@ag.nv.gov
9 VRakowsky@ag.nv.gov

10 *Attorneys for Defendant,*
11 *State of Nevada,*
Department of Taxation

12
13 DISTRICT COURT
14 CLARK COUNTY, NEVADA

15 MM DEVELOPMENT COMPANY, INC., a
16 Nevada corporation

17 Plaintiff,

18 vs.

19 STATE OF NEVADA, DEPARTMENT OF
TAXATION; and DOES 1 through 10; and
20 ROE CORPORATIONS 1 through 10,

21 Defendants.

Case No. A-18-785818-W
Dept. No. XVIII

22 DECLARATION OF TALOVA V. DAVIS

23 1. I, Talova V. Davis, first being duly sworn, present this Declaration regarding the status of
24 imaging cellular phones pursuant to the Court's Order dated December 13, 2018 and entered December
25 14, 2018 ("Court Order").

26 2. I have personal knowledge of, and am competent to testify, regarding these matters.

27 3. I am employed as a Cybercrime Investigator II by the Investigations Division of the
28 Nevada Office of the Attorney General, having been so employed by the State of Nevada since 2007. I

1 hereby affirm that I am a certified digital forensic specialist with extensive training and experience in the
2 preservation and examination of digital evidence.

3 4. I have been assigned the task of obtaining and forensically imaging cellular phones and
4 hard drives pursuant to the Court Order. On December 24, 2018, Nevada Office of the Attorney General
5 Chief of Investigations Roland D. Swanson II provided me with a list of names and phone numbers to
6 contact Manpower employees, asking that I begin contacting said employees on December 26, 2018.

7 5. This Court Ordered that in the event that any such cellular phone is not available, that the
8 State is to provide a sworn declaration explaining why the cellular phone is not available.

9 6. This is my sworn declaration explaining why the cellular phones below are not available
10 in compliance with the Court's Order.

11 7. At approximately 2:14 p.m. on December 26, 2018, I spoke with Manpower 1 regarding
12 the imaging of Manpower 1's personal cellular phone. Manpower 1 was willing to meet with me at 8
13 a.m. on the morning of December 27, 2018 to have the cellular phone imaged. Manpower 1 called back
14 at 8:08 a.m. on December 27, 2018 and said that after speaking with a few people, Manpower 1 is going
15 to decline having the cellular phone imaged until a subpoena requires Manpower 1 to do so.

16 8. At approximately 1:55 p.m. on December 26, 2018, I spoke with Manpower 2 regarding
17 the imaging of Manpower 2's personal cellular phone. Manpower 2 declined to have the cellular device
18 imaged, citing concerns about having personal pictures and personal identifiable information available
19 to others, even with a court order in place. Manpower 2 mentioned that the cellular phone was not used
20 for any work-related activity.

21 9. At approximately 8:33 a.m. on December 27, 2018, I left a voice mail message for
22 Manpower 3 regarding the forensic imaging of Manpower 3's cellular phone. On December 28, 2018 at
23 6:50 a.m., I received a voice mail message from Manpower 3 stating that Manpower 3 is not willing to
24 have the personal cellular phone copied as it was not used for business.

25 10. At approximately 9:05 a.m. on December 27, 2018, I left a voice mail message for
26 Manpower 4 regarding the forensic imaging of Manpower 4's cellular phone. On December 28, 2018 at
27 8:11 a.m., I received a voice mail message from Manpower 4 stating that Manpower 4 is not prepared to
28 authorize the forensic imaging of the cellular phone at this time.

1 11. At approximately 9:08 a.m. on December 27, 2018, I left a voice mail message for
2 Manpower 5 regarding the forensic imaging of Manpower 5's cellular phone. As of 11:00 a.m. on
3 December 31, 2018, I have not received any communications from Manpower 5.

4 12. At approximately 9:39 a.m. on December 27, 2018, I left a voice mail message for
5 Manpower 6 regarding the forensic imaging of Manpower 6's cellular phone. As of 11:00 a.m. on
6 December 31, 2018, I have not received any communications from Manpower 6.

7 Dated this 3rd day of January, 2019.

8 ADAM PAUL LAXALT
9 Attorney General

10 By: 

11 Talova V. Davis
12 Cybercrime Investigator II
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EXHIBIT 5

EXHIBIT 5

A-18-785818-W

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Mandamus

COURT MINUTES

February 05, 2019

A-18-785818-W MM Development Company, Inc, Plaintiff(s)
vs.
State of Nevada, Department of Taxation, Defendant(s)

February 05, 2019 08:30 AM All Pending Motions

HEARD BY: Barker, David COURTROOM: Phoenix Building 11th Floor 110

COURT CLERK: Trujillo, Athena

RECORDER: Page, Robin

REPORTER:

PARTIES PRESENT:

David J. Pope	Attorney for Defendant
Nathanael R. Rulis, ESQ	Attorney for Plaintiff
Robert E. Werbicky	Attorney for Defendant
VIVIENNE RAKOWSKY, ESQ	Attorney for Defendant
William Simon Kemp	Attorney for Plaintiff

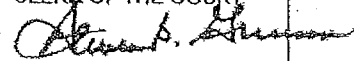
JOURNAL ENTRIES

MOTION FOR RECONSIDERATION ... MOTION FOR ORDER OF CONTEMPT AGAINST THE STATE OF NEVADA, DEPARTMENT OF TAXATION FOR FAILURE TO PRESERVE RELEVANT ELECTRONICALLY STORED INFORMATION FROM CELL PHONES AND ORDER SHORTENING TIME

Argument by Mr. Werbicky, noting that imaging was requested, however, it must be done by their criminal department. Further, Mr. Werbicky advised four out of the six Manpower employees indicated they had no opposition to the imaging of their phones, then changed their minds. Further, Mr. Werbicky noted the motion was filed when they began imagine laptops. Mr. Kemp argued against the motion, however, requested the Manpower employees be deposed. Mr. Pope reviewed the transcript and argued that depositions are premature. Court noted Mr. Kemp has requested the Motion for Contempt be WITHDRAWN: Mr. Werbicky advised there is no opposition to following normal discovery rules or for subpoena's issuing as long as they are appropriate under rule 45. Mr. Kemp argued section B of the Manpower contract allows for the imaging of employee's phones. Mr. Werbicky argued that the phones are personal property. COURT ORDERED, Motion for Reconsideration GRANTED; Motion for Order of Contempt DENIED and WITHDRAWN; Court will allow depositions for the limited purposes of Manpower employees being asked the types of phones they have, their service provider, and to explain the limits of the Court order; Mr. Kemp to prepare the order.

EXHIBIT 6

EXHIBIT 6



1 ORDR
2 AARON D. FORD
3 Attorney General
4 David J. Pope (Bar No. 8617)
5 Chief Deputy Attorney General
6 Robert E. Werbicky (Bar No. 6166)
7 Deputy Attorney General
8 Vivienne Rakowsky (Bar No. 9160)
9 Deputy Attorney General
10 Office of the Attorney General
11 555 E. Washington Ave., Ste. 3900
12 Las Vegas, NV 89101
13 (702) 486-3105 (phone)
14 (702) 486-3416 (fax)
15 dpope@ag.nv.gov
16 vrakowsky@ag.nv.gov
17 rwerbicky@ag.nv.gov
18 *Attorneys for Defendants*
19 *State of Nevada Department of Taxation*

11 DISTRICT COURT
12 CLARK COUNTY, NEVADA

14 MM DEVELOPMENT COMPANY, INC., a
15 Nevada Corporation and LIVFREE
16 WELLNESS, LLC,

16 Plaintiffs,

17 vs.

18 STATE OF NEVADA, DEPARTMENT OF
19 TAXATION; and DOES 1 through 10; and ROE
20 CORPORATIONS 1 through 10,

20 Defendants.

Case No. A-18-785818-W
Dept. No. IX

~~[PROPOSED]~~ ORDER

Date of Hearing: February 5, 2019
Time of Hearing: 8:30 a.m.

21 Plaintiffs, MM Development Company, Inc. ("MM Development") and Livfree Wellness LLC,
22 dba The Dispensary ("Livfree"), by and through counsel Will Kemp, Esq., and Nathanael R. Rulis, Esq.,
23 of the law firm Kemp, Jones & Coulthard, LLP; and Defendant State of Nevada, Department of Taxation
24 (the "Department"), by and through counsel Robert E. Werbicky, Esq., and David J. Pope, Esq., of the
25 State of Nevada, Office of the Attorney General, appeared before this Court on February 5, 2019, for the
26 hearing on Plaintiffs' Motion for Order of Contempt Against State of Nevada, Department of Taxation
27 for Failure to Preserve Relevant Electronically Stored Information from Cell Phones on Order Shortening
28 Time (the "Contempt Motion").

