IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: D.O.T. LITIGATION TGIG, LLC; NEVADA HOLISITIC MEDICINE, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; THC NEVADA, LLC; HERBAL CHOICE, INC.; RED EARTH LLC; NEVCANN LLC, GREEN THERAPEUTICS LLC; AND GREAN LEAF FARMS HOLDINGS LLC, Appellants, vs. THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF TAXATION, Respondent.	Supreme Court Case No.: 82014 District Court Case No.: A787004

APPELLANT'S OPENING BRIEF

CLARK HILL, PLLC
Dominic P. Gentile, Esq. (NSBN 1923)
Ross Miller, Esq. (NSBN 8190)
Mark S. Dzarnoski, Esq. (NSBN 3398)
John A. Hunt, Esq. (NSBN 1888)
A. William Maupin (NSBN 1315)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
Attorneys for Appellants

ATTORNEY GENERAL'S OFFICE
Steven Shevorski, Esq. (NSBN 8256)
Akke Levin, Esq. (NSBN 9102)
555 E. Washington, Ste. 3900
Las Vegas, Nevada 89101
Attorneys for Respondent

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons as described in NRAP 26.1(a) and must be disclosed. No corporate other entities are nongovernmental parties in this case. These representations are made in order that the judges of this Court may evaluate possible need for disqualification or recusal.

TGIG, LLC, a Nevada limited liability company is 63.12% owned by Core TGLV, Kouretas Capital LLC is 16.88% owner of TGIG, LLC, and Kouretas Management LLC is 20% owner of TGIG.

NULEAF INCLINE DISPENSARY, LLC, a Nevada limited liability company is 100% owned by Nuleaf, Inc. Nuleaf Capital Investors Group, LLC is 55% owner of Nuleaf, Inc. Nuleaf Operators, LLC is 45% owner of Nuleaf, Inc.

NEVADA HOLISTIC MEDICINE, LLC, a Nevada limited liability company. It has no parent corporations and no publicly held company owns 10% or more of its stock.

MEDIFARM, LLC, a Nevada limited liability company is 100% owned by Terra Tech Corp

GBS NEVADA PARTNERS, LLC, a Nevada limited liability company is 15.450% owned by MMJ Investment Facility, LLC, 24.850% owned by Hammermeister NV, LLC, 24.850% owned by The Meservey Family Trust, 24.850% owned by Greenacre Trust, and 10% owned by 483 Management, LLC.

FIDELIS HOLDINGS, LLC, a Nevada limited liability company. It has no parent corporations and no publicly held company owns 10% or more of its stock.

NEVADA PURE, LLC, a Nevada limited liability company. It has no parent corporations and no publicly held company owns 10% or more of its stock.

The following law firms have appeared for the TGIG Applicants at the district court: Gentile, Cristalli, Miller, Armeni & Savarese, PLLC, and Clark Hill, PLLC.

The following attorneys have appeared for the TGIG Applicants at the district court: Dominic Gentile, Esq., Michael Cristalli, Esq., Ross Miller, Esq., Vincent Savarese, III, and John A. Hunt, Esq., Mark S. Dzarnoski, Esq., and A. William Maupin, Esq.

The following law firms have or are expected to appear for the TGIG Applicants in this matter before this Court: Clark Hill, PLLC.

Dated this 22nd day of December, 2021.

CLARK HILL PLLC

/s/ Mark S. Dzarnoski, Esq.
Dominic P. Gentile, Esq. (NSBN 1923)
Ross Miller, Esq. (NSBN 8190)
Mark S. Dzarnoski, Esq. (NSBN 3398)
John A. Hunt, Esq. (NSBN 1888)
A. William Maupin (NSBN 1150)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
Attorneys for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

RULES

REGULATIONS

CONSTITUTIONAL PROVISIONS

I.

JURISDICTIONAL STATEMENT

This is an Appeal from two separate orders denominated Findings of Facts, Conclusions of Law and Order issued by the District Court in Phase I and Phase II of coordinated actions. The District Court issued its "Findings of Fact and Conclusions of Law" for PHASE 1 on September 9, 2020. Notice of Entry of Order was served electronically on September 22, 2020. The District Court issued its "Findings of Fact and Conclusions of Law" for PHASE 2 on September 3, 2020. Notice of Entry of Order was also served electronically on September 22, 2020. Appellant therein filed their Notice of Appeal on October 23, 2020 as required under NRAP 4(a)(1).

On September 10, 2020, Appellants filed a Motion to Amend the September 3, 2020 Findings of Fact, Conclusions of Law and Permanent Injunction relating to PHASE 2. By Minute Order dated October 15, 2020, the District Court denied the Motion to Amend but clarified the Findings of Fact and Conclusions of Law. A written order denying the Motion was electronically filed on October 27, 2020.

This Court has jurisdiction to take this Appeal under NRAP 3A(b)(1) as the Findings of Fact and Conclusions of Law constitute final judgments entered in an action or proceeding commenced in the court in which the judgment is rendered. This Court also has jurisdiction under NRAP 3A(b)(3) in that the Findings of Fact

and Conclusions of Law for Phase II is an order granting or refusing to grant an injunction and the issues on Appeal include errors related to the breadth, scope and enforcement of the injunction granted by the District Court.

II.

ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court Per NRAP 17(2), (11), and (12). The matter involves the statewide ballot question legalizing the use and sale of marijuana, it is a matter raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law, and it is a matter raising as a principal issue a question of statewide public importance.

III.

ISSUES PRESENTED FOR REVIEW

1. Did The District Court Err in its Analysis of the Issue Regarding Disclosure of the Physical Addresses of the Proposed Marijuana Establishments

2. Did The District Court Err in Failing to Issue Injunctive Relief for Plaintiffs' Loss of Market Share

3. Did The District Court Err By Permitting the DOT to Certify Its Own Compliance With the Injunction

4. Did The District Court Err In Failing to Fashion Remedies Consistent With The Ballot Initiative As Passed By Nevada Voters

5. Did The District Court Err in Failing to Admit Extra-Record Evidence in Phase I of the Trial

IV.

STATEMENT OF THE CASE

Nevada allows voters to amend its Constitution or enact legislation through the initiative process. Nevada Constitution, Article 19, Section 2. In 2016, Nevada voters Approved Ballot Question 2 ("BQ2"), an initiative legalizing recreational marijuana. In 2017, BQ2 was enacted by the legislature and codified as NRS 453D. The main goal was to decriminalize the use and sale of marijuana and to regulate on a very high level what had been a renegade illegal industry. The coordinated actions in this matter were calculated to address and did demonstrate a failure of purpose so profound that the State of Nevada itself has changed the regulatory Apparatus three times in the last five years.

During the 2017 legislative session, Assembly Bill 422 transferred responsibility for the registration, licensing, and regulation of marijuana establishments from the State of Nevada Division of Public and Behavioral Health to the Department of Taxation ("DoT"). On February 27, 2018, the DoT adopted regulations governing the issuance, suspension, or revocation of retail recreational marijuana licenses in LCB File No. R092-17, which were codified in NAC 453D (the "Regulations"). As the government agency charged with the implementation of the Nevada recreational marijuana program pursuant to NRS 453D.200, the DoT accepted and graded Applications for licenses to operate recreational retail

marijuana dispensaries across the state of Nevada from Approximately 463 Applicants between September and December 2018 (the "September 2018 Application Period").

Because the number of Applications far exceeded the available licenses, awards of licenses were subject to "an impartial and numerically scored competitive bidding process to determine which Application or Applications among those competing will be Approved." See NRS 453D.210(6). Pursuant to the process developed and implemented by the DoT, on December 5, 2018, the DoT announced the results and awarded Approximately 64 conditional licenses to successful Applicants.

After the DoT announced the license winners, several of the non-winning Applicants, including Appellants, brought multiple suits against the DoT asserting that the process the DOT used to award licenses violated various provisions of NRS Chapter 453D, violated the losing Applicants' constitutional rights under both the Federal and Nevada Constitutions, or was otherwise arbitrary and capricious for a multitude of reasons. The various plaintiffs sought multiple forms of relief including (a) setting aside the process in total; (b) remanding the matter back to the DoT for further development of an administrative record on the issue of "completeness" of the Applications; and/or (c) to obtain licenses under a number of different legal theories.

Appellants filed their initial Complaint on or about January 4, 2019, naming the DoT as the sole party defendant. Several winning Applicants, believing that their interests were subject to the outcome of the litigation, sought to and were granted leave to intervene as party defendants aligned with DoT. Following evidentiary hearings on Appellants' Motion for Preliminary Injunction and various pre-trial motion proceedings, Appellants ultimately filed their operative Second Amended Complaint on or about November 26, 2019, naming the DoT and the intervening successful Applicants as party defendants.

On May 13, 2019, the District Court coordinated a number of the cases brought by non-winning Applicants in Department 11 of the Eighth Judicial District Court in order to determine whether a preliminary injunction should issue against the DoT. After conducting a nearly four-month evidentiary hearing on the matter, the District Court granted the preliminary injunction based on the failure of the DoT to conduct background checks of the Applicants as required under the ballot initiative.

Following the issuance of the preliminary injunction, the District Court adopted a Trial Protocol separating the trial into three (3) phases.

PHASE 1 encompassed all of the plaintiffs' claims for judicial review in the consolidated actions. Appellants in this case made such a claim in their Second

Amended Complaint and participated fully in PHASE 1.[1] The District Court issued its "Findings of Fact and Conclusions of Law" for PHASE 1 on September 9, 2020. Notice of Entry of Order was served electronically on September 22, 2020.

PHASE 2 encompassed claims regarding the "(l)egality of the 2018 recreational marijuana Application process (claims for Equal Protection, Due Process, Declaratory Relief, Intentional Interference with Prospective Economic Advantage, Intentional Interference with Contractual Relations and Permanent Injunction." Again, Appellants made such claims and fully participated in PHASE 2 of the trial. The District Court issued its "Findings of Fact and Conclusions of Law" for PHASE 2 on September 3, 2020. Notice of Entry of Order was served electronically on September 22, 2020.

