IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DOT LITIGATION

TGIG, LLC; NEVADA HOLISTIC 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 GREEN LEAF FARMS HOLDINGS LLC,

Appellants,

vs.

THE STATE OF NEVADA DEPARTMENT OF TAXATION,

Respondent.

Case No. 82014

Electronically Filed
Mar 14 2022 04:59 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

THE ESSENCE ENTITIES' MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISDICTIONAL DEFECT

I. INTRODUCTION

Appellants are unsuccessful applicants from the State's 2018 recreational marijuana licensing process. After being denied licenses, Appellants alleged various illegalities in the application process and sued. The Essence Entities[1] are among the group of successful applicants that intervened in the litigation to protect their licenses and to defend against Appellants' spurious accusations.

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[1] Integral Associates, LLC d/b/a Essence Cannabis Dispensaries, Essence Tropicana, LLC, and Essence Henderson, LLC.

Docket 82014 Document 2022-08083

Trial eventually began in July 2020. Through a trial protocol order, the district court divided trial into three phases. The parties have completed the first two trial phases but – two years later – the last phase has not even started. The district court entered interim orders after Phases 1 and 2 that partially denied injunctive relief. But the denial of an injunction in the middle of a phased trial is not appealable. There is no final judgment, and the phased interim orders have not been certified as final under NRCP 54(b). As a result, there is no appealable order; thus, this Court lacks jurisdiction. This appeal should be dismissed.

Alternatively, all appellate deadlines should be stayed until Appellants cure the jurisdictional defect. For unclear reasons, the Essence Entities and the other industry intervenors have not been identified as respondents in this appeal, and they have not been receiving notice of the filings.[2] Once the Essence Entities

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[2] (*See* Jan. 19, 2022 Order) (ordering the Clerk to provide notice only to Lone Mountain Partners, LLC and stating "[i]f Lone Mountain believes it is a proper party to this appeal, it may file a motion to be added as a respondent, explaining why it is a proper respondent.").

To the extent necessary, the Essence Entities ask the Court to construe this motion as an additional request to be added as a respondent so it can pursue this motion. *Cf. Frieder v. Morehead State Univ.*, 770 F.3d 428, 430 (6th Cir. 2014) ("Rule [3(c)] does not require an appellant to list any appellee's name. It tells a prospective appellant only to 'specify the party or parties taking the appeal,' to 'designate the judgment, order, or part thereof being appealed,' and to 'name the court to which the appeal is taken.' The person required to notify the appellees is not the appellant but the district clerk . . . . [T]he 'failure to serve notice does not

became aware of this appeal, they alerted Appellants to the jurisdictional problem and provided them an opportunity to address the defect without a further stay or delay of proceedings. Despite multiple follow up efforts, Appellants have not fixed or cured the jurisdictional defect, and the Essence Entities have no other option but to file this motion.[3] Therefore, this appeal should be dismissed or, alternatively, stayed until Appellants cure the jurisdictional defect.

II. STATEMENT OF RELEVANT FACTS

In July 2020, the district court entered Amended Trial Protocol No. 2 and bifurcated trial into three separate phases. (Ex. 4, at § VIII.) The first phase was to address claims based on petitions for judicial review. (*Id*. § VIII(A).) The second phase was to assess the "[l]egality of the 2018 recreational marijuana application process (claims for Equal Protection, Due Process, Declaratory Relief, Intentional Interference with Prospective Economic Advance, Intentional Interference with Contractual Relations, and Permanent Injunction)." (*Id*. § VIII(B).) And, the third phase was to resolve certain parties' requests for writs of mandamus based on purported "[i]mproper scoring of applications related to calculation errors on the 2018 recreational marijuana application." (*Id*. § VIII(C).) Other disappointed

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affect the validity of the appeal.' [Appellant] complied with Rule 3, and we have jurisdiction over all of the defendants.") (internal citations omitted).

[3] (*See* Exs. 1-3.)

applicants also asserted claims under Section 1983 which – unlike the other phases – are going to be resolved in a later jury trial for damages. (*See* Ex. 5 (Business Court Scheduling Order and Order Setting Civil Jury Trial, Calendar Call and Pre-Trial Conference for Phase III).)