1 After reviewing the papers and pleadings on file herein, and hearing the arguments of counsel, the Court
2 makes the following findings and conclusions;

3 After the Department updated the Court on the status of its efforts to comply with the December
4 13, 2018 Order, the Plaintiffs withdrew the Contempt Motion;

5 During the hearing Plaintiffs submitted a verbal motion on the record for permission to conduct
6 pre-conference discovery (the "Discovery Motion") including taking the depositions of the six (6)
7 Manpower Employees;

8 The Department did not object to limited pre-conference discovery provided Plaintiffs established
9 good cause, but the Department did seek to limit the scope of any such discovery; NRCP 30(a)(2)(A)(iii)
10 provides a party must obtain leave of the court if the party seeks to take a deposition before the time
11 specified in Rule 26(d);

12 NRCP 30(a)(2) provides the court must grant such leave consistent with the allowance of NRCP
13 26(b)(1) and the limitations of NRCP 26(b)(2);

14 Further, discovery may commence before the parties have a discovery conference. Tracfone
15 Wireless, Inc. v. Adams, 304 F.R.D. 672 (S.D. Fla. 2015); *see also Semitool, Inc. v. Tokyo Electron Am.,*
16 *Inc.*, 208 F.R.D. 273 (N.D. Cal. 2002) ("Good cause may be found worthy need for expedited discovery
17 and consideration if the administration of justice outweighs the prejudice the responding party.").

18 Good cause exists to permit limited pre-conference depositions to be taken of the six (6)
19 Manpower Employees as directed and limited by this Court;

20 Based on the foregoing findings and conclusions:

21 IT IS HEREBY ORDERED that Plaintiffs' Contempt Motion is DENIED as moot;

22 IT IS FURTHER ORDERED Plaintiffs' Discovery Motion is GRANTED IN PART;

23 IT IS FURTHER ORDERED that, pursuant to Rules 30 and 45 of the Nevada Rules of Civil
24 Procedure, Plaintiffs are given leave to take limited depositions of the six (6) Manpower Employees;

25 IT IS FURTHER ORDERED that any depositions of the Manpower Employees are limited to the
26 following questions:

- 27 - "Please provide the make(s), model(s), and operating system of your personal cellular
28 telephone(s) used from July 2018 – December 2018."

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- "Please provide the name of the service provider(s) for each personal cellular telephone used from July 2018 – December 2018."

- "Do you understand the December 13, 2018 Order Granting in Part and Denying in Part Plaintiff's Emergency Motion (the "Preservation Order") issued in this case does not permit the disclosure of any of your personal information unless and until ordered by the Court?"

IT IS FURTHER ORDERED that if any Manpower Employee chooses to provide their personal cellular phone to the Department for imaging, Plaintiffs' right to conduct the pre-conference deposition of that Manpower Employee pursuant to this Order is rescinded.

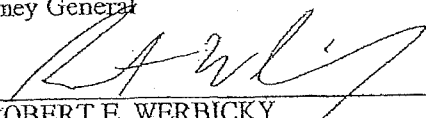
DATED this 1st day of March, 2019.



DISTRICT COURT JUDGE

Respectfully Submitted by:


AARON D. FORD
Attorney General

By: 

ROBERT E. WERBICKY
Deputy Attorney General (Bar No. 6166)

EXHIBIT “D”

RSA000208



1 **DCRR**
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@pnlaw.net

10 *Attorneys for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 NEVADA WELLNESS CENTER, LLC, a
14 Nevada Limited Liability Company,

15 Plaintiff,

16 v.

17 STATE OF NEVADA, DEPARTMENT OF
18 TAXATION; and DOES I through X,
19 inclusive; and ROE CORPORATIONS I
20 through X, inclusive,

21 Defendants.

CASE NO.: A-19-787540-W
DEPT. NO.: XVIII

22 **DISCOVERY COMMISSIONER'S REPORT AND RECOMMENDATIONS**

23 **Date of Hearing:** March 29, 2019

24 **Time of Hearing:** 9:30 a.m.

25 **Attorney for Plaintiff:** Theodore Parker, III, Esq., of the law firm of PARKER, NELSON &
26 ASSOCIATES, CHTD.

27 **Attorney for Defendant:** Robert Werbicky, Esq., and David J. Pope, Esq. of the OFFICE OF
28 THE ATTORNEY GENERAL

I.

FINDINGS

Plaintiff Nevada Wellness Center, LLC ("Plaintiff" or "NWC") having filed a Plaintiffs' Emergency Motion for Order Requiring the SMC, Ms. Karen Cronkita and Mr. Damon Hernandez of Department of Taxation to Preserve and/or Immediately Turn Over Relevant Electronically Stored Information from Servers, Stand-Alone Computers, and Cell Phones on Order Shortening Time.

1 The State of Nevada, Department of Taxation ("the State") used Manpower employees
2 (hereinafter referred to as the "Manpower") to evaluate and rate marijuana dispensary license
3 applications. The State's employees trained the Manpower employees regarding the evaluation,
4 grading, and scoring of the marijuana dispensary license applications. Plaintiff has stated sufficiently
5 to satisfy the Sedona principles, that there is a real danger of evidence destruction, based on the
6 position taken by the unidentified Manpower employees with regard to the evidence.

7 II.

8 RECOMMENDATIONS

9 Plaintiff's Motion is hereby GRANTED as follows:

10 IT IS THEREFORE RECOMMENDED that the State shall preserve server, any standalone
11 computers (including laptops, iPads or thumb drives), or cellular devices in its possession or in the
12 possession of a State employee used in the evaluation and rating process for marijuana dispensary
13 license applications as part of the September 2018 application period (the "ESI" or
14 "electronically-stored information"). The State shall also preserve communication made with
15 Manpower related to the hiring of the personnel by Manpower for the September 2018 application
16 period or the training of any Manpower employees. Though not an exclusive list of State employees
17 subject to this order, the work devices of Steve Gilbert, Kara Cronkhite, Damon Hernandez, Jorge
18 Pupo and a Northern Nevada State employee identified as "Kyle" are subject to this order as well
19 as any personal devices (e.g., laptop, home computer, tablet or phone) that were utilized for work
20 purposes.

21 IT IS FURTHER RECOMMENDED that the State shall provide Plaintiff a list of State
22 personnel, including any and all Manpower personnel, that assisted in the evaluation and rating of
23 all applications for dispensary licenses, trained and/or assisted in the training of the Manpower
24 personnel, and/or evaluated such license applications received in the September 2018 application
25 period and provide a list of any full or partial cell phone numbers known to the Department sufficient
26 to allow the identification of the cell phone (including but not limited to personal cell phone
27 numbers, for personal phones used for work purposes ^{only}) for each such person within 5 business
28 days after notice of entry of this order. At the same time, the State may use reasonable identifiers,

1 e.g. "Manpower Employee 1," instead of names of the Manpower Employees if the State so desires.
2 At the same time the State may designate up to 6 persons on a list that the State believes were
3 primarily involved on behalf of Manpower and/or the State in the processing of all applications for
4 dispensary licenses and/or the evaluation of such license applications. If the State has a pre-existing
5 organizational chart of the Manpower employees, it shall provide the same to Plaintiff, but the State
6 is not obligated to create an organizational chart. The State must identify all personal and work
7 devices used by State and Manpower employees for the purposes referenced above.

8 Upon learning the identities of any of the State personnel or Manpower personnel, Plaintiff
9 shall have the opportunity to serve depositions upon written questions related to asking whether
10 individuals used personal electronic devices for work purposes, ^{only}. The State will have 14 calendar
11 days – instead of the normal 30 calendar days – to provide responses to Plaintiff's depositions upon
12 written questions.