PHASE 3 encompassed a more narrowly limited claim for "Writ of Mandamus -- regarding improper scoring of Applications related to calculation errors on the 2018 recreational marijuana Applications." The Trial Protocol further referenced the mandamus claims of plaintiffs in the consolidated cases other than Appellants, *i.e.*, MM Development and LiveFree and any other Plaintiffs with mandamus claims based on allegations of improper scoring of Applications due to calculation errors. While Appellants made claims for mandamus in their Second

[1] Because of issues related to Covid-19 and to accommodate briefing schedules, the trial of PHASE 2 actually occurred first. Trial of PHASE 1 followed completion of the trial on PHASE 2.

Amended Complaint, they did not include claims based upon allegations of "improper scoring of their Applications due to calculation errors." Rather, mandamus claims generally related to the arbitrary process utilized by the DoT and more particularly with the failure of the DoT to determine "completeness" of the Applications submitted to the DoT by the successful Applicants. As to this mandamus claim, the District Court denied that claim in its September 3, 2020 Findings of Fact and Conclusions of Law relating to PHASE 2 of the trial. The District Court ruled as follows: "The Court declines to issue an extraordinary writ unless a violation of the permanent injunction occurs." *See* September 3, 2020 Findings of Fact and Conclusions of Law at pg. 29, lines 20-21. Based upon the above and foregoing, Appellants are not a party to PHASE 3 of the trial as their mandamus claim was denied in PHASE 2.

Following the completion of PHASE 2 of the trial, the District Court issued a permanent injunction against the DoT enjoining it from conducting a final inspection of any of the conditional licenses issued in the September 2018 Application Period for any who did not provide the identification of each prospective owner, officer or board member as required by NRS 453D.200(6). Appellants herein assert that the scope of the permanent injunction should have been far broader to prevent final inspection and final issuance of licenses for any successful Applicant and that a "redo" of the licensing process should be ordered. At a minimum, Appellants assert

that the permanent injunction should have encompassed those successful Applicants who failed to submit a truthful and complete Application to the DoT during the September 2018 Application Period.

As to PHASE 1 of the trial, the District Court denied any relief to Appellants. At a minimum, the District Court should have remanded the matter back to the DoT to further develop an administrative record demonstrating that it considered the completeness of Applications submitted during the September 2018 Application Period before submitting the Applications to its supposedly impartial and numerically scored competitive bidding process. The District Court further should have permitted Appellants to supplement the certified administrative record with evidence that fully 70% of the Applications were fatally incomplete for failure to include required information and/or contained disclosures that were false and fraudulent --statutorily mandating the denial of such Applications.

V.

STATEMENT OF FACTS

1. Pursuant to the Regulations governing the September 2018 Application Period, a person holding a medical marijuana establishment registration certificate could JPAly for one or more recreational marijuana establishment licenses within the time set forth by the DoT in the manner described in the Application. NAC 453D.268.

2. Each of the Plaintiffs were issued marijuana establishment licenses involving the cultivation, production and/or sale of medicinal marijuana in or about 2014 and filed Applications for recreational licenses within the September 2018 Application Period.

3. NRS 453D.210(6) mandated the DoT to use "an impartial and numerically scored competitive bidding process" to determine successful Applicants where competing Applications were submitted for a single county.

4. NAC 453D.272(1) provides the procedure for when the DoT receives more than one "complete" Application for a single county. Under this provision the DoT will determine if the Application is complete and in compliance with this chapter and Chapter 453D of NRS, the Department will rank the Applications . . . in order from first to last based on the compliance with the

provisions of this chapter and Chapter 453D of NRS and on the content of the Applications relating to . . .” several enumerated factors. NAC 453D.272(1).

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

(a) Whether the owners, officers or board members have experience operating another kind of business that has given them experience which is Applicable to the operation of a marijuana establishment;

(b) The diversity of the owners, officers or board members of the proposed marijuana establishment;

(c) The educational achievements of the owners, officers or board members of the proposed marijuana establishment;

(d) The financial plan and resources of the Applicant, both liquid and illiquid;

(e) Whether the Applicant has an adequate integrated plan for the care, quality and safekeeping of marijuana from seed to sale;

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

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

(h) The (unspecified) experience of key personnel that the Applicant intends to employ in operating the type of marijuana establishment for which the Applicant seeks a license; and

(i) Any other criteria that the Department determines to be relevant.

6. The DoT posted the initial Application on its website and released the initial Application ("Initial Application") for recreational marijuana establishment licenses on July 6, 2018.

7. After the public posting of the Application on July 6, 2018, Jorge Pupo, a DoT employee, unilaterally decided to eliminate the physical location requirement outlined in NRS 453D.210(5) and NAC 453D.265(1)(b)(3) from the Application review and scoring processes.

8. The DoT published a revised Application on July 30, 2018. The DoT sent the revised Application ("Revised Application") to all participants via the department's Listserv. The Revised Application modified the disclosure of the

physical address requirements set forth in the Initial Application. For example, a sentence on Attachment A of the Application, prior to this revision, had read: "Marijuana Establishment's proposed physical address (this must be a Nevada address and cannot be a P.O. Box)." The Revised Application on July 30, 2018, read: "Marijuana Establishment's proposed physical address if the Applicant owns property or has secured a lease or other property agreement (this must be a Nevada address and not a P.O. Box)." Otherwise, the Applications are virtually identical.

9. The modification of the Initial Application resulted in two different versions of the Application bearing the same "footer" being disseminated to Applicants with the original Initial Application remaining available on the DoT's website. The DoT accepted Applicant submissions regardless of whether the Applicant used the Initial Application or the Revised Application.

10. Notwithstanding that the Initial Application expressly and unqualifiedly required the Applicant to disclose the physical location of the proposed marijuana establishment, and that the Revised Application required disclosure of the physical location of the proposed marijuana establishment only if the Applicant owned the property or had secured a lease or other property agreement for the physical location, neither Application permitted the

Applicant to use an address in Attachment A that was a P.O. Box and/or was not the actual proposed physical location of the marijuana establishment.

11. Both versions of the Application required, in instruction 5.1.4, that "(a)ll information is to be completed as requested."

12. NAC 453D.312 requires the DoT to deny an Application for issuance of a license if any owner, officer or board member provides false or misleading information to the Department.

13. Further, Attachment A to both versions of the Application require the Applicant to attest that "the information provided to the Department for this Recreational Marijuana Establishment License Application is true and correct."

14. NAC 453D.272(1) required the DoT to determine which Applications were "complete and in compliance with this chapter and chapter 453D of NRS" prior to evaluating them for purposes of scoring and ranking. Only Applications that were complete and in compliance with statutes and regulations were eligible for scoring.

15. NRS 453D.210(5) provides that the DoT shall Approve a license Application if, among other things, "the physical address where the proposed marijuana establishment will operate is owned by the Applicant or the Applicant has the

written permission of the property owner to operate the proposed marijuana establishment on that property."

16. NAC 453D.265(1)(b)(3) requires that the **Application** include the physical address where the proposed marijuana establishment will be located and the physical address of any co-owned or otherwise affiliated marijuana establishments.

17. The DoT had created a working group of Pupo, Gilbert, Cronkhite, Plaskon, Sherrick-Warner and Hernandez to draft the Initial Application to be in compliance with the regulations and statute. After the Initial Application was Approved and disseminated to interested industry participants, the working group was disbanded.

18. Pupo, without input from the working group, independently determined to change the disclosure requirement of the property location in the Application and directed that the Revised Application be created.

19. Pupo also determined that, regardless of the language contained in the statute, regulations, Initial Application and Revised Application regarding the physical address of the proposed marijuana establishment, the DoT would not consider any disclosure of the physical address of the proposed marijuana establishment in determining whether an Application was complete, whether the Applicant

submitted truthful information to the DoT in its Application and/or as part of the DoT's scoring and ranking process.

20. Multiple Applicants submitted multiple Applications which included addresses for the "Marijuana Establishment's proposed physical address" which were nothing more than mail drops maintained at such locations by the UPS Store and other like vendors.

21. In evaluating whether an Application was "complete and in compliance" with the provisions of NAC 453D, the provisions of the Ballot Initiative and the enabling statute, the DoT made no effort to verify that the addresses supplied by Applicants constituted real physical addresses where a marijuana establishment might be operated and wholly ignored clear evidence that the addresses were mail drops -- for instance, a single Applicant submitted the same address for multiple locations and multiple Applicants used the same address (with different box or suite numbers) as used by other Applicants. Nonetheless, the DoT considered the Applications as complete, considered them in the scoring and ranking process and awarded licenses to the Applicants who disclosed false physical locations for proposed marijuana establishments.

VI.

SUMMARY OF THE ARGUMENT

As stated, in its FFCL dated September 3, 2020, the District Court granted Plaintiffs' declaratory relief claims set forth in the Second Amended Complaint. The District Court issued the following injunction:

> The DoT acted beyond its scope of authority when it arbitrarily and capriciously replaced the mandatory requirement of BQ2, for the background check of each prospective owner, officer and board member with the 5 percent or greater standard in NAC 453.255(1). This decision by the DoT was not one they were permitted to make as it resulted in a modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada Constitution. [JPA Vol. 333: 046848-046877 at 046876].
>
> The State is permanently enjoined from conducting a final inspection of any of the conditional licenses issued in or about December 2018 for an Applicant who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6). [JPA Vol. 333: 046848-046877 at 046876].

Despite providing relief on this single issue, and despite finding numerous other defects in the original licensing process, the district court failed to provide remedies to bring the process as a whole into compliance with the ballot initiative. The district court also committed numerous errors in resolving claims for direct relief.