The second phase was conducted first – before Phase 1 for judicial review claims. The "second phase" started on July 17, 2020, and ended August 18, 2020. (Ex. 6.) Ultimately, the district court denied all relief with one exception. The district court determined that the State acted beyond its authority when it adopted a regulatory standard requiring background checks only for prospective owners, officers, and board members with a 5% or greater ownership stake instead of requiring background checks for all owners, officers, and board members regardless of ownership interest. (*Id*. at 29.) The district court narrowly enjoined this regulatory requirement. (*Id*.) The Findings of Fact, Conclusions of Law, and Permanent Injunction was entered September 3, 2020. (*Id*.)

However, the industry intervenors without any owners, officers, or board members with less than a 5% stake – like the Essence Entities – were unaffected by the district court's ruling. All of the Essence Entities' prospective owners, officers, and board members were subject to the State's background check because they had no one with less than a 5% interest. Accordingly, the Essence Entities were not

impacted by the injunction and have been operating their locations since the district court's ruling.

On September 8, 2020, the district court conducted the petition for judicial review phase ("Phase 1"). (Ex. 7.) The district court denied the petitions for judicial review under NRS 233B.130 in their entirety. (*Id*. at 12.) The Findings of Fact and Conclusions of Law was entered September 16, 2020. (*Id*.)

The mandamus claims originally contemplated for the third phase were partially resolved by pretrial motion practice and the affected parties settled with the State during Phase 2 (but conducted first). (*See* Ex. 4, §VIII(C) n.5.) Because those claims have been resolved, the last, third phase will only involve the remaining jury trial for Section 1983 claims. (*See* Ex. 5.)

The third phase has not started, so there has been no final judgment concluding all three phases of the trial. There have been no orders certifying the Phase 1 or Phase 2 interim rulings as final under NRCP 54(b). Consequently, there is no appealable order. In fact, when certain parties filed memoranda of costs after the first two phases, the district court granted motions to retax because "[t]he award of costs is premature under NRS 18.110 as there is not a final judgment in this matter." (Ex. 8.) The district court explained that a "[f]inal judgment will be issued following completion of Phase 3 [then] scheduled for a jury trial on June 28, 2021." (*Id.*). The district court and the parties have always contemplated that a

final judgment will be entered after Phase 3 which will merge the district court's rulings from all prior phases. Without a final judgment, or NRCP 54(b) certification, this Court lacks jurisdiction over this appeal and it should be dismissed or stayed.

III. ARGUMENT

A. There is No Final Appealable Judgment.

Nevada Rule of Appellate Procedure 3A(b) generally sets out the orders and judgments that are appealable. In their respective opening briefs, Appellants cite NRAP 3A(b)(1) and NRAP 3A(b)(3) as the jurisdictional bases for their appeals. NRAP 3A(b)(1) permits an appeal from "a final judgment in an action or proceeding commenced in the court in which the judgment is rendered." This provision embodies the "final judgment rule" that a final judgment is usually required before a party may appeal. *Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 823, 407 P.3d 702, 709 (2017) (citing NRAP 3A(b)(1)).

A judgment is final when it disposes of all issues presented in the litigation and leaves nothing for future consideration except post-judgment matters. *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). There is generally only one final judgment in a case. *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1213, 197 P.3d 1051, 1056 (2008). NRCP 54(b) confirms that any other order or decision that "adjudicates fewer than all the claims

or the rights and liability of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." The final judgment rule is an important part of an efficient judiciary because it inhibits premature appellate interference in trial proceedings, prevents piecemeal or duplicative appeals, minimizes caseloads, and allows appeals to proceed on a complete record. *Archon Corp*., 133 Nev. at 823-24, 407 P.3d at 709.

Here, there has been no final judgment. Only the first two phases of a singular trial have been completed. The third and final phase has not finished (or started), and there are still issues to be resolved. When resolving the motions to retax, the district court expressly stated its intention to enter a final judgment after the third phase. (Ex. 8.) Thus, NRAP 3A(b)(1) does not provide a basis for appellate jurisdiction.