13 The State shall make the ESI available to be imaged by Plaintiff's contractor or by the State
14 in the presence of a computer expert retained by Plaintiff in the next 10 business days after notice
15 of entry of this order. The State shall make 3 copies of any hard drives of the ESI, at Plaintiff's
16 expense, with all 3 copies to be held by the State. To allow Plaintiff and the State (i.e., the Nevada
17 Department of Taxation) to determine the most efficient way to allow the State to make such copies,
18 the State shall make their primary IT persons available for a conference call with the ESI expert for
19 Plaintiff and counsel for the Plaintiff, counsel for the State (and counsel and IT manager for
20 Manpower if desired by Manpower) to identify in general the types of servers (including standalone
21 computers and laptops) that will be subject to the copying protocol and types and amount of data
22 maintained on such servers (including standalone computers and laptops). The conference call shall
23 be held no later than 5 business days after notice of entry of this order.

24 IT IS FURTHER RECOMMENDED that the State shall make all cell phones (personal - only
25 if used for work purposes - and/or business) of each such person that assisted in the processing of
26 applications for dispensary licenses and/or evaluated such license applications, available for copying
27 in the 10 business days after notice of entry of this order at a location convenient to State and
28 Manpower, and that the State, in the presence of Plaintiff's computer expert, shall make 3 copies of

1 the data from each cell phone. In the event any such cell phones are not available, the State shall file
2 a sworn declaration regarding any cell phone that is not available explaining why such cell phone
3 is not available within 10 business days after notice of entry of this order.

4 IT IS FURTHER RECOMMENDED that neither Plaintiff's counsel nor Plaintiff or their
5 agents or employees shall access the cell phone data until the State and Plaintiff agrees to a
6 procedure to protect non-discoverable confidential data or the Court allows such access by
7 subsequent order. The State is authorized to inform any such persons whose cell phone data is
8 copied that any and all personal information will either be returned or destroyed at a later date.
9 Plaintiff's counsel and Plaintiff and their agents or employees are restricted from accessing ESI data
10 except as authorized by a confidentiality order or other order of the Court.

11 IT IS FURTHER RECOMMENDED that the State is directed to maintain any and all
12 documents in its possession regarding the processing of applications for dispensary licenses and/or
13 evaluation of such license applications, for the September 2018 application period.

14 IT IS FURTHER RECOMMENDED that the State shall serve a copy of this Order upon
15 Manpower within three (3) business days of notice of entry of this Order.

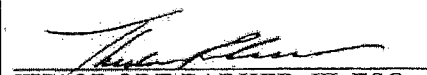
16 The Discovery Commissioner, met with counsel for the parties, having discussed the issues
17 noted above and having reviewed any materials proposed in support thereof, hereby submits the
18 above recommendations.

19 DATED this 10th day of May, 2019.

20 
21 DISCOVERY COMMISSIONER


22 Respectfully submitted by:

23 **PARKER, NELSON & ASSOCIATES,**
24 **CHTD.**

25 
26 THEODORE PARKER, III, ESQ.
27 Nevada Bar No. 4716
28 2460 Professional Court, Suite 200
Las Vegas, Nevada 89128
Attorneys for Plaintiff,
Nevada Wellness Center, LLC

Approved as to form and content by:

OFFICE OF THE ATTORNEY
GENERAL


ROBERT E. WERBICKY, ESQ.
Nevada Bar No. 6166
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
Attorneys for Defendant,
State of Nevada, Department of Taxation

NOTICE

Pursuant to NRCP 16.3(c)(2), you are hereby notified that within fourteen (14) days after being served with a report any party may file and serve written objections to the recommendations. Written authorities may be filed with objections, but are not mandatory. If written authorities are filed, any other party may file and serve responding authorities within seven (7) days after being served with objections.

Objection time will expire on May 24 2019.

A copy of the foregoing Discovery Commissioner's Report was:

Mailed to Plaintiff/Defendant at the following address on the _____ day of _____ 2019:

Electronically filed and served counsel on May 10, 2019, Pursuant to N.E.F.C.R. Rule 9.

The Commissioner's Report is deemed received three (3) days after mailing or e-serving to a party or the party's attorney, or three (3) days after the clerk of the court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office. E.D.C.R. 2.34(f).

By: Natilie Lee

COMMISSIONER DESIGNEE

EXHIBIT “E”

RSA000214



1 **TRAN**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 MM DEVELOPMENT COMPANY,
INC,

7 Plaintiff(s),

8 vs.

9 STATE OF NEVADA,
10 DEPARTMENT OF TAXATION,

11 Defendant(s).

Case No. A-18-785818-W

DEPT. IX

12
13 BEFORE THE HONORABLE DAVID BARKER,
14 SENIOR DISTRICT COURT JUDGE

15
16 TUESDAY, FEBRUARY 5, 2019

17 **TRANSCRIPT OF PROCEEDINGS RE:**
18 **ALL PENDING MOTIONS**

19 **APPEARANCES:**

20 For the Plaintiff(s):

WILLIAM SIMON KEMP, ESQ.
NATHANAEL R. RULIS, ESQ.

21
22 For the Defendant(s):

ROBERT E. WERBICKY, ESQ.
DAVID J. POPE, ESQ.

23
24 RECORDED BY: ROBIN PAGE, COURT RECORDER
25

1 **LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 5, 2019**

2 [Proceeding commenced at 8:42 a.m.]

3
4 THE COURT: All right. Page 3 is 785818, MM Development
5 Company vs. State of Nevada, Department of Taxation.

6 Gentlemen, this has got a lot of meat on the bone. This is
7 where I've been spending the vast majority of my day yesterday.

8 MR. KEMP: Judge, I was going to suggest you might want to
9 trail this, because I -- I think this might take a while.

10 THE COURT: You're -- you're one of three, actually, that are
11 going to take a while. So, yeah, I -- yes, I am going to trail you,
12 gentlemen. Appreciate your patience. Let me call you back when I can
13 free up some room. All right?

14 MR. KEMP: Okay. Thank you, Your Honor.

15 MR. WERBICKY: Thank you, Your Honor.

16 [Matter trailed at 8:42 a.m., until 9:20 a.m.]

17 THE COURT: 785818, MM Development Company vs. State
18 of Nevada, Department of Taxation.

19 MR. RULIS: Your Honor, I believe counsel stepped out to the
20 bathroom. I think -- I think both sides did.

21 THE COURT: That was an expensive stepping.

22 [Matter trailed at 9:20 a.m., until 9:33 a.m.]

23 THE COURT: All right. On the record in 785818, MM
24 Development Company vs. State of Nevada, Department of Taxation.

25 Can I have counsel for Plaintiffs state appearance for the

1 record, please.

2 MR. KEMP: Your Honor, Will Kemp appearing on behalf of
3 the plaintiff, MM Development.

4 THE COURT: Thank you, Mr. Kemp.

5 MR. RULIS: Good morning, Your Honor. Nate Rulis on
6 behalf of Plaintiffs MM Development and Livfree.

7 THE COURT: Thank you, Mr. Rulis.

8 On behalf of the defendant?

9 MR. WERBICKY: Good morning, Your Honor. Robert
10 Werbicky on behalf of the Department of Taxation.

11 THE COURT: Thank you, Mr. Werbicky.

12 Time set and Motion for Reconsideration, Motion for Order of
13 Contempt Against the State of Nevada Department of Taxation for
14 Failure to Preserve Relevant Electronically Stored Information From Cell
15 Phones on an OST. I also note you have Motions for Protective Order --
16 Defendants' Motion for Protective Order scheduled for the 19th, and a
17 Motion to Dismiss Amended Complaint and a Motion to Intervene on
18 the 20th.

19 MR. POPE: Your Honor?

20 THE COURT: Yes, gentlemen.

21 MR. POPE: I was hiding behind the monitor. Can I state my
22 appearance, please?

23 THE COURT: Yes.

24 MR. POPE: David Pope with the attorney general's office.

25 THE COURT: Pope.

1 MR. POPE: Also on behalf of the Department of Taxation.

2 Thank you.

3 THE COURT: Thank you.

4 All right. So a Motion for Reconsideration. I -- I have
5 a 30,000-foot view, gentlemen. So I generally understand it.

6 Mr. Pope, Mr. Werbicky, this is your effort to try to modify
7 some of the orders entered by Judge Bailus. So let's just take it as it
8 comes. All right?