In this, the district court erred in its analysis of the issue regarding disclosure of the physical address of proposed marijuana establishments, erred in failing to issue injunctive relief for plaintiffs' loss of market share, erroneously permitted the DoT to certify its own compliance with the injunctive relief that it granted as stated

above, and denied judicial review without a complete record, and abused its discretion when asked by Appellants to order supplementation of the administrative record.

Most notably, the district court failed to fashion remedies for numerous defects based upon the notion that the process was defective equally as to all of the Applicants and thus there had been no harm done to any of them. This implicates conclusion of law 85 issued as part of the district court's rulings:

> The Nevada Supreme Court has recognized that "[i]nitiative petitions must be kept substantively intact; otherwise, the people's voice would be obstructed. . . [I]nitiative legislation is not subject to judicial tampering. The substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed. For this reason, our constitution prevents the Legislature from changing or amending a proposed initiative petition that is under consideration." *Rogers v. Heller*, 117 Nev. 169, 178, 18 P.3d 1034,1039–40 (2001).
>
> [JPA Vol. *333*: 0*46848*-0*46877* at *046871*].

In summary, this statement provides a strict standard of review of government actions taken in aid of the mandates of a ballot initiative. The people of this State took a bold step in legalizing an industry which had been illegal for many decades. Nevadans wanted legalization but with conditions -- they wanted a regulatory construct that ensured that licensees sold medically safe products, that would ensure that competent and reputable business people would own the various regulated businesses and would ensure that companion criminal enterprises such as money-

laundering could not occur. If anything came from the trials in the matters below, the desired regulatory construct could never eventuate under the practices of the Dot during the licensing process: allowing licensees to go into business with inadequate background checks; without legitimate addresses for oversight; and without adequate training for the graders of the Applications. And, as stated, the trial court in this instance found that several categories of deficiencies were irrelevant because they affected all of the Applicants equally. This resulted in a substandard regulatory scheme that circumvented the strict intent of the people – an intent easily gleaned from the plain language of original ballot measure.

VII.

ARGUMENT

A. The Court Erred in its Analysis of the Issue Regarding Disclosure of the Physical Address of the Proposed Marijuana Establishment

The District Court made a fundamental error in its findings respecting the issue regarding disclosure of the actual physical locations of the proposed marijuana establishments. The District Court correctly found that the DoT disseminated various versions of the 2018 Retail Marijuana Application (i.e. the Initial Application [Trial Exhibit 1005 at JPA Vol 329: 046356-046389] and the Revised Application [Trial Exhibit 1006 at JPA Vol 330: 046390-046423]). Unfortunately, however, the District Court also found that while the Initial Application required the Applicant to provide an actual physical Nevada address for the proposed marijuana establishment and not a P.O. Box, it erroneously found that the Revised Application deleted the location requirement. [FFCL 98 at JPA Vol. *333*: 0*46848*-0*46877* at *046873*]. In finding as it did, the District Court conducted an analysis that wholly bypassed the question of whether the DoT acted arbitrarily and capriciously in modifying the statutory and regulatory requirement that an Application be "complete and in compliance" with the provisions of NAC 453D and NRS 453D before submitting the Applications to the scoring and ranking process.

A comparison of the Initial Application [Trial Exhibit 1005 at JPA Vol 329: 046356-046389] with the Revised Application [Trial Exhibit 1006 at JPA Vol 330: 046390-046423] conclusively establishes that the Revised Application did not delete the requirement that Applicants disclose an actual physical address for their proposed marijuana establishment. What the Revised Application did do was require disclosure of the actual physical address of the proposed marijuana establishment if the Applicant owned the property or had a lease or similar property agreement to use the location for its marijuana establishment.

In placing an address in Attachment A of the Initial Application [JPA Vol 329:046356-046389 at 046376], the Applicant was making an affirmative representation that said address was the proposed physical address of the marijuana establishment. In placing an address in Attachment A of the Revised Application [JPA Vol 330: 046390-046423 at 046410], the Applicant was making an affirmative representation that said address was the proposed physical address of the marijuana establishment and that the Applicant either owned the property or had a lease or other property agreement to utilize the location for its proposed marijuana establishment. If an Applicant did not own or lease an actual physical location for the proposed marijuana establishment, a truthful and accurate disclosure would have been "Not Applicable," "To be determined," "unknown" or some similar response

or it could simply have been left blank.[2] One thing neither Application authorized was the false disclosure of a mail drop as the proposed physical address of the marijuana establishment.

This is significant because both versions of the Application required, in instruction 5.1.4, that "(a)ll information is to be completed as requested." [JPA. Vol 329:046364 and Vol 330:046398]. Further, NAC 453D.312 **requires** the DoT to deny an Application for issuance of a license if any owner, officer or board member provides false or misleading information to the Department.

Clearly, an Application that discloses an address in Attachment A that is not the "Marijuana Establishment's proposed physical address" is not completed as requested and/or in compliance with NAC 453D. Equally clear, the Applicant who set forth a mail drop as the proposed physical address of the marijuana establishment in Attachment A submitted false or misleading information to the DOT. For failure to complete the Application as requested, the Application should never have been submitted to the scoring and ranking process. For submitting false or misleading information, such an Application should have been denied summarily. Since the

[2] Some Applicants who did not own or lease a physical location did, in fact, make such truthful disclosures which addresses were set forth on DoT reports as "TBD." These reports evidence that Applications with addresses "TBD" were accepted and scored and some of such Applications were granted. *See* Trial Exhibits 1135 and 3291 at JPA. Vol 330: 046424-046445 and JPA. Vol 331: 046549-046564 respectively.

District Court incorrectly found that the Revised Application totally eliminated the requirement to disclose a physical address of the proposed marijuana establishment, it failed to consider the issues of "completeness and compliance" and/or denial for submission of false information.

The District Court was entirely correct in determining that the DoT processed Applications during the September as if the disclosure of the physical address was eliminated entirely from the DoT's licensing criteria. This change did not, however, emanate from the revisions contained in the Revised Application; rather, it came from the unilateral and independent determination of the DoT's executive director Pupo. [Testimony of S. Gilbert at 225:24-226:5 and 235:2-8 and 238:4-19 at JPA Vol 282:040815-Vol 283:040980 at Vol. 283:040888-040889 and Vol 283:040898-040901].

BQ2 and NRS 453D.210(5) provides that the DoT shall Approve a license Application if, among other things, "the physical address where the proposed marijuana establishment will operate is owned by the Applicant or the Applicant has the written permission of the property owner to operate the proposed marijuana establishment on that property." Consistent with BQ2 and NRS 453D.210(5), the DoT adopted regulation NAC 453D.265(1)(b)(3) which requires that the Application itself MUST include the physical address where the proposed marijuana establishment will be located and the physical address of any co-owned or otherwise

affiliated marijuana establishments. The Initial Application requiring disclosure of the physical address, without qualification, was internally created by a working group of the DoT and Approved by the DoT. The Revised Application still required disclosure of the physical address if the property was owned or leased by the Applicant.[3]

[3] The process and procedures utilized by the DoT in creating the Initial Application and the subsequent Revised Application were detailed in the trial testimony of Steven Gilbert, program manager of the DoT to assist in the implementation of the NRS 453D. [See JPA Vol 282:040815-Vol 283:040980 at Vol. 282:040820-040842 and Vol 283:040843-040898]. Among other things, his testimony established the following:

a. In creating the Application, the DOT was required to abide by the regulations set forth in NAC Chapter 453D [Transcript 161:20-22];
b. NAC 453D.268 was the guide and starting point for the Application [Transcript 165:23-166:1];
c. A working group was formed to create the Application [Transcript 166:2-14];
d. The object of the working group was to create an Application that reflected the requirements of NAC 453D [Transcript 166:15-23];
e. The working group knew that NAC 453D.268 set forth matters that MUST be included in the Application [Transcript 169:7-15];
f. The working group knew it needed to include language requiring dislocsure of the physical address of the proposed marijuana establishment [Transcript 171:3-11];
g. The working group had no authority to alter or amend any regulation and that such modifications would have to go through a rule-making process to be valid [Transcript 172:6-18];
h. No person at the DOT had the authority to modify the regulations [Transcript 217:12-15];
i. No rule-making process was ever commenced to modify or amend NAC 453D.268 [Transcript 172:22-173:2];
j. If an Application was submitted that failed to disclose the physical address of the proposed marijuana establishment, the DOT deemed it complete, accepted it and evaluated and scored it. [Transcript 179:5-18];

A single person (i.e. Pupo) determined that the DOT would not consider whether the Applicant truthfully and properly disclosed the physical location of the proposed marijuana establishment in its Application, notwithstanding the language of BQ2, the language of the regulations and the language of the Applications. It would be hard to conceive of a more blatant example of arbitrary and capricious action permeating an agency's decision-making process.

In the landmark United States Supreme Court case of *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the US Supreme Court held that administrative agencies in the Federal Government are obliged to follow their own regulations, policies and procedures. The Accardi doctrine provides that when

---

k. In practice, the DOT simply did not require disclosure of physical addresses in the Application [Transcript 180:24];
l. The working group and Pupo agreed that the Initial Application complied with the regulations [Transcript 196:6-12 and 197:1-5;
m. Pursuant to the terms of the Initial Application, all Applicants were required to disclose the physical address of the proposed marijuana establishment [Transcript 214:7-11];
n. The Revised Application still required Applicants to disclose the physical address of the proposed marijuana establishment if they owned or leased the property [Transcript 224:9-25];
o. Pupo directed that the physical address would not be required or considered at all [Transcript 225:24-226:5];
p. Pursuant to Pupo's directive, whether an address wa disclosed, truthfully or untrughfully, didn't matter at all in the Application process [Transcript 235:2-8 and 238:4-19]; and
q. If an Applicant followed instructions, the disclosure of a physical address in the Revised Application constituted a statement by that Applicant that they owned or leased the location [Transcript 229:8-18].

an agency fails to follow its own procedures or regulations, that agency's actions are generally invalid.