The Findings of Fact, Conclusions of Law, and Permanent Injunction entered after the first two phases are not separately appealable. For example, in *Reno Hilton Resort Corp. v. Verderber*, the district court divided the action into two phases. 121 Nev. 1, 3, 106 P.3d 134, 135 (2005). The first phase considered liability and punitive damages while the second phase would consider individual compensatory damages. After the first phase, the jury found liability and awarded punitive damages. *Id*. Before the second phase, the appellants moved for a new

trial on the first phase ruling but were denied. *Id*. The appellants attempted to appeal from the denial of their motion for a new trial and respondents moved this Court to dismiss for lack of jurisdiction. *Id*.

This Court granted the motion to dismiss. The Court surveyed cases and held that – notwithstanding the apparent language of NRAP 3A(b)(2) – the rule contemplated an appeal from a final judgment, not an intermediate order after one phase that did not resolve all issues. *Id*. at 2-6, 106 P.3d at 135-37; *see also 180 Land Co LLC v. City of Las Vegas*, 2019 WL 1783349, at *1, 439 P.3d 396 (Nev. 2019) (unpublished) (describing *Verderber* as "recognizing that an order entered after the first phase of a bifurcated proceeding is not final, but interlocutory").

Likewise, trial in this matter has been phased, and the orders after the first two phases are not independently appealable absent a final judgment.

B. Appellants Cannot Yet Appeal the Denial of Full Injunctive Relief.

NRAP 3A(b)(3) does not serve as a jurisdictional basis for similar reasons. NRAP 3A(b)(3) allows an appeal from "[a]n order granting or refusing to grant an injunction . . . ." However, case law interpreting analogous appellate provisions holds that this exception to the final judgment rule does not apply when trial has been bifurcated into phases. *See Kuang v. Sawyer*, No. B188747, 2007 WL 2307036, at *1 (Cal. Ct. App. Aug. 14, 2007) (citing cases).

The California courts addressed this issue in *McCarty v. Macy & Co*., 153 Cal. App. 2d 837, 315 P.2d 383 (1957). There, four separate actions seeking to enjoin a nuisance and recover damages were consolidated. *Id. at* 838, 315 P.2d at 384. The parties stipulated to try the equitable injunction issue first and reserved the damages issue for a separate jury trial. *Id*. The trial court denied the injunction, and the appellants appealed under the California Code of Civil Procedure provision that, like NRAP 3A(b)(3), allowed appeals "[f]rom an order … refusing to grant … an injunction." *Id.* at 839, 315 P.2d at 385.

The court dismissed the appeal. It explained "[w]e are convinced that the quoted language [from the provision] does not authorize an appeal under the circumstances shown by the record here, but that it is intended to apply to a preliminary or intermediate order denying or granting an injunction." *Id.* at 840, 315 P.2d at 385. The court disagreed that the provision authorizing an appeal was intended to apply to a denial of an injunction in one phase when a damages phase still remained before final judgment. *Id*. "Until the remaining issue of whether or not appellants are entitled to damages is tried and determined, or is abandoned, there can be no final judgments in the actions, and until final judgments are entered there can be no appeals in the instant cases." *Id*. at 840-41, 315 P.2d at 386.

As in *McCarthy*, Appellants' permanent injunctive relief rights were resolved in the earlier phases of a multiphase trial, but a jury trial phase on

damages remains pending. Like the California provision, NRAP 3A(b)(3) was not designed to allow an interlocutory appeal in these circumstances. It does not allow an immediate appeal in the middle of trial after only two steps of a singular multistep trial process. *See Engle v. City of Oroville*, 238 Cal. App. 2d 266, 269, 47 Cal. Rptr. 630, 632 (Ct. App. 1965) (stating that appeal of injunctive relief after one phase of trial "was dismissed as premature since the issue of damages was still undetermined.").

Thus, neither NRAP 3A(b)(1) nor NRAP 3A(b)(3) confer jurisdiction, and the appeal should be dismissed. Alternatively, all deadlines should be stayed to allow Appellants to pursue NRCP 54(b) certification of the Phase 1 and 2 orders or otherwise remedy this Court's lack of jurisdiction. *See* NRAP 12A(b) (remand after an indicative ruling).

IV. CONCLUSION

For these reasons, the Essence Entities respectfully request that this appeal be dismissed or, alternatively, stayed to cure the jurisdictional defects.

DATED this 14th day of March, 2022.