9 MR. WERBICKY: Okay, Your Honor. At this point I'd say this
10 is probably a pretty simple request. The Department filed this motion on
11 December 31st, when it was uncertain when the -- it was going to be
12 able to accomplish the --

13 THE COURT: You had 10 days. If -- and, gentlemen, I
14 have -- did a lot of reading over the last few hours, few days. So -- so
15 you had 10 days to comply with Judge Bailus's order. You, as I
16 understood it, sat with Plaintiffs' counsel, Mr. Kemp, and his team and --

17 MR. WERBICKY: Yes, Your Honor.

18 THE COURT: -- and Mr. Rulis to try to come up with some
19 accommodations on this, to try to get in front of these concerns.

20 MR. WERBICKY: Yes, Your Honor. Initially, the order
21 indicated copying of the -- of various devices. There was a telephone
22 conference call required to be held within I believe five business days,
23 which would have put it on the next Friday. On Tuesday, we had a
24 telephone conference call where we set Friday, the fifth day,
25 at 10:00 a.m. for a conference call amongst the experts.

1 During that conference call amongst the experts, that's when it
2 was first determined that what the plaintiffs really wanted was an image
3 of these various devices as a --

4 THE COURT: Which is more involved than copying.

5 MR. WERBICKY: Correct, Your Honor. That was the first
6 time we'd heard of it. Imaging wasn't discussed at the -- at the hearing
7 on the 13th, and even if it had been, the procedures and complications
8 associated with it weren't really discovered until this telephone
9 conference call. I believe it was -- I'm sorry, I can't think of the exact
10 date. It was, like, the 21st.

11 MR. POPE: 21st.

12 MR. WERBICKY: The 21st. So on the 21st we had this
13 telephone conference call. And in the morning call, it was determined
14 that the State didn't have the capability of -- at least the Department of
15 Taxation did not have the capability of imaging the phones.

16 So we decided to reconvene at 3:00 p.m., where we would try
17 and find out what the State's capabilities were, if we were going to have
18 to get a third-party vendor, because of the confidentiality rules of the
19 Department, to image these various, you know, devices.

20 So on the 21st in the afternoon, by the afternoon, we'd
21 discovered that the criminal division actually could image the phones
22 through an agreement with the Washoe County Sheriff's Office. But
23 since it's the cyber crime lab, you know, strict evidence rules applied.
24 So an outside consultant could not partake -- could not step into the lab,
25 I think, for obvious reasons.

1 So we had to work out a -- an accommodation regarding that
2 process, which took Christmas Eve and the day after Christmas to finally
3 determine that.

4 So by the 31st -- well, I guess I should also indicate that the
5 Department attempted to contact the -- the -- what are called the
6 Manpower employees to see if they would let their -- allow their cell
7 phones to be imaged.

8 Mr. Pope and I contacted I think four of the six employees on
9 the 21st, and the other two employees were contacted, I believe, the
10 following week. Well, one for certain, and then the other one was out of
11 town. I'm sorry, might have been contacted by the Department directly.

12 So the four of the six that we contacted initially indicated that
13 they would be willing to have their cell phones imaged, and we put -- we
14 let them know that Talova Davis, the cyber investigator that -- for the
15 attorney general's office, would be contacting them to set up a time. So
16 as of the 26th, we thought we had a procedure in place and at least four
17 of the six phones were going to be imaged.

18 Apparently, starting on the 27th, the Manpower employees
19 started calling Ms. Davis and indicating that they did not want their cell
20 phones to be imaged for privacy reasons. And as a result, it looked like
21 we were not going to be able to get the phones imaged. And then
22 Ms. Davis decided to focus on the Department laptops, which were --
23 had been segregated out and being -- were being held by the
24 Department. So she arranged for those to be delivered to her by the
25 Department or picked up at the Department, I'm not sure which, which

1 would occur on the 31st. But, obviously, it was going to take more than
2 a few hours to image all the various laptops.

3 So that's when we filed the Motion for Reconsideration. And it
4 dealt with a couple of particular issues. Number one, the fact that when
5 Ms. -- Judge Bailus made his ruling, he was not aware of the -- the
6 imaging or the complications associated with the imaging, particularly,
7 the fact that we were going to have to go to a cyber crime lab in order to
8 image the items requested by the plaintiffs.

9 So unknown -- it was unknown how long the -- it would take
10 for that to happen, so we filed the Motion for Reconsideration to alter the
11 dates. Now --

12 THE COURT: Suppose you want more time than 10 days,
13 obviously.

14 MR. WERBICKY: We wanted more time than 10 days, plus
15 the stipulation that had been entered into right around the same time.
16 So everything, basically, was imaged by the 8th, just -- but just barely,
17 because, you know, Ms. Davis was -- was taxed. She also is a, you
18 know, a cyber criminal investigator. So she had, I believe, some -- a
19 federal search warrant she had to deal with, she had a couple of
20 homicides she had to deal with in the interim. So those took precedent
21 over this civil matter.

22 And as a consequence, the first time they were able to
23 coordinate the imaging of three particular cell phones, and that's the
24 personal cell phone of Mr. Steve Gilbert and the Northern Nevada
25 employee that's identified in the order, and Mr. Gilbert's business phone,

1 those were all imaged on the 24th. And now those images are available,
2 along with the laptop images.

3 And because of the change of department and everything, and
4 since this isn't even in the discovery process yet, technically we want to
5 just know what we're supposed to do with the copies that we do have.
6 They're in a Department safe right now. One's in a Department safe
7 down here. The cell phones images are still up in Northern Nevada in
8 the possession of the AG's office, the criminal division. So we just need
9 to know what we should do with the Court's copy of the phones.

10 So that's the -- the primary focus of the Motion for
11 Reconsideration, was really to request more time.

12 Now, I don't know if you want to go over the control issue --

13 THE COURT: Well, I --

14 MR. WERBICKY: -- in this aspect or in the Motion to -- for
15 Contempt.

16 THE COURT: It's all kind of running together for me.

17 But I want to hear from Mr. Kemp and Mr. Rulis here. I know
18 what you're -- I understand what you're trying to accomplish in getting in
19 front of the discovery issues.

20 So Mr. Kemp --

21 MR. KEMP: Your Honor, I think the Motion --

22 THE COURT: -- you've heard the AG outline or counsel for --
23 you're an AG, correct, Mr. Werbicky?

24 MR. WERBICKY: I am, Your Honor.

25 THE COURT: That's what I thought.

1 MR. KEMP: Your Honor, I think the Motion for
2 Reconsideration is moot, because, as counsel said, they wanted more
3 time and they wanted 10 days after December 31st. It's now February
4 whatever. And so they've -- they've had plenty of time.

5 The real issue, I think, is -- is these six Manpower phones.

6 THE COURT: Okay. So they've got -- let's take the
7 low-hanging fruit, if it is.

8 MR. KEMP: Okay.

9 THE COURT: So they've -- they've secured copies of
10 computers?

11 MR. WERBICKY: Yes, Your Honor.

12 THE COURT: And they're in a vault someplace safe where
13 you guys can fight about what's on them. Right?

14 MR. KEMP: Right.

15 THE COURT: As -- as the case moves forward. They've got
16 a couple of the phones -- or one of the phones secured.

17 MR. KEMP: Three --

18 MR. WERBICKY: Three of the phones.

19 MR. KEMP: -- three phones, but none of the Manpower
20 employee phones.

21 THE COURT: Okay. So that -- all right. So that's secured.
22 Again, same thing, you can fight about that as you move forward in the
23 action, Mr. Kemp.

24 So let's talk about the Manpower and the extent that I --

25 MR. KEMP: Okay.

1 THE COURT: I'm concerned I have authority. And I'm sure
2 Mr. -- or Judge Bailus was too.

3 MR. KEMP: Well, Your Honor, when -- when this started,
4 when we first requested the preservation order, we had been informed
5 that the grading was done by some out-of-state consultant, like, you
6 know, a big accounting firm or someone like that.

7 THE COURT: Okay.

8 MR. KEMP: It wasn't till we actually got to the hearing that
9 counsel informed us that the State had hired Manpower to do this, which
10 was rather shocking to us, and it's been shocking to pretty much
11 everyone who's looked at it. You know, we quoted Commissioner
12 Kelesis's comments, he was shocked. I mean, the State charged these
13 people two and a half million dollars for application fees and then they
14 went and hired Manpower to -- to rate these applications.

15 And the amount of money involved is staggering, Your Honor.
16 The -- the estimate -- we attached a copy of the complaint in the Verano
17 case. The Verano people were winning bidders. They won 11 licenses.
18 So they estimate that each one of those is worth \$30 million. I think
19 that's probably a little on the high side, to be candid with the Court. But
20 let's just say they're worth 10.