Generally speaking, as a fundamental right of due process, state courts have Applied the doctrine set forth in Accardi to state agency action even if courts have not specifically identified it by name. "Action by a State agency in contravention of State statutes and its own regulations is *per se* arbitrary and capricious because it violates express and implied legislative policy." *County of Monmouth v. Dep't of Corr.*, 236 *N.J.Super.* 523, 525, 566 *A.*2d 543 (JPA.Div.1989). See also *Com., Transportation Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. Ct. JPA. 2004) "it is axiomatic that failure of an administrative agency to follow its own rule or regulation generally is per se arbitrary and capricious." Citing *State ex rel. Wyoming Workers' Compensation Div. v. Brown*, 805 P.2d 830 (1991); 2 Am. Jur.2d Administrative Law § 499 (2004); *Bowen v. State, Wyoming Real Estate Comm'n*, 900 P.2d 1140, 1142 (Wyo. 1995) ("failure of an agency to abide by its rules is per se arbitrary and capricious.")

While not directly adopting or citing the "Accardi doctrine" in its decisions, the Nevada Supreme Court should hold that actions by state agencies in contravention of their own regulations are arbitrary and capricious. Indeed, the Nevada Supreme Court has not hesitated to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or

exceeds the statutory authority of the agency or is otherwise arbitrary and capricious. *See* NRS 233B.110; *Clark Co. Social Service Dep't v. Newkirk,* 106 Nev. 177, 179, 789 P.2d 227, 228 (1990); *Roberts v. State,* 104 Nev. 33, 37, 752 P.2d 221, 223 (1988).

In deciding not to require or consider the truthful disclosure of the actual physical location of the proposed marijuana establishment in the Applications submitted for the September 2018 Application Period, the DoT has effectively amended, modified or repealed both the statutory language of NRS 453D.210(5), the regulations set forth in NAC 453D.265(1)(b)(3) (i.e. disclosure of the physical address in Application), and NAC 453D.312 (*i.e*. denial for false disclosure) in violation of Nevada's Administrative Procedure Act as set forth in NRS Chapter 233B. Because the decision contravened the DoT's own regulations, it is arbitrary and capricious and should be set aside.

Further, NRS 233B.038 defines a "Regulation" as follows:

> **NRS 233B.038 "Regulation" defined.**
> 1. "Regulation" means:
>
> (a) An agency rule, standard, directive or statement of general Applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency;
> (b) A proposed regulation;
> (c) The amendment or repeal of a prior regulation; and
> (d) The general Application by an agency of a written policy, interpretation, process or procedure to determine whether a person is in compliance with a federal or state statute or

> regulation in order to assess a fine, monetary penalty or monetary interest.

The DoT decisions to forego the disclosure of the actual physical address of the proposed marijuana establishment in the Application and to consider the truthful or false disclosure thereof for any purposes during the September 2018 Application Process, is clearly an act of rulemaking by the DOT. First, the decision is a "directive or statement of general Applicability which effectuates or interprets law or policy" within the meaning of NRS 233B.038(1)(a). Next, it is a de facto "amendment or repeal of a prior regulation" (i.e. NAC 453D.265(1)(b) and NAC 453D.312). An agency "is free to amend its regulations; it need only follow the provisions of NRS 233B.060 which are meant 'to establish minimum procedural requirements governing the regulation-making process of state agencies.' [citation omitted]." *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 99 Nev. 268, 275, 662 P.2d 624, 628–29 (1983).

Because the decision constituted rulemaking, the DoT was required to follow the procedures set forth in NAC 233B.040 et. seq. before it could adopt and implement the "policy directive or statement of general Applicability" of Pupo. In short, Pupo's unilateral actions constituted a de facto amendment or repeal of two different regulations. It cannot be contested that the DoT failed to follow the required procedures of the Administrative Procedure Act before implementing

Pupo's policy directive. [See Footnote 3 hereto describing the process for developing the Applications].

While the District Court failed to analyze the case as set forth above, it did find that the modification of the requirement to disclose the physical address of the proposed marijuana facility evidenced the lack of a fair process. FFCL 60 is as follows:

> The DoT's late decision to delete the physical address requirement on some Application forms while not modifying those portions of the Application that were dependent on a physical location (i.e. floor plan, community impact, security plan, and the sink locations) after the repeated communications by an Applicant's agent, not effectively communicating the revision, and leaving the original version of the Application on the website is evidence of a lack of a fair process. [FFCL 60 at *JPA Vol. 333: 046848-046877 at 046868:* See also FFCL 100 at *JPA Vol. 333:046874*].

The above and foregoing established Plaintiffs' right to relief including an injunction against the DoT enjoining it from issuing final permits/licenses to any Applicant that failed to truthfully disclose the physical address of the proposed marijuana establishment in its Application as part of the 2018 Application Period and requiring it to deny any Applications which falsely disclosed mail drops, P.O. Boxes, etc. as the physical location of the proposed marijuana establishment. While Plaintiffs have sought the remedy of declaring the entire 2018 Application Process invalid and subject to a redo for other reasons, a more limited injunction impacting only those

Applications that failed to satisfy the disclosure of the actual physical location of the proposed marijuana establishment would remedy the error set forth in this Section.[4]

B. The District Court Erred in Failing to Issue Injunctive Relief for Plaintiffs' Loss of Market Share

The First Claim for Relief in Plaintiffs' Second Amended Complaint[5] is for a Due Process violation of deprivation of property pursuant to U.S. Const.,

---

[4] Numerous licenses were awarded to Applicant who falsely disclosed the physical location of a proposed marijuana establishment. Commerce Park, LLC and Cheyenne Medical, LLC (affiliated companies) filed 9 Applications utilizing the Revised Application and six were granted. [See Britten testimony at pg. 4-32; JPA Vol. 318:045088-045161]. All nine Applications used addresses for mail drops at UPS stores and/or similar facilities. By admission, the Applicant did not intend to use the mail drops for the proposed locations of their marijuana establishments, did not own the properties and did not lease the properties for use as dispensaries. [Id. See also Trial Exhibits 2157 (JPA. Vol 330: 046449-046502) and 2158 (JPA. Vol 330: 046503-046548)]. Similarly, Essence Tropicana, LLC and Essence Henderson, LLC filed eight Applications and was granted multiple licenses. [See Yemenidjian testimony 187:19-188:10; 200:10-205:9 (JPA Vol 303:043323-Vol 304:043420]. All eight Applications used addresses for mail drops at UPS stores and/or similar facilities. Even though the Applicant had identified action locations of interest for the proposed dispensaries, they did not disclose those addresses in their Applications. *Id.* Trial Exhibits 1135 and 3291 [JPA Vol 330:046424-046445 and Vol 331:046549-046564 respectively] are DoT spreadsheets identifying the addresses disclosed by each Applicant for their proposed marijuana establishments and evidence the substantial duplication of UPS Store addresses for Applicant cross referenced by whether they were granted licenses.]See also Plaskin Testimony at 42:4-62:25 (JPA Vol 295:042391-Vol 296:042605)]. Notwithstanding that the DOT was clearly aware that multiple Applicant used the same base UPS Store addresses in their Applications and, in some cases, identical addresses for competing Applications, the DOT deemed the Applications complete, submitted them for scoring and awarded licenses to Applicant who submitted false information in the Applications.

[5] The Second Amended Complaint ("SAC") is found at JPA Vol 49: 006025-006047.

Amendment XIV; Nev. Const., Art. 1, Sec. 1, 8; and Title 42 U.S.C. § 1983. As addressed in the SAC's first (1st) claim for relief, Nevada has created a statutorily protected intangible property interest in a business's "market share" from being harmed by unfair competition in NRS 598A which is subject to the due process protections of the Fourteenth Amendment to the Constitution of the United States and Article 1, Sections 1 and 8 of the Constitution of the State of Nevada. [SAC at para.s 54-58 at JPA Vol 49: 006025-006047]; See also analysis set forth in Section III.1 of Plaintiffs' Opposition To Lone Mountain Partners, LLC's Motion To Dismiss Second Amended Complaint which is incorporated herein by reference. [JPA Vol 50: 006124-006206]. In denying Lone Mountain Partners, LLC's Motion To Dismiss Second Amended Complaint, the District Court correctly determined that loss of market share can support a legally viable claim for violations of the Fourteenth Amendment to the Constitution of the United States and Article 1, Sections 1 and 8 of the Constitution of the State of Nevada. [See Order denying Motion to Dismiss JPA Vol 62: 007940-007941].

To be sure, in an open and fair competitive market, a business has no protected property interest in preserving it against private or government actors. However, when those conditions are not present and where a valid license issued pursuant to a process administered with constitutional integrity is required to conduct the business, Plaintiffs have a due process right to protect that market share from unfair

competition facilitated by governmental failure to adhere to those constitutionally mandated standards.