PISANELLI BICE PLLC

By: */s/ Jordan T. Smith*
Todd L. Bice, Esq., Bar No. 4534
Jordan T. Smith, Esq., Bar No. 12097
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for the Essence Entities

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and pursuant to NRAP 25(b) and NEFR 9(d), that on this 14th day of March, 2022, I electronically filed the foregoing **THE ESSENCE ENTITIES' MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISDICTIONAL DEFECT** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex), Participants in the case who are registered with Eflex as users will be served by the Eflex system as follows

/s/ Kimberly Peets
An employee of Pisanelli Bice PLLC

EXHIBIT 1

From: Amy Sugden
To: Jordan T. Smith
Subject: Re: In re DOT Appeal
Date: Friday, December 17, 2021 2:05:43 PM

CAUTION: This message is from an EXTERNAL SENDER.
Great, thanks.

From: Jordan T. Smith <JTS@pisanellibice.com>
Date: Friday, December 17, 2021 at 2:04 PM
To: Amy Sugden <amy@sugdenlaw.com>, Gentile, Dominic <dgentile@ClarkHill.com>, Hunt, John A. <jhunt@clarkhill.com>, Dzarnoski, Mark <mdzarnoski@clarkhill.com>, Maupin, A. William <awmaupin@clarkhill.com>
Cc: Todd Bice <tlb@pisanellibice.com>, Steven G. Shevorski <SShevorski@ag.nv.gov>
Subject: RE: In re DOT Appeal

Thanks, Amy. That works for me. Talk to you then.

Jordan T. Smith
Partner
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100
fax 702.214.2101

From: Amy Sugden <amy@sugdenlaw.com>
Sent: Friday, December 17, 2021 2:02 PM
To: Jordan T. Smith <JTS@pisanellibice.com>; Gentile, Dominic <dgentile@ClarkHill.com>; Hunt, John A. <jhunt@clarkhill.com>; Dzarnoski, Mark <mdzarnoski@clarkhill.com>; Maupin, A. William <awmaupin@clarkhill.com>
Cc: Todd Bice <tlb@pisanellibice.com>; Steven G. Shevorski <SShevorski@ag.nv.gov>
Subject: Re: In re DOT Appeal

CAUTION: This message is from an EXTERNAL SENDER.
Hi Jordan,

Thanks for the email. Hope all is well with you too.

Let's do a call at 4 p.m. (let me know if that's not possible on your end)

Dial In: 605-313-5682
Access Code: 656490

Amy

From: Jordan T. Smith <JTS@pisanellibice.com>
Date: Friday, December 17, 2021 at 10:24 AM
To: Gentile, Dominic <dgentile@ClarkHill.com>, Hunt, John A. <jhunt@clarkhill.com>, 'Amy@sugdenlaw.com' <'Amy@sugdenlaw.com'>, Dzarnoski, Mark <mdzarnoski@clarkhill.com>, 'sigal@thegoodlawyerlv.com' <'sigal@thegoodlawyerlv.com'>
Cc: Todd Bice <tlb@pisanellibice.com>, Steven G. Shevorski <SShevorski@ag.nv.gov>
Subject: In re DOT Appeal

All,

I hope you've been well. We just learned that appellant's opening brief is due next week. For some reason, we haven't been receiving the electronic filing notices. We intend to file a motion to dismiss the appeal for lack of jurisdiction and we wanted to discuss it with you. We (and the State) are willing to stipulate that your opening brief is not due until that motion is resolved. We don't want you guys to spend more time and effort perhaps unnecessarily.

Are you available today for a quick call? We are also available on Monday.

Thanks,

Jordan T. Smith
Partner
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100
fax 702.214.2101

EXHIBIT 2

From: Dzarnoski, Mark
To: Jordan T. Smith; Todd Bice
Cc: RAISULI1@AOL.COM; Bain, Tanya
Subject: RE: DOT Appeal: Jurisdictional Issue
Date: Tuesday, February 22, 2022 8:57:51 AM

CAUTION: This message is from an EXTERNAL SENDER.
Thank you for the email. I will get this handled by the end of the week.

Mark Dzarnoski
Senior Counsel
Clark Hill LLP
3800 Howard Hughes Parkway, Ste 500, Las Vegas, NV 89169
(702) 697