21 So what we're talking about here is over 60 licenses, 10
22 million apiece, that were rated by this -- this process, that the
23 governor's -- the governor's own proclamation calls it opaque. Okay.
24 That's the governor of our state is calling it opaque.

25 But in any event, so what has happened here, Your Honor, is

1 a number of people who were previous licensees, including our clients,
2 MM Development and Livfree, we were ranked fourth and fifth by the
3 State last time.

4 THE COURT: All right. Okay.

5 MR. KEMP: Okay. Now we're not even in the top 30. The
6 only new factor added to the rating criteria was diversity. And if -- if
7 anything, we should have gone -- MM Development should have gone
8 up, because one quarter of the business is owned by American Indians.
9 So if diversity is really a factor, we -- we should have went up.

10 Instead, we saw a situation where three Canadian-controlled
11 companies won substantially all of the licenses, especially in Clark
12 County. I've already mentioned Verano. They're financed -- they're a
13 Chicago company, but they get their money out of Canada. They
14 won 11. Another group won eight. Another group won seven. These
15 are all big Canadian companies.

16 And to say the industry was shocked I think would be
17 understating it. Because everyone thought, you know, if we win one
18 license, it's great. If we win two, it's -- you know, that's wonderful.

19 THE COURT: That's \$10 million. That's \$10 million.

20 MR. KEMP: Yeah. Yeah, they were dreaming about
21 winning -- yeah, these are lottery tickets, Your Honor.

22 THE COURT: Okay.

23 MR. KEMP: And so this one company wins 11 out of 11,
24 Verano. And, you know, that -- the Department comes in and says,
25 Well, you have no proof that anything inappropriate happened. Well, we

1 do, Your Honor. Verano has already -- the partners in Verano have
2 already sued themselves and the -- the partner that runs the dispensary
3 here is run by Robert Frey. I don't know if Your Honor's familiar with that
4 name, he's a long-time businessman here in Nevada.

5 THE COURT: No.

6 MR. KEMP: Has a number of cigar stores.

7 Anyway, according to his lawsuit, he arranged with the Illinois
8 people who were in the process of merging with him, that they would file
9 applications, the 11 applications, on behalf of both of them. And so they
10 used Mr. Frey's dispensary, they used his taxation, they used his
11 trademarks. And lo and behold, they won 11 out of 11.

12 Mr. Frey contact him and said, Boy, we did great.

13 And they said, Well, what's this we stuff? These are all our
14 licenses.

15 So he's filed a lawsuit. This is the winning bidder -- the
16 winning bidder that's won the most licenses has filed a lawsuit saying
17 that there was fraud, that there was misappropriation of his trademarks,
18 that the process was not appropriate. The winning bidder has said this,
19 Your Honor. We also say this for the reasons I've indicated, we were
20 ranked four and five.

21 But anyway, this all shines a bright spotlight on how these
22 applications were graded and evaluated.

23 THE COURT: Okay.

24 MR. KEMP: So when we came here with Judge Bailus, I
25 disagree with counsel that we weren't talking about imaging at that time.

1 The phrase we were using was downloading, and we had a copy of a
2 court order that we had with Judge Escobar from a previous case, where
3 the same downloading process that we proposed in this case was used.
4 I don't think counsel was familiar with it.

5 But be that as it may, I can't remember if it's Lieutenant Davis
6 or Captain Davis, but the -- the computer person for the State --

7 THE COURT: Okay.

8 MR. KEMP: -- did do the process right. They did download
9 the phone. And the reason that's important is, is because if you
10 download it, you can -- you can find out if someone tried to delete stuff
11 and you can capture more data.

12 THE COURT: Okay.

13 MR. KEMP: So download is the preferred method, which she
14 is using. Okay.

15 So the problem is that out of the nine phones that it was
16 anticipated be downloaded, the six Manpower employees are now
17 resistant, allegedly. And I say that, because we have no affidavit from
18 any Manpower employee. We have no affidavit from -- from anybody
19 that's speaking on a personal basis. We have a representation from
20 Davis about a conversation she had with these Manpower employees,
21 which I find suspicious. Because when they first approached the
22 Manpower employees, all six of them have said that they could get in
23 contact -- I think they got in contact with four or five of them -- all of them
24 said, Fine, we'll bring the phones in, when do you want them? Okay.

25 All of a sudden, a couple of days later, quote, after speaking

1 with a few people, so the Manpower employees were speaking with
2 other people, we don't know who, all of a sudden all six of them flip-flop
3 and say, Oh, we're not going to produce our phones. You know, I find
4 that very strange, Your Honor.

5 I think what may have occurred here, and I won't accuse
6 anyone, which is going to get me to my remedy, but I think what may
7 have occurred here is either they weren't adequately informed that there
8 was actually a court order that they produce this, or they didn't
9 understand that the process to be employed was that we would
10 segregate their personal data and that that would never be produced to
11 anybody to look at. I don't know if they were informed that.

12 But in any event, the situation we have is the people that did
13 the actual grading are now refusing to produce their phones, according
14 to the State. Okay. So this is the key evidence in the case, because
15 how did they grade these applications? What criteria did they use?
16 Who did they communicate with? You know. And -- and her -- her
17 affidavit --

18 THE COURT: Well, you'll still be able to ask those questions
19 of those individuals as a component of the action, Mr. Kemp, correct?

20 MR. KEMP: I'm -- I may be able to ask them, Your Honor,
21 but -- but -- because the State takes the position that this is all
22 confidential, and that's going to have to be --

23 THE COURT: Oh, well, I don't know about that. But
24 whatever.

25 MR. KEMP: -- gone into at a later date.

1 THE COURT: Yeah.
2 MR. KEMP: All I'm here on now is preserve. Okay?
3 THE COURT: Right.
4 MR. KEMP: Not produce.
5 THE COURT: So tell --
6 MR. KEMP: Preserve.
7 THE COURT: Take me to your remedy. And I understand
8 why you want to -- why you want to protect it. You've made --
9 MR. KEMP: Right.
10 THE COURT: -- an interesting argument. So tell me how I
11 can help.
12 MR. KEMP: Well, the -- the real problem, and we've seen this
13 in other cell phone cases, Your Honor, is cell phones have an auto
14 delete function. And usually what happens is you cannot recover
15 anything that happened over six months ago. So today is February. So
16 six months in the past would be August. So if we got the cell phones
17 now, even the beginning of next month, there's not a big concern.
18 THE COURT: Wouldn't you -- wouldn't you lodge that order,
19 arguably, with the cell phone service provider?
20 MR. KEMP: Well, that's an addressing thing. We've -- we've
21 done this a couple of times, Your Honor. Google basically keeps
22 everything forever. It's just a matter of getting the appropriate court
23 order to get it.
24 THE COURT: Okay.
25 MR. KEMP: I don't know that these are Google devices. I

1 don't know what kind they are.

2 Apple is basically impossible to get anything out of their cell
3 phones, unless you go hire Israeli intelligence for \$5 million. Okay.

4 THE COURT: And even that doesn't work supposedly.

5 MR. KEMP: And even that doesn't work.

6 THE COURT: Based upon the narrative, anyway.

7 MR. KEMP: Right. So -- so Apple, of course, is one of the
8 predominant cell phones. So I don't know that this can be fixed later.
9 The easy way to fix it is to download it. And I submit that we all have the
10 same interests, me, the State, the Court, it should be to preserve this
11 evidence.

12 THE COURT: Right.

13 MR. KEMP: Because, I mean, \$10 million a license, 70
14 licenses, there's already seven lawsuits filed? You know, I was involved
15 in the first phase of the marijuana litigation when the license were --
16 were originally issued, and that was contentious too. There was, you
17 know, I don't know if the Court --

18 THE COURT: Hey, when there's money involved, Mr. Kemp,
19 it seems like --

20 MR. KEMP: We-- we went to hearings that were literally 200
21 attorneys at the hearing, Your Honor. It was --

22 THE COURT: Blood in the water, Mr. Kemp.

23 MR. KEMP: Yeah, it was -- yeah, it attracted a lot of people.
24 And, you know, we're starting to attract people, I -- we're probably going
25 to hit 200 in this case too.