Respecting the issue of diminution of market share, the District Court made the following important findings:

1. There are an extremely limited number of licenses available for the sale of recreational marijuana. [FFCL 70 in JPA Vol. 333: 046848-046877]

2. The number of licenses available was set by BQ2 and is contained in NRS 453D.210(5)(d). [FFCL 71 in JPA Vol. 333: 046848-046877]

3. Although there has been little tourism demand for legal marijuana sales due to the public health emergency and as a result growth in legal marijuana sales has declined, the market is not currently saturated. With the anticipated return of tourism after the abatement of the current public health emergency, significant growth in legal marijuana sales is anticipated. Given the number of variables related to new licenses, the claim for loss of market share is too speculative for relief. [FFCL 73 in JPA Vol. 333: 046848-046877]

The District Court's denial of injunctive relief for diminution of market share is reversible error because the analysis and findings treats the matter before the court as a claim for damages, when it should have been properly viewed as one for injunctive relief. When a plaintiff can show that defendant's conduct threatens him with unlawful injury, his inability to *quantify* the harm already suffered, or likely to be suffered, is not a ground for denying injunctive relief. On the contrary, extreme difficulty in ascertaining the amount of damages is a factor *favoring* injunctive relief. *Huong Que, Inc. v. Luu*, 150 Cal. JPA. 4th 400, 418, 58 Cal. Rptr. 3d 527, 541–42 (2007). Injunctive relief is available when a party suffers economic harm that cannot

necessarily be quantified. *See Barlow v. Sipes*, 744 N.E.2d 1, 7, 13 (Ind.Ct.JPA.2001) (in a tort case involving intentional interference with a business relationship and defamation, injunctive relief was necessary "because money damages cannot be calculated with any predictability or certainty"). This conclusion necessarily flows from the general proposition that the party seeking injunctive relief carries the burden of proving that there exists a reasonable probability of irreparable harm for which compensatory damages would not provide adequate remedy. *S.O.C., Inc. v. Mirage Casino–Hotel*, 117 Nev. 403, 408, 23 P.3d 243, 246 (2001). Clearly, in a case where a plaintiff can establish damage but cannot, for various reasons, quantify the amount of damages with any certainty, no adequate remedy at law exists.

In the case sub judice, the District Court's finding that "given the number of variables related to new licenses, the claim for loss of market share is too speculative for relief" evidences that the amount of damages is too speculative to support a claim for compensatory damages and that no adequate remedy at law exists. That the District Court viewed Plaintiffs' claim respecting market share through the lens of a damages claim is evident from the language of its Order: *i.e.*, "[n]o monetary damages are awarded given the speculative nature of the potential loss of market share." [FFCL 73 in JPA Vol. 333: 046848-046877].

In support of their claim under the First Claim for Relief, Plaintiffs offered the uncontested testimony of two experts: Ronald Seigneur [testimony is JPA Vol

309:043977-044063] and Jeremy Aguelo [testimony is JPA Vol. 318:045166-Vol. 319:045275]. Both experts testified that the opening of new dispensaries pursuant to licenses issued in the September 2018 Application Period would cause a diminution of market share for those operators who did not receive a proportionate number of newly issued licenses.

> SEIGNEUR: "It's my opinion generally that additional licenses would take market share away, but I didn't quantify it for any particular licensee." [JPA Vol 309:043977-044063 at 87:2-4]
>
> ARGUELLO: "My conclusion was fairly straightforward. I believe that additional licensees coming online will negatively impact the market share for existing operators in the State of Nevada today." [JPA Vol. 318:045166-Vol. 319:045275 at 98:25-99:4.]

While both experts agreed that non-winning Applicants would lose market share due to an increased number of operators, neither expert was able to quantity the amount of decrease in market share to be suffered by each Plaintiff. [See Arguello at JPA Vol. 318:045166-Vol. 319:045275 at 134:1-6: "not able to quantify how much of a decrease in market share any particular license holder dispensary would have based on the addition of new licenses." See also Seigneur JPA Vol 309:043977-044063 at :67:21-68:3.]

One significant reason that neither expert witness could quantify the actual amount of damages caused to plaintiffs from the opening of new dispensaries was that the DOT arbitrarily and capriciously eliminated the statutory and regulatory

requirement for Applicants to disclose the physical location of their proposed marijuana establishments as set forth above.

> Q Okay. Now, I want to ask you, you can't tell the impact that a new location is going to have on a current business without knowing where the new location is; am I right?
>
> A Yes, sir. That's correct.
>
> Q So if five marijuana retail stores opened up in the same post office box, they would probably be competing with each other pretty heavily, wouldn't they?
>
> A There's no doubt.
>
> Q Okay. And if they opened up in the same building, they'd be competing with each other pretty heavily?
>
> A Also correct, sir.
>
> Q Okay. And unless you know where they're going to be, there's No way for your to –to do a quantifiable analysis with regard to any given Location that already exists?
>
> A That's also correct, sir.
>
> Aguero – JPA Vol 318:045166-Vol. 319:045275 at 181:13-182-2 [See also Seigneur JPA Vol 309:043977-044063 at 48:15-15 "Where the additional conditional licenses are granted has a huge impact on how they will potentially disrupt or cannibalize sales from current dispensary locations."]

"According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between

the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction (citations omitted)." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 1839, 164 L. Ed. 2d 641 (2006). Pursuant to Nevada precedent, permanent injunctive relief is available "where there is no adequate remedy at law..., where the balance of equities favors the moving party, and where success on the merits has been demonstrated." *State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.,* 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) (citing 43 C.J.S. § 18 Injunctions (1978)) (overturning the issuance of a permanent injunction). An additional factor in analyzing whether to grant injunctive relief is to look to the public interest and the rights of third parties and whether those weigh in favor of the denial of a request for injunctive relief. *See Tate v. State Bd. Of Med. Examiners,* 131 Nev. 675, 681, 356 P.3d 506, 511 (2015) (citing with support to 42 Am. Jur. 2d Injunctions §§ 15, 39 —"Deciding an injunction motion requires a delicate balance of several factors, including...the interest of the public or others.").

The decision to grant or deny permanent injunctive relief rests in the district court's sound discretion and this Court will not overturn such a decision unless it has been shown to constitute an abuse of discretion. *See Director, Dept. of Prisons v. Simmons,* 102 Nev. 610, 613, 729 P.2d 499, 502 (1986), *overruled on other grounds by Las Vegas Novelty v. Fernandez,* 106 Nev. 113, 787 P.2d 772 (1990). Nonetheless,

if the facts surrounding the underlying issues are undisputed, the district court's decision to grant or deny a permanent injunction will be reviewed de novo. *See Secretary of State v. Give Nevada A Raise,* 120 Nev. 481, 486 n. 8, 96 P.3d 732, 735 n. 8 (2004). Additionally, purely legal questions surrounding the issuance of an injunction are likewise reviewed de novo. *Secretary of State v. Give Nevada A Raise,* 120 Nev. 481, 486 n. 8, 96 P.3d 732, 735 n. 8 (2004).

Appellants respectfully submit that the record on this Appeal establishes that the opening of new dispensaries in the September 2018 Application Period caused a diminution in the market share of dispensary operators who did not receive new licenses in the September 2018 Application Period. Whether the market was saturated or not, is entirely irrelevant to an analysis of market share diminution.[6] It is also undisputed that Plaintiffs could not quantify the actual monetary damages they suffered or will suffer from the diminution of their market share substantially because the DOT accepted Applications and awarded new licenses to Applicants who did not disclose the actual physical address of their proposed marijuana establishments in their Applications. Substantial evidence supports Appellants'

[6] Per Seigneur, the overall market size might grow by the addition of new operators but the market share of existing operators would still be cannabilized. JPA Vol 309:043977-044063 at 42:17-43:9. Per Aguerro, despite an increase in the overall size of the market, the additional licenses will cause current licensees to experience some market share dilution. Argello JPA Vol. 318:045166-Vol. 319:045275 at 153:13-23.

position in the matter, and no substantial evidence supports the DoT's position on this issue. That equates to abuse of discretion under the Nevada Administrative Procedure Act.

The issue before the Supreme Court is thus a question of law to be reviewed de novo: *i.e.* does the diminution of Plaintiffs' market share caused by the arbitrary and capricious process utilized by the DoT during the September 2028 Application Period entitle Plaintiffs to a permanent injunction. Based upon the above and foregoing, Plaintiffs have demonstrated that they have or will suffer injury to their market share and that monetary damages are inadequate to compensate for that injury because they are not quantifiable in amount.

The District Court also determined that "(t)he balance of equities weighs in favor of Plaintiffs" in issuing an injunction based upon the adoption of the so-called "5% rule" by licensing less than all of the "owners;" here by allowing persons with interests of 5 or less per cent of the enterprise to evade regulatory scrutiny. The defects identified in that aspect of the licensing process have the same effect respecting the market share issue – a regulatory Apparatus that fails to meet the intent of the people in passing the measure in the first place. Finally, the public interest weighs substantially in favor of issuance of an injunction in this case. In its Conclusion of Law #85, the District Court concluded as follows:

> The Nevada Supreme Court has recognized that "[i]nitiative petitions must be kept substantively intact; otherwise, the people's voice would

> be obstructed. . . [I]nitiative legislation is not subject to judicial tampering. The substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed. For this reason, our constitution prevents the Legislature from changing or amending a proposed initiative petition that is under consideration." *Rogers v. Heller*, 117 Nev. 169, 178, 18 P.3d 1034,1039–40 (2001).

[FFCL 85 in JPA Vol. 333: 046848-046877]

The highest public interest is to assure that government agencies do not take actions inconsistent with voter approved initiatives and/or act arbitrarily and capriciously when they establish procedures that impact protectable property rights.

C. The District Court Erred By Permitting the DOT to Certify Its Own Compliance With the Injunction

In its FFCL dated September 3, 2020, the District Court granted Plaintiffs' declaratory relief claims set forth in the Second Amended Complaint. The District Court issued the following declaration of rights:

> The DoT acted beyond its scope of authority when it arbitrarily and capriciously replaced the mandatory requirement of BQ2, for the background check of each prospective owner, officer and board member with the 5 percent or greater standard in NAC 453.255(1). This decision by the DoT was not one they were permitted to make as it resulted in a modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada Constitution. [JPA Vol. 333: 046848-046877 at 046876].