1 But in any event --

2 THE COURT: Just tell me how I can help you.

3 MR. KEMP: Okay. Holding them in contempt really doesn't
4 do me any good. I have an order, I can put it on the wall of the office.
5 What I suggested to them is that why don't we just take the depositions
6 of these Manpower employees, I'll serve a subpoena on them for them
7 to bring in the cell phone, we'll do it that way. Okay.

8 Their response is, Well, number one, we think that we can
9 keep the confidentiality of these names confidential. I don't -- I don't
10 think that's what the statute says, Your Honor. But I don't want to fight
11 about that now.

12 THE COURT: Okay.

13 MR. KEMP: So what I'm willing to do is take their depositions
14 and have the State produce them, and when I take the deposition, I will
15 just say, Are you Manpower Employee Number One? I won't, you know,
16 we'll figure out a way to give them the oath.

17 THE COURT: Uh-huh.

18 MR. KEMP: I think if you allow us to take the six depositions
19 with the subpoena now -- and I want to do it now, I don't want to wait five
20 months for the reasons I've indicated, because the automatic delete of
21 the cell phone -- I think one of two things are going to happen.

22 One, I think out of these six employees, probably at least four
23 of them are just going to say, Go copy the phone, I don't want to do a
24 deposition.

25 THE COURT: Or -- or image it.

1 MR. KEMP: Or image it. Okay. I'm using the terms
2 interchangeably.

3 THE COURT: Yeah.

4 MR. KEMP: But Davis is doing it the right way, Your Honor,
5 because she -- she -- we were going to have our person up there to
6 watch her, but they worked out a procedure where she would videotape
7 it, and she sent the videotapes to our computer consultant. And she is
8 imaging them the correct way.

9 THE COURT: Okay.

10 MR. KEMP: There's no question about that. The only issue is
11 getting the phones into her hands so she can do it with the other six
12 phones.

13 So what I -- what we proposed as an alternative remedy, and
14 this is what I proposed to the State earlier, is that we be allowed to take
15 the six depositions now, along with the subpoena to produce the
16 phones, and we see where that goes.

17 So one of two things are going to happen. Either they're going
18 to say, Here's the phone, solves the issue as to that employee. Or we're
19 going to take the deposition.

20 If we take the deposition, I would propose it not get into the
21 grading, I don't want to get into the grading now for a lot of reasons,
22 because, number one, I don't have the underlying data, but number two,
23 I don't think that would be appropriate.

24 The only subject to be discussed would be do you understand
25 that there's a court order? Do you understand why this phone's

1 important? Do you understand that we're going to segregate your
2 personal data from any business-related data? And then see if they'll
3 produce the phone, Your Honor.

4 And then the other aspect of it would be, you know, who have
5 these people been talking to that all of the sudden they flip-flop from, Oh,
6 here's the phone, to, We refuse to produce the phone. You know, there
7 may be an issue there, Your Honor, but I think that should be explored
8 as well.

9 So -- so I guess what we're doing is we're modifying our
10 request for contempt slightly to -- to just ask that the Court allow us to
11 take the six depositions at the present time.

12 THE COURT: Mr. Werbicky, seems like kind of, well, unique
13 case, but aren't they all? What's your response to this most recent
14 development that Mr. -- or idea that Mr. Kemp has?

15 MR. WERBICKY: As he indicated, it's the most recent
16 development. I guess, primarily, I guess -- I'm sorry, I have to ask the
17 Court a question.

18 THE COURT: Sure.

19 MR. WERBICKY: Is a Rule 45 subpoena typically appropriate
20 prior to a Rule 16 conference?

21 THE COURT: I don't know. I haven't looked at the rule. This
22 just came up.

23 MR. WERBICKY: Yeah. I know.

24 THE COURT: Somebody tell me if it is or isn't.

25 MR. KEMP: Yeah, Your Honor --

1 THE COURT: I only do what the law lets me do.
2 MR. WERBICKY: All right.
3 MR. POPE: Your --
4 THE COURT: I'll tell you that.
5 MR. POPE: Your Honor, can I chime in real quick, please?
6 THE COURT: All right. Go.
7 MR. POPE: Okay. So I reviewed the transcript and Judge
8 Bailus in a couple of places -- you know, I'm looking at page 60 and 61
9 of the transcript -- said that the State had to provide the order to the
10 Manpower employees, which we did. We read the order to them. So,
11 you know, the order requires that we get the phones so that they can be
12 copied. And so we did that. And the -- the assertion --
13 THE COURT: I'm -- he's -- he's withdrawn the request.
14 MR. POPE: -- or allegation that that wasn't done --
15 THE COURT: No, I don't think so.
16 MR. POPE: -- it was inappropriate.
17 THE COURT: I don't know.
18 MR. POPE: So we complied with the order. We -- I mean,
19 Judge Bailus said that we had to have a good faith effort and we had to
20 provide the order to the employees and that if -- if something happened,
21 if -- if they refused, we had to file an affidavit to say what happened and
22 why.
23 THE COURT: And you did.
24 MR. POPE: And then Plaintiffs would -- Judge Bailus's
25 roadmap was they would seek subpoenas to get the phones to have

1 them imaged. Copied. And, you know, so if they do that and they get
2 the phones, that's where Judge Bailus was going. To open it up to
3 depositions, it seems premature. It's not what they want. They want
4 what's on the phones. So it would seem that --

5 THE COURT: Well, what other mechanism can we -- can be
6 employed here to secure or protect that -- that information? I mean --

7 MR. POPE: Well, I guess my point is, you know, our --

8 THE COURT: You're not going to be held -- nobody's going to
9 get held in contempt. Mr. Kemp has withdrawn the request for a
10 contempt order.

11 MR. POPE: Yeah.

12 THE COURT: Now I'm just trying to functionally help
13 everybody protect the information so --

14 MR. POPE: So as much as I appreciate that, I think we've
15 complied with the order.

16 THE COURT: All right. Okay.

17 MR. POPE: And to address the -- the comment about
18 copying, we actually, in the back room, had a discussion about the
19 copying. And part of the reason why the Department thought it could --
20 could get it done within 10 days, perhaps, was because it was just
21 copying. It wasn't forensic imaging.

22 THE COURT: Right.

23 MR. POPE: So if you read the transcript, we've complied with
24 what Judge Bailus said we needed to do. And then they were supposed
25 to get a subpoena to try to get the phones. Whatever they do after

1 we've complied with the order is kind of up to them. So I don't see why
2 depositions are being thrown on the table. It seems premature to me.

3 THE COURT: All right. Mr. Werbicky?

4 MR. WERBICKY: Indeed, I -- this was first brought up in a
5 reply brief on the -- wasn't the motion contempt? Yeah, reply brief on
6 their Motion for Contempt. It's really a separate request for an order. So
7 it should have been -- it should have been briefed a little bit more fully in
8 order to get there.

9 Nevertheless, what I'm really trying to do is make sure that -- I
10 have no problem with them following standard discovery rules. If the
11 discovery rules allow for a subpoena to be issued prior to the -- the 16.1
12 conference, they -- they know Manpower. They could probably get the
13 information -- the initial information from Manpower and then follow --
14 follow up with that with -- with subpoenas on the -- on the individuals
15 themselves.

16 So as long as the Rule 45 subpoena is appropriate prior to a
17 Rule 16 --

18 THE COURT: You don't stand in opposition to the request,
19 the oral request?

20 MR. WERBICKY: No.

21 THE COURT: So I'm going to -- all right.

22 MR. POPE: Your Honor, I'm sorry, could I just add one more
23 thing?

24 THE COURT: Sure.

25 MR. POPE: Since we're arguing both motions together,

1 correct?

2 THE COURT: Yeah, we are.

3 MR. POPE: So there was -- we've talked about the copying,
4 imaging confusion. There was also, I think, some confusion between
5 employee and independent contractor as far as what the contract said.
6 Judge Bailus seemed to be convinced that these were employees of the
7 State.

8 THE COURT: Oh.

9 MR. POPE: And if -- you know, I just note for the record,
10 page 5 of the contract, that's a little paragraph 4, and a big block in the
11 middle, it says that none of the employees, none of the temporary
12 employees would be employees of the State.

13 THE COURT: They're independent contractors.

14 MR. POPE: Correct.

15 THE COURT: Employees of Manpower.

16 MR. POPE: Correct.

17 THE COURT: Right.

18 MR. POPE: And that -- I mean, the contract also goes on,
19 Your Honor, on page 12 and it, you know, it says that the contract, it's
20 paragraph 4.2.13, says that the contractor has some responsibility to
21 take care of custody of the State personal tangible property and real
22 property. State-owned tangible property and real property. Nowhere
23 does this contract address intangible property or property of the
24 Manpower independent contractor employee-owned property.

25 So there was some confusion in that order with regard to what

1 the State's responsibilities were.

2 THE COURT: All right. Sorry, Mr. Pope, Mr. Werbicky.

3 MR. POPE: Thank you.

4 THE COURT: What does Rule 45 say? NRCP.

5 MR. KEMP: Judge, we cited the cases in Footnote 3 of our
6 opposition to the -- excuse me, of our reply. And these were the same
7 cases that were discussed at the hearing. And, basically, the case law
8 is that you can issue pre-16.1 deposition notices and subpoenas for
9 good cause. In this case, we would submit the good cause would be
10 that the evidence is going to disappear.

11 MR. WERBICKY: Of course, that's -- that's not the end of the
12 analysis.

13 THE COURT: Where are you at? What's the -- what's the
14 additional analysis for right now? Because I can make a finding for good
15 cause based upon the pending litigation and the record that's been built
16 so far.

17 MR. WERBICKY: Well, most of the cases that deal with --
18 with allowing for pre-16.1 discovery deal with trademark infringement or
19 an ongoing violation of some -- of some right. These -- these licenses
20 have already been issued. So they essentially need to have that
21 unwound in order for anything to change. So that can be established
22 through the normal discovery process.

23 Also, the Sedona Principles that we cited to specifically
24 indicate preservation orders and these type of pretrial discovery orders
25 with electronic information are only rarely granted under unique

1 circumstances where there's a showing that there's going -- that the
2 information is potentially relevant and is likely to be destroyed.

3 There's no indication that this auto delete function is on these
4 particular devices. There's no indication that any of the information on
5 there is potentially relevant. Even the Manpower employee -- the
6 Manpower contract talks about, you know, items relevant to the work
7 product. There's -- I don't even know, really, what their allegations in
8 this lawsuit are yet. And that's the reason for the -- for -- partially, for the
9 Motion to Dismiss.

10 THE COURT: But if I -- if I enter a limited order consistent
11 with what Mr. Kemp is talking about in terms of just protecting, you
12 know, an opportunity to engage under oath with the witness for the
13 limited purposes of securing the information and potentially the
14 discoverable information that might be destroyed as a function of routine
15 delete.

16 MR. WERBICKY: Yeah, it's -- again, it's a function of
17 changing the rules simply because it's them, I guess. I mean --

18 THE COURT: Well, no, I'm not changing anything. I'm
19 trying -- the reality is the allegation has been -- allegations involving --
20 my concern is that there's information digitally -- currently digitally
21 available that might be not available after a set period of time, six
22 months, whatever it is. I just want everybody to be able to secure --

23 MR. WERBICKY: Sure.

24 THE COURT: -- the necessary information.

25 MR. WERBICKY: So --

1 THE COURT: I'm not turning -- I'm not ordering that it
2 necessarily be turned over.

3 MR. WERBICKY: Sure. And, you know, it's -- that's --

4 THE COURT: Right now you have it in the vault. You didn't
5 hear me say, Give up the -- give up the copies of the --

6 MR. WERBICKY: No.

7 THE COURT: -- computers, give up the copies of the phone
8 you do have.

9 MR. WERBICKY: Right. No, we're talking about -- now about
10 information that's on -- on personal property.

11 THE COURT: Personal, yeah.

12 MR. WERBICKY: All right. So, you know, again, the -- if -- if
13 they follow standard discovery, I'm -- I'm not really having a problem. If
14 they're asking for an extraordinary departure from the rules, then they
15 should provide an extraordinary reason for that. The preservation orders
16 have been sent out. If they are --

17 THE COURT: Have they gone to the -- you don't even know
18 who their Internet -- you don't even know who the service providers are
19 for the phones.

20 MR. KEMP: Judge, we --

21 MR. WERBICKY: No, that's -- that's true. We weren't -- we
22 weren't asked to give that --

23 THE COURT: Right.

24 MR. WERBICKY: -- that out. We gave the information, the --
25 I'm sorry, the litigation hold orders both by the plaintiffs and by the -- the

1 attorney general's office to the Manpower employees. So they know
2 they are under requirement to preserve the information on their phones.
3 If they don't, then he'd be entitled to some kind of --

4 THE COURT: Okay.

5 MR. WERBICKY: -- instruction associated with it.

6 THE COURT: Well, it would be a *Bass Davis* instruction,
7 arguably, or theoretically at the time appropriate in the action.

8 MR. WERBICKY: So --

9 MR. KEMP: Judge, who wants to go there? I mean, what --
10 what we're trying to avoid is a big spoliation issue. You know, I've
11 already told counsel that, you know, if any of these six phones gets lost
12 or destroyed or the data gets deleted, that we're reserving our right to
13 file a spoliation motion.

14 THE COURT: Well, of course.

15 MR. KEMP: Because the -- the Manpower contract, which, by
16 the way, they didn't bring up at the hearing, we -- we brought it up at the
17 hearing, the Manpower contract, Section B, says that:

18 The contractor, Manpower, agrees that all the relevant books,
19 records, written, electronic, computer-related or otherwise, shall be
20 subject to reasonable inspection, examination, review, audit, and
21 copying by the State.

22 This is in their contract. And it says:

23 "All subcontracts shall reflect the requirements of this section."

24 So these are Manpower employees that they have in a State
25 office. They work in a State office -- they're not working in a Manpower

1 office -- that are under their direction and control, and under this section
2 B, they have the right to copy these things. And then, you know, now it's
3 time to copy them and they say, Oh, these are Manpower employees.
4 You know, some of them, at least as of the end of December, were still
5 working for them. In fact, I think all of them were still working for the
6 State.

7 So these people, they show up at the State tax offices in
8 Carson City every day with their phones and they --

9 MR. WERBICKY: Private phones.

10 MR. KEMP: -- can't tell them to walk over to T Davis's copy
11 center and get them copied? I mean, I think it's very disingenuous to try
12 to argue, Oh, Judge, you know, these people aren't under our control.
13 Because they are.

14 These are the employees that they charged us two and a half
15 million dollars and then they hired to do the copying project. And I think
16 it's very simple here, you know, we -- the case law allows it, we'll serve
17 a -- a subpoena on them to -- to allow the phone for copying. If they
18 don't want to comply with the subpoena, we will take the deposition,
19 which is specifically allowed in Rule 27. 27 allows for depositions
20 before -- before the action -- before the action's even filed, we can take
21 depositions under 27, Your Honor. And I've done that before, usually in
22 cases where someone's going to die, to be honest. But it's always the
23 case where evidence is going to disappear.

24 And there can be no doubt that evidence is going to disappear
25 in this case, because of the auto delete function, which we've already

1 talked about. And so I don't understand why the State doesn't want to
2 just eliminate any spoliation argument, because, you know, I'm not the
3 only lawyer that's going to make it on behalf of a disappointed applicant.

4 And so I think a reasonable thing to do would be just to allow
5 us to subpoena the six Manpower people, however the State wants to
6 do it, we'll serve the subpoenas through them. They are their
7 employees still.

8 THE COURT: Well, they're independent contractors of the
9 State.

10 MR. KEMP: Well, they -- they're --

11 MR. WERBICKY: They're independent contractors --

12 MR. KEMP: -- independent contractors that come to the State
13 office every day.

14 MR. WERBICKY: And the RFP, specifically -- the request for
15 proposal, specifically, which is incorporated in the contract says,
16 specifically, that they are not State employees.

17 THE COURT: Okay. The -- I found that language, if I
18 understood it correctly, that Mr. Kemp was reading from regarding the
19 contract, employment contract, talked about acknowledging the potential
20 for downloading that information that we're --

21 Is that correct, Mr. Werbicky?

22 MR. WERBICKY: It's -- it's not correct, Your Honor. Because,
23 number one, there's a two-step process associated with that under --
24 under --

25 MR. KEMP: Your Honor, this is on page --

1 MR. WERBICKY: -- federal case law.

2 MR. KEMP: -- page 8 of our reply, if you want to look at the
3 actual language.

4 MR. WERBICKY: That's nice, Mr. --

5 The -- first there's no question that the State does not have
6 possession of the phones. All right. There's also no indication that
7 Manpower itself has possession of the phones. It's the individuals
8 themselves that have possession of their personal property that they've
9 paid for and no one pays them for the -- for the use of their phones.