The District Court also granted Plaintiffs' Equal Protection claim as follows:

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

> nature of the potential loss of market share. [JPA Vol. 333: 046848-046877 at 046876].
>
> The District Court then issued the following injunction:
>
> The State is permanently enjoined from conducting a final inspection of any of the conditional licenses issued in or about December 2018 for an Applicant who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6). [JPA Vol. 333: 046848-046877 at 046876].[7]

The District Court declined to issue any extraordinary writ at that time "unless violation of the permanent injunction occurs." [JPA Vol. 333: 046848-046877 at 046876].[8]

Following issuance of a preliminary injunction identical to the permanent injunction later issued, the District Court asked the DoT to file a certification with the District Court as to which Applicants failed to disclose 100% of their owners and thus prevented the DOT from conducting a background checks of persons owning less than 5% of an Applicant.[9] The DOT certification was attached as Court Exhibit

---

[7] In enjoining the DoT from issuing final permits to Applicant who failed to disclose all owners of the Applicant, the District Court found that it was arbitrary and capricious for the DoT to adopt a "5% Rule" by regulation that conflicted with the voter Approved ballot initiative – the initiative required disclosure of all owners, not just persons with ownership interests of or in excess of 5%. [JPA. Vol. 326:045927-045932; See also FFCL 107 at JPA Vol. 333: 046848-046877].

[8] The factual and legal basis for the District Court's order respecting the 5% rule is set forth in an Order dated August 14, 2020 which granted a motion for partial summary judgment on this issue. [JPA Vol. 326:045927-045932]. This district court should have Applied this analysis to other violations of the initiative.

[9] The Findings Of Fact And Conclusions Of Law Granting Preliminary Injunction are at JPA Vol. 46: 005469-005492.

3 to the District Court's order granting a preliminary injunction and was admitted as Trial Exhibit 1302 in Phase II of the trial. [JPA Vol. 330: 046446-046448]. In said certification, the DOT identified three tiers of Applicants to the District Court with the third tier being Applicants for which the DoT could not eliminate a question as the completeness of the Applications. At a hearing on August 29, 2019, the District Court considered the DoT certification and stated as follows:

> Those who are in the third category will be subject to the injunctive relief which is described on page 24 the findings of fact and conclusions of law. Those who are in the first and second category will be excluded from that relief. [Transcript at 56:12-21; JPA Vol. 326:045915-045916].

Four Applicants were listed in Tier 3 of Court Exhibit 3 as follows: Helping Hands Wellness Center, Inc., Lone Mountain Partners, LLC, Nevada Organic Remedies, LLC and Greenmart of Nevada NLV, LLC. [Trial Exhibit 1302 at JPA Vol. 330: 046446-046448].

This seemingly clear injunctive language was rendered illusory by subsequent actions of the district court. On September 22, 2020, the Cannabis Compliance Board issued a Final Notice of Licensure for Applicant Nevada Organic Remedies, LLC. [JPA Vol. 333:046964-046965]. Plaintiffs filed a Motion for Order to Show Cause on October 16, 2020. [JPA Vol. 333: 046944-046965]. A hearing was held on November 2, 2020. [JPA Vol. 343: 048144-048281].

The District Court's decision on the Motion for OSC was based upon a filing by the DoT dated August 11, 2020, which purportedly removed all four entities previously certified by the DOT as being in non-compliance with the Application requirements, including Nevada Organic Remedies, from Tier 3 in Court Exhibit 3. [JPA Vol. 320: 045317-045332].

> The order to show cause is denied. In the filing the State made to remove NOR and others from Tier 3, it stated that NOR in its Application listed each of its owners, which included GGB Nevada, LLC, that was 100 percent owned by Xanthic Biopharma, LLC, an entity listed on the Canadian Securities Exchange.
>
> The State has made a determination that NOR provided all of the information and was truthful in its Application. I am not going to disturb that decision.

[Transcript 28:12-20: JPA. Vol. 343 at 048171].

"A decision that lacks support in the form of substantial evidence is arbitrary or capricious" and, therefore, an abuse of discretion. *Tighe v. Las Vegas Metro. Police Dep't,* 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994); *see also* NRS 233B.135(3). "Substantial evidence" is "that which "a reasonable mind might accept as adequate to support a conclusion." *State, Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (quoting *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (quoting *Edison Co. v. Labor Board,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)).

Substantial evidence does not exist that supports the conclusion that Nevada Organic Remedies, LLC disclosed 100% of its owners for purposes of conducting background checks. Indeed, Plaintiffs produced evidence demonstrating that it was impossible for Nevada Organic Remedies, LLC to disclose 100% of the natural persons who were in the chain of ownership of the Applicant.

As noted by the District Court, the DOT stated that Nevada Organic Remedies disclosed that GGB Nevada, LLC was one of its "owners" in its Application. Further, the DOT stated that GGB Nevada, LLC was 100 percent owned by Xanthic Biopharma, LLC, an entity listed on the Canadian Securities Exchange.

Publicly filed disclosures with the Canadian Securities Exchange on SEDAR were presented to the District Court. FORM 51-102F4 is a BUSINESS ACQUISITION REPORT filed by Xanthic Biopharma which disclosed that GGB Nevada LLC, a wholly-owned subsidiary of Xanthic, acquired 100% of the outstanding membership interests of Nevada Organic Remedies LLC. The effective date of the acquisition was September 4, 2018 and the transaction was completed on September 7, 2018. [JPA Vol. 343 at 048204].

Also presented to the District Court was the Notice of Annual and Special Meeting of Shareholders dated October 12, 2018 filed on SEDAR. The following disclosure appears therein:

Advice to Beneficial Shareholders of Common Shares

The information set forth in this section is of significant importance to many Shareholders as a substantial number of Shareholders do not hold their Common Shares in their own name and thus are considered non-registered Shareholders (referred to as **"Beneficial Shareholders").** Beneficial Shareholders should note that only proxies deposited by Shareholders whose names appear on the records of the Corporation as the registered holders of Common Shares can be recognized and acted upon at the Meeting. If Common Shares are listed in an account statement provided to Shareholders by a broker then, in almost all cases, those shares will not be registered in the Shareholder's name on the records of the Corporation. Such Common Shares will more likely be registered under the name of the Shareholder's broker or an agent of that broker or another similar entity (an **"Intermediary").** Common Shares held in the name of an Intermediary can only be voted by the Intermediary (for or against resolutions or withheld) upon the instructions of the Beneficial Shareholder. Without specific instructions, Intermediaries are prohibited from voting shares.

JPA. Vol. 343 at 048227.

Given the above and foregoing, in order for the Nevada Organic Remedies Application to be deemed complete, the natural persons who were shareholders of Xanthic Biopharma were required to be disclosed in the Application to enable the DOT to conduct background investigations of all owners. The DOT's conclusory assertion that the Application was complete and disclosed all owners cannot be given any credence at all because "a substantial number" of Xanthic shareholders held their shares in the name of an Intermediary and were therefore not identifiable.

During the hearing on the Motion for Order to Show Cause, the District Court specifically asked the DOT to identify the factors other than the statutory changes in

AB533 which caused the DOT to remove Nevada Organic Remedies from Tier 3. The DOT identified the entirety of those reasons as follows:

> MR. SHEVORSKI: The other reasons were that there had been no evidence that there were undisclosed owners (video interference) the plaintiffs' case in chief had closed nor that the shares of Xanthic were even being traded at the time or even listed.
>
> THE COURT: All right. Anything else?
>
> MR. SHEVORSKI: No.

[Transcript at 20:7-13: JPA Vol. 343 at 048163].

The reasons cited by the DoT for removal of Nevada Organic Remedies from Tier 3 are nothing more than a revisionist attempt to justify an arbitrary and capricious act. In the initial certification (Court Exhibit 3: JPA Vol 330: 046446-046448), the DoT admitted that "the Department could not determine whether there were shareholders who owned a membership interest in the Applicant at the time the Application was submitted, but who were not listed on Attachment A, as the Applicant was acquired by a publicly traded company on or around September 4, 2018." Further, the DoT made the certification with full knowledge of the public disclosures made by Xanthic on SEDAR.

> In creating this answer; the Department of Taxation sought to answer the Court's question in a neutral fashion based on the information available to it from the Applications themselves, testimony given at the hearing (without reference to issues of admissibility, which an affected party may raise), **and information publicly available from a government website (the Canadian Securities Exchange website)**, which was submitted by the Applicant or information submitted about

> the Applicant by an entity claiming an affiliation to the Applicant. (emphasis added). [JPA Vol 330: 046446-046448].

Having initially informed the District Court that its original certification was based, in part, upon the information contained in public disclosures on SEDAR, the DoT is not free to later disavow knowledge of those same public disclosures in removing Nevada Organic Remedies from Tier 3.

The DoT submitted no evidence to support a determination that Nevada Organic Remedies provided all of the information required regarding its owners and was truthful in its Application so as to be removed from Tier 3. All evidence is to the contrary. Therefore, the District Court's decision that it was "not going to disturb that decision" is an abuse of discretion.

Moreover, the District Court's willingness to defer to an enjoined party (*i.e.* the DoT) to determine whether it is in compliance with the terms of the injunction is legally unsustainable. This is akin to asking the fox to report the daily inventory for the hen house. Having issued an injunction in favor of Plaintiffs, the District Court should have made a determination of compliance or non-compliance therewith based upon evidence presented to it rather than merely accepting the DoT's representations that it was in compliance.

D. The District Court Erred In Failing to Fashion A Remedy Consistent With The Ballot Initiative As Passed By Nevada Voters

As stated in its FFCL dated September 3, 2020, the District Court granted Plaintiffs' declaratory relief claims set forth in the Second Amended Complaint. As stated, the District Court issued the following injunction:

> The State is permanently enjoined from conducting a final inspection of any of the conditional licenses issued in or about December 2018 for an Applicant who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6). [*JPA Vol. 333: 046848-046877 at 046876*]

Beyond that, however, the district court found the following defects in the original licensing process but failed to provide a remedy to bring the process into compliance with the ballot initiative:

(a) "the lack of training for the graders affected the graders' ability to evaluate the Applications objectively and impartially;" [*JPA Vol. 333: 046848-046877 at* FFCL 53]

(b) In evaluating "completeness" of an Application, the DOT did nothing to verify owners, officers of board members notwithstanding its statutory obligation to do so; [*JPA Vol. 333: 046848-046877 at* FFCL 54, 55]

(c) "For purposes of grading the Applicant's organizational structure[25] and diversity, if an Applicant's disclosure in its Application of its owners, officers, and board members did not match the DoT's own records, the

DoT did not penalize the Applicant. Rather, the DoT permitted the grading, and in some cases, awarded a conditional license to an Applicant under such circumstances and dealt with the issue by simply informing the winning Applicant that its Application would have to be brought into conformity with DoT records." [*JPA Vol. 333: 046848-046877 at* FFCL 56]

(d) Regarding the use of Advisory Boards by many Applicants who were LLCs, the "DoT provided no guidance to the potential Applicants or the Temporary Employees of the manner by which these 'Boards' should be evaluated;" [*JPA Vol. 333: 046848-046877 at* Footnote 25]

(e) The DoT's decision to eliminate the requirement to disclose the proposed dispensary location "is evidence of a lack of a fair process;" [*JPA Vol. 333: 046848-046877 at* FFCL 60]

(f) In eliminating the requirement to disclose the dispensary location, the graders could not "adequately assess graded criteria;" [*JPA Vol. 333: 046848-046877 at* Conclusion of Law 100]

(g) The DOT's failure to have a single point of contact and provision of preferred access to some Applicants "is evidence of a lack of a fair process" [Finding 61] and "created an unfair process" [*JPA Vol. 333:*

046848-046877 at FFCL 63] and is "an arbitrary and capricious act;" [*JPA Vol. 333: 046848-046877 at* Conclusion of Law 97] and,

(h) The DoT failed to properly train the Independent Contractors and failed to establish any quality assurance or quality control of the grading done by Independent Contractors. [*JPA Vol. 333: 046848-046877 at* Conclusion of Law 102].

Despite finding these defects in the licensing process and finding that they evidence the lack of a fair process, the District Court granted no further relief to Plaintiffs. Note 25 and Conclusion of Law 102 set forth the viewpoint of the District Court that somehow an arbitrary, capricious and unfair process utilized by a state agency is legally sustainable as long as all participants/Applicants were subject to the same arbitrary, capricious and unfair process. In Conclusion of Law 102, the District Court acknowledges the lack of training of graders and the lack of quality assurance and quality control; however, the District Court denied relief because the "DoT treated all Applicants the same in the grading process" and the "failures in training the Independent Contractors applied equally to all Applicants."

Inasmuch as Plaintiffs do not challenge the District Court's findings regarding the procedural defects set forth above, this Court should review de novo whether or not the District Court erred in its Application of the law to the factual findings it

made in denying relief to Plaintiffs. Central to an analysis of this issue is FFCL 85 which is as follows:

> The Nevada Supreme Court has recognized that "[i]nitiative petitions must be kept substantively intact; otherwise, the people's voice would be obstructed. . . [I]nitiative legislation is not subject to judicial tampering. The substance of an initiative petition should reflect the unadulterated will of the people and should proceed, if at all, as originally proposed and signed. For this reason, our constitution prevents the Legislature from changing or amending a proposed initiative petition that is under consideration." *Rogers v. Heller*, 117 Nev. 169, 178, 18 P.3d 1034,1039–40 (2001).
>
> [*JPA Vol. 333: 046848-046877 at* FFCL 85]

This statement of law reflects the notion that initiative petitions, like statutes in derogation of common law, must be strictly construed so that the clear intent of the voters be followed. The defects noted above cry out for remedies because the agency has changed important meanings sought by the electorate. More to the point, the initiative was designed to make legal an activity that had been illegal for decades. In this, the ballot initiative was intended to eradicate the problems that justified criminality for this once illegal activity which included the inability to regulate the narcotics trade and its collateral illegal enterprises such as "money-laundering." Thus, if there was an error that equally contaminated every Application, the public ended up with a substandard regulatory structure that did not comport with the will of the voters to issue licenses only to the best candidates in a fair and impartial

process. In addition, among the winning and losing Applicants, the general public could not determine whether the most suitable candidates were selected.

Outside Nevada, the Superior Court of New Jersey Appellate Division recognized the public's overriding interest in the fairness of the New Jersey Department of Health's process of selecting licensees for medical marijuana dispensaries in *In re Application for Medicinal Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness, LLC***,** 465 N.J. Super. 343 (N.J. Super. 2020), 243 A.3d 688 (Decided Nov 25, 2020). In this, the New Jersey Court vacated the agency action in awarding the licenses and remanded to the Department of Health requiring it to develop a further record to explain its actions based upon the public's interest in a fair, competitive and trustworthy selection process.

> We intervene in the administrative proceedings that have taken place so far to ensure the public's confidence in both the results achieved at the agency level so far and to ensure that future similar proceedings will be likewise subjected to a measure of scrutiny at the agency level that will guarantee the process does not produce determinations that are arbitrary, capricious or unreasonable. We so hold not because it betters our ability to review the agency decisions but because of the overriding public interest. As we have said before in bidding matters, "[b]oth the public interest and the public's perception" that the process is "fair, competitive and trustworthy are critical components and objectives." *Muirfield Constr. Co. v. Essex Cty. Improvement Auth.*, 336 N.J. Super. 126, 137-38, 763 A.2d 1272 (JPA. Div. 2000).
>
> *Id.*

Here, the district court seems to have avoided whether the original Application process satisfied the underlying policy of BQ2 to award licenses to the

best Applicants through a fair and impartial process. Although the District Court implicitly concluded that this was below the standards expected by the voters, the District Court abused its discretion when it failed to provide complete remedies for defects in the initial process on the ground that all Applicants were treated the same. The failure to explain how the flawed process fell short of that required in the enabling legislation and ballot initiative but harmed no-one is likewise an abuse of discretion resulting from a lack of substantial evidence on the issue.

E. The District Court Erred in Failing to Admit Extra-Record Evidence in Phase I of the Trial

Phase I of the trial was for Judicial Review. On or about June 12, 2018, the DOT filed and certified an "Administrative Record" with the Court ostensibly constituting the entire administrative record considered by the DOT in granting and/or denying the Applications and in adopting the procedures and policies utilized in consideration thereof. [JPA Vol 75-269:009890-038871]. The Administrative Record filed and certified by the DOT contains 73 Parts. Parts 1-71 of the Administrative Record filed and certified by the DOT are license Applications filed by Plaintiffs herein as well as other plaintiffs in the consolidated action and/or other Applicants who were not granted licenses during the September 2018 Application Period. The Administrative Record also contains a reference to 19 Applications of other unsuccessful Applicants designated by Bates Stamp numbers and "Attorney Eyes Only." Part 72 of the Administrative Record filed and certified by the DoT are

scorecards for Applicants submitting Applications during the September 2018 Application Period. Part 73 of the Administrative Record filed and certified by the DoT are scores by category of both identified and non-identified sections of the Applications.

On July 9, 2020, Plaintiffs filed a Motion For Order Requiring The DoT To Supplement And Recertify The Administrative Record; To Permit Plaintiffs To Offer Extra- Record Evidence At The Hearing Of Judicial Review; And To Enlarge Time For Filing Opening Brief. [JPA Vol. 275: 039576-039735]. As noted in those Applications, the Administrative Record filed and certified by the DoT fails to include a plethora of documents relevant to Plaintiffs' claims that the process utilized by the DoT was arbitrary and capricious including the following:

(a) Any Applications from an Applicant that was granted a conditional license in the September 2018 Application Period;

(b) Any documents (email, text message, memorandum policy statement, announcement, web posting, etc.) referring or relating to any process or discussions leading to the approval and release of either the Initial Application or the Revised Application;

(c) Any documents referring or relating to any process or discussions leading to the approval and initial announcement of the second version

of the Application released to potential Applicants on or about July 30, 2018;

(d) A blank version of either the Initial Application or the Revised Application;

(e) Any documents referring or relating to any process or discussions leading to (a) the DoT's decision not to require Applicants to submit their "Proposed Physical Address of their Marijuana Establishment," (b) the DoT's decision not to score or consider the physical location of the proposed marijuana establishment, and/or (c) the DoT's decision to permit Applicants to file Applications utilizing mail drops as their disclosed physical location;

(f) Any documents advising any Applicant that the physical location of the proposed marijuana establishment was not an Application requirement.

(g) Any document contained in an Applicant's licensing file that was reviewed to verify or corroborate the information contained in the Applications submitted.

(h) Any document from which it could consider whether all license grantees disclosed all of the owners, officers and directors of the successful Applicants such that each could/would undergo background

checks, including but not limited to those Applicants that were publicly traded companies.

In their July 9, 2020 Motion, Plaintiffs requested the District Court to Order the DoT to supplement the record it certified to include the missing information set forth above. Alternatively, the Motion requested that Plaintiffs be allowed to introduce extra-record evidence relating to the missing information at trial.

By Order dated August 28, 2020, the District Court denied Plaintiffs' Motion. [JPA Vol. 331: 046568-046572]. Plaintiffs assert that this decision is an error of law that should be reviewed de novo by this Court.

> NRS 233B.135 provides, in relevant part, as follows:
>
> **NRS 233B.135 Judicial review: Manner of conducting; burden of proof; standard for review.**
>
> 1. Judicial review of a final decision of an agency must be:
>   (a) Conducted by the court without a jury; and
>   (b) Confined to the record.
>
> -- In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities. (emphasis added)

Absent contrary stipulation as permitted by NRS 233B.131(1), NRS 233B.135 requires the district court to consider the entire administrative record to determine whether the agency's decision is clearly erroneous. NRS 233B.131; NRS 233B.135; *Schulz Partners, LLC v. State, ex rel. Bd. of Equalization*, 127 Nev. 1173, 373 P.3d 959 (2011). The administrative record is not just "those documents that the agency has compiled and submitted as 'the' administrative record." *Thompson v.*

U.S. Dept. of Labor, 885 F.2d 551, 555 (9th Cir. 1989), citation omitted. Rather, it must be "the whole record," which "includes everything that was before the agency pertaining to the merits of its decision." *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (citation omitted). In fact, an agency may not "exclude information on the grounds that it did not 'rely' on the excluded information in its final decision." *Maritel, Inc. v. Collin*s, 422 F. Supp. 2d 188, 196 (D.D.C. 2006). In other words, the "whole record" encompasses "all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Thompson*, 885 F.2d at 555, citation omitted.

The agency's designation of the record is accorded a strong presumption of regularity and completeness, which the plaintiff must overcome with "clear evidence." *Gill v. Dep't of Justice*, No. 14-cv-03120-RS (KAW), 2015 WL 9258075, at *5 (N.D. Cal. Dec. 18, 2015). To meet this standard, the plaintiff must identify the allegedly omitted materials with sufficient specificity and "identify reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record." *Id.* See also *In re United States*, 875 F.3d 1200, 1206 (9th Cir. 2017), (citing *Bar MK Ranches*, 994 F.2d at 740), vacated on other grounds, ––– U.S. ––––, 138 S. Ct. 443, 199 L.Ed.2d 351 (2017) (While a court presumes an

administrative record is complete, plaintiffs can rebut this presumption with "clear evidence to the contrary.").

In addition to seeking supplementation of an administrative record when it is clearly incomplete, a court may, in a case involving judicial review of agency actions, review extra-record material under certain circumstance. As set forth above, NRS 233B.135(1) expressly states as follows: "In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities."

> A court reviewing an agency decision is authorized to supplement the record and to receive evidence "[i]n cases concerning alleged irregularities in procedure before [the] agency that are not shown in the record." NRS 233B.135(1)(b). Any evidence must pertain only to the alleged irregularities. (citation omitted). Thus, the court was authorized to accept the information, in the form of sworn letters or affidavits, if it determined that the proffered information was relevant to a procedural irregularity.
>
> *Minton v. Bd. of Med. Examiners*, 110 Nev. 1060, 1081, 881 P.2d 1339, 1353–54 (1994). (See also *Famuyiwa v. Employment Sec. Div.*, 130 Nev. 1175 (2014) recognizing that a district court may consider evidence outside of the administrative record where there are irregularities in procedure that warranted receiving the additional evidence.)

Courts may additionally review extra-record material when: (1) it is necessary to determine whether the agency has considered all relevant factors and explained its decision; (2) the agency has relied on documents not in the record; (3) supplementing the record is necessary to explain technical terms or complex subject

matter; or (4) plaintiffs make a showing of bad faith. *City of Las Vegas* v. *F.A.A.*, 570 F.3d 1109, 1116 (9th Cir. 2009). When the agency action cannot be adequately explained in the record it compiled, the court's consideration of evidence outside the agency's "administrative record" is not only warranted, *Esch* v. *Yeutter*, 876 F.2d 976, 991 (D.C.Cir.1989), but necessary to a meaningful judicial review of the agency's action. See *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir.1980) (Agency record may be supplemented when additional information "fully explicate[s] ... [the agency']s course of conduct or grounds of decision.")

The United States Supreme Court has on multiple occasions recognized the need for extra-record evidence and/or testimony of agency officials to explain administrative action. If the record is so sparse that limiting review to the record supplied would frustrate effective judicial review of the agency's decision and thought processes, extra-judicial evidence, including testimony of agency officials, is necessary in order to determine if the agency acted within the scope of its authority and if the agency's action was justifiable under applicable law. *Camp v. Pitts*, 411 U.S. 138, 142–43, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S. Ct. 814, 825, 28 L. Ed. 2d 136 (1971), abrogated by *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

For all the reasons set forth in Plaintiffs' July 9, 2020 Motion, the District Court should have granted the Motion either by requiring the DOT to supplement its certified Administrative Record with the missing items identified by Plaintiffs in their Motion. Further, as the case involves alleged irregularities in procedure before the DOT that are not shown in the certified record, the District Court should have permitted the admission of extra-record evidence to prove the process was arbitrary and capricious.

Since the District Court did not order supplementation of the Administrative Record or the admission of extra-record evidence, Plaintiffs liberally made proffers of evidence at the trial/hearing for Phase I. [See Transcript of Proceedings: JPA Vol. 332:046667-046776]. In closing argument during Phase I, Plaintiffs enunciated the relief they were requesting as follows:

> And we're not asking you to make a decision to enjoin anyone. We're not asking you to award my client a license. We're asking you to look at this administrative record and recognize the problem, the problem being that it does not give adequate information to you or us to conduct any kind of meaningful judicial review. And that the only way to conduct that meaningful judicial review is to remand for further fact-finding and see what the D.O.T. comes up with.
>
> If they match my numbers and they say these were all incomplete and they gave Essence and Thrive and some other people licenses pursuant to that when they shouldn't have, I'm -- I don't know that you would be the ultimate person to decide what to do under those circumstances. I suspect the first person -- or the first people that would look at it and develop the administrative record would be the CCB, and they'd say, okay, we granted these licenses, but we shouldn't have. What do we do now? And then two years from now, all of a sudden there's a

phone call, and we'll be back in Court with you to argue about that one problem.

But -- but that's the remand, and that's the -- the way my client will not be aggrieved and the way that you can -you can make sure that at a minimum this process was in substantial compliance (telephonic interference) compliance with the statutes and the regulation because we know that as the situation stands now and (indiscernible) everybody on this call and everybody who's read your Order knows that everything wasn't done in a fashion that anybody should be proud of.

And now you can -- you can help my client in giving a remedy simply by remanding for further factual findings on this one particular issue dealing with completeness insofar as it encompasses ownership disclosure, the "to be determined" licensing, and the -- or "to be determined" property location, and to do a search on Google to verify that these addresses that were used are not UPS Stores, P.O. boxes and the like. That's at the very, very minimal request.

It does not seem it would take much time for the D.O.T. It would at least let everybody know what would have happened if the -- if the process and the statutes had been followed. And then we'll -- government agencies and Applicants and licensees will have to act accordingly after that remand and the new record is developed, and none of us can say what that way is.

[Transcript at 88-89: JPA Vol. 332 at 046754-046755]

While the District Court failed to provide the above and foregoing relief to Plaintiffs, the request was prescient of the relief granted by the Superior Court of New Jersey Appellate Division in *In re Application for Medicinal Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness*, LLC, 465 N.J. Super. 343 (N.J. Super. 2020), 243 A.3d 688 (Decided Nov. 25, 2020) which bears remarkable similarities to the case sub judice. In that case, the New Jersey Court reviewed the processes and procedures adopted and implemented by the New Jersey Department

of Health in its selection of entities to operate Alternative Treatment Centers to grow, process, and dispense marijuana as part of the State's Medicinal Marijuana Program. The New Jersey Court, like the District Court herein, found numerous process deficiencies in the selection process and summarized as follows:

> In short, all roads lead to the same point: numerous, indisputable anomalies in the scoring of the Appellants' Applications prevent us from having sufficient confidence in the process adopted by the Department or its results for the approval of ATCs in this important industry that provides "beneficial use[s] for ... treating or alleviating the pain or other symptoms associated with" certain medical conditions.
>
> *Id.*

Faced with the same legal and factual concerns as have been found by the District Court in the case at hand, the New Jersey Court imposed the very form of remedy requested by Plaintiffs at Phase I of the trial.

> For all these reasons, we have considerable concerns about the Department's processes and the results produced that – without further agency proceedings and explanation – would leave us to conclude that the decisions in question are arbitrary, capricious and unreasonable. We therefore vacate the final agency decisions in question and remand for further administrative proceedings in conformity with the spirit of this opinion.
>
> *Id.*

Thus, the District Court erred in not considering the extra-record evidence proffered by Plaintiffs and in failing to grant the additional relief sought.

VIII.

CONCLUSION

The phased trial proceedings in this matter revealed, as found by the district court, that the people of this state did not nearly get what they voted for when the DoT proceeded to execute its mission under the ballot initiative. Because there are no equivocations in the district court's factual findings, injunctive relief should have been provided to force the DoT into conformity with the will of the voters. This matter should be remanded to the district court for evaluation and assessment of remedies that are congruent with the defects found in the original licensing process. The refusal to grant relief should be re-visited by the district court with full explanations of the rulings given. Beyond the failure to grant relief, the failure to explain why the relief was not forthcoming is equally an abuse of discretion. Finally, the district court should hear the petition for judicial review anew upon a full record.

Dated this 22nd day of December, 2021.

CLARK HILL PLLC

/s/ Mark S. Dzarnoski, Esq.
Dominic P. Gentile, Esq. (NSBN 1923)
Ross Miller, Esq. (NSBN 8190)
Mark S. Dzarnoski, Esq. (NSBN 3398)
John A. Hunt, Esq. (NSBN 1888)
A. William Maupin (NSBN 1150)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that this opening brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This opening brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman style, and a 14-font size.

I further certify that this opening brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains 13,948 words, starting from the statement of the case.

Finally, I hereby certify that I have read this opening brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

//

//

//

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of December, 2021.

CLARK HILL PLLC

/s/ Mark S. Dzarnoski, Esq.
Dominic P. Gentile, Esq. (NSBN 1923)
Ross Miller, Esq. (NSBN 8190)
Mark S. Dzarnoski, Esq. (NSBN 3398)
John A. Hunt, Esq. (NSBN 1888)
A. William Maupin (NSBN 1150)
3800 Howard Hughes Pkwy, Suite 500
Las Vegas, Nevada 89169
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1(d) on the 22nd day of December, 2021, I did serve at Las Vegas, Nevada a true and correct copy of APPELLANTS' OPENING BRIEF and APPENDIX in 343 volumes, on all parties to this action by Electronic Filing.

/s/Tanya Bain
An employee of Clark Hill PLLC