10 So in order for us to have, under the -- the case law --

11 THE COURT: Were they -- forgive me for not knowing this --

12 MR. WERBICKY: Sure.

13 THE COURT: -- but -- and maybe it's in the brief, are they
14 provided a phone as a component of their -- their independent contract
15 with the State?

16 MR. WERBICKY: No, Your Honor, they're not. My --

17 THE COURT: And I -- and I don't really -- and I don't want to
18 get down to the weeds in terms of what their responsibilities are. That's
19 not my role here. Right now I'm looking at a Motion for Reconsideration,
20 that the State is asking for relief from Judge Bailus's previously entered
21 order in terms of a timeline for compliance with the order and a dueling
22 Motion for Contempt, because you have not, by -- by your own
23 admission, complied -- didn't comply within 10 days. Although I -- I
24 don't -- there's no pending motion now. He's withdrawn the Motion for
25 Contempt.

1 You've got a Motion for Protective Order --

2 MR. WERBICKY: Yes, Your Honor.

3 THE COURT: -- on -- I don't want to go outside the four
4 corners of my effort here. But it does -- and I also guess I'm taking this
5 as an oral motion to -- upon withdrawing the Order of Contempt
6 against -- or Request for Contempt against the State, there's a -- a oral
7 Motion to Permit Subpoena and Deposition, limited deposition, for --
8 under Rule 27 and 45 of these individuals who are in possession of
9 personal property that may or may not contain relevant information to
10 the future of the action.

11 MR. WERBICKY: Right.

12 THE COURT: Is that what we're doing?

13 MR. KEMP: I think --

14 THE COURT: Right?

15 MR. KEMP: I think it's actually a written motion, because we
16 put it in the reply, Your Honor.

17 THE COURT: Oh.

18 MR. KEMP: But this is exactly what Judge Bailus said we
19 should do at the hearing. He was the one that suggested that we
20 subpoena the -- if -- if the first effort to get the phones failed.

21 THE COURT: Okay.

22 MR. KEMP: He said to do this. So this is nothing new or
23 different.

24 THE COURT: Okay.

25 MR. KEMP: This is --

1 MR. WERBICKY: So doing this, a 45 -- NRCP 45 subpoena,
2 provided it's allowed at this point, I've got no problem with that.

3 THE COURT: Good. So I'm going to -- I'm going to be -- I
4 want the minutes to reflect I want continuity with Judge Bailus's
5 previously entered order. I'm going to grant the Motion for
6 Reconsideration, the State is relieved of the obligation of complying
7 within the -- with the 10-day requirement previously ordered.

8 I'm going to deny the Motion for Contempt, one, because
9 there's no grounds for it, and two, it was withdrawn.

10 Also consistent with Judge Bailus's previous order, I'm going
11 to allow limited deposition of the individuals identified as the Manpower
12 employees for purposes of determining who their service provider might
13 be and making sure they are aware of the previous order to permit the
14 imaging of their phone.

15 But again, it's not automatically -- if they agree, it's not
16 automatically turned over; it's just protected, so that you can -- you can
17 all fight about it later.

18 MR. WERBICKY: Right.

19 THE COURT: Correct?

20 MR. KEMP: Your Honor, can we also ask --

21 MR. WERBICKY: Yes.

22 MR. KEMP: -- for the type of phone during the deposition?

23 Because the type of phone --

24 THE COURT: That makes -- it's relevant.

25 MR. KEMP: Right. Right.

1 THE COURT: Because I guess the technology will probably
2 be --

3 MR. WERBICKY: Yeah.

4 THE COURT: -- proprietary.

5 MR. WERBICKY: Okay. So --

6 THE COURT: But those are the -- those are the areas of
7 limited inquiry.

8 MR. WERBICKY: Type of phone.

9 THE COURT: Type of phone.

10 MR. WERBICKY: Sorry, what else?

11 MR. KEMP: Service provider.

12 THE COURT: Do they -- do they understand that they're --

13 MR. WERBICKY: Service provider.

14 THE COURT: -- they'll be a -- there's a limitation of the order
15 that what's relevant in the action would only be turned over as opposed
16 to a -- their personal --

17 MR. WERBICKY: Yeah, they -- I don't have a problem with
18 that. We told them that.

19 MR. KEMP: Yeah.

20 MR. WERBICKY: The ones that we were able to talk to, we
21 told them that.

22 THE COURT: Okay. That's two. And there was three.

23 MR. KEMP: And, Your Honor, who counseled them -- the last
24 thing we want to talk about is who counseled them not to produce the
25 phone? Because they were all going to produce the phone, and then

1 according to Davis, they went and spoke to somebody that's been
2 unidentified, I have no idea who that is.

3 THE COURT: Well, as long as it's not violation of another
4 order, like an attorney-client privilege or --

5 MR. KEMP: As long as it's not an attorney-client privilege.

6 THE COURT: Well, I don't know. There are --

7 MR. WERBICKY: Now we're getting -- we're getting into
8 standardized discovery at this point.

9 THE COURT: We kind of are.

10 MR. WERBICKY: Yeah.

11 THE COURT: I agree with you, Mr. Werbicky.

12 Just the two areas of inquiry. Let's protect the data --

13 MR. KEMP: Okay.

14 THE COURT: -- and identify enough information so plaintiff
15 can have the tools they need to do the work. All right?

16 MR. WERBICKY: Okay.

17 MR. KEMP: I think it was three areas, Your Honor.

18 THE COURT: Three areas.

19 MR. KEMP: The preservation order that they were informed
20 of it.

21 MR. WERBICKY: Uh-huh.

22 MR. KEMP: And that they understand it. The service
23 provider, and the type of phone.

24 THE COURT: Correct.

25 MR. WERBICKY: Okay.

1 MR. KEMP: And this would only be if they still refuse to
2 produce the phone.

3 THE COURT: Right. And again, the same protocol in play as
4 the previous order. If they agree to the imaging of the phone, that's just
5 secured, it's not disclosed.

6 MR. WERBICKY: Kind of a procedural thing here, based on
7 what we're talking about, so we just do a -- a Notice of Deposition?
8 Because, I mean, we can't really --

9 THE COURT: He's going to have to --

10 MR. WERBICKY: -- I don't think we can compel it.

11 THE COURT: He's going to have to subpoena them pursuant
12 to Rule 45, and he's permitted under Rule 27 as I read it here now.

13 MR. WERBICKY: To do a pretrial -- pre -- yeah.

14 THE COURT: Yeah, to take a deposition before the action.
15 And I'm limiting it. It's not a full -- it's not a full deposition on all facts that
16 might be relevant to the action, but limited for the sole purposes of
17 protecting any electronically stored ESI.

18 MR. WERBICKY: Right.

19 MR. KEMP: Your Honor, what I anticipate doing is just Notice
20 of Deposition is just the name of Manpower Number 1, Number 2 and
21 Number 3, because of their confidentiality concerns.

22 THE COURT: Okay.

23 MR. KEMP: And then working with counsel, of course, to --

24 THE COURT: That -- that seems to be --

25 MR. KEMP: -- try and resolve -- yeah.

1 THE COURT: -- a fair course. All right?

2 Mr. Werbicky, I know you're -- you don't know what you don't
3 know.

4 MR. WERBICKY: Right.

5 THE COURT: But, frankly, you're going to be back on your
6 protective order on the 19th.

7 MR. WERBICKY: When we'll be able to report then.

8 THE COURT: You got ambushed a little bit this morning. So
9 we'll see where the 19th takes us. All right?

10 MR. WERBICKY: Wonderful, Your Honor.

11 THE COURT: Mr. Kemp, you're going to prepare the order.

12 MR. KEMP: And I'm going to run it by Mr. Werbicky.

13 THE COURT: Perfect. Thank you, gentlemen.

14 MR. WERBICKY: Thank you, Your Honor.

15 THE COURT: Anything else we can do today?

16 MR. WERBICKY: Thank you very much, Your Honor.

17 MR. POPE: Thank you, Your Honor.

18 THE COURT: Good.

19 [Proceeding concluded at 10:15 a.m.]

20 ///

21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video proceedings in the above-entitled case to the best of my
23 ability.

24 

25 Shawna Ortega, CET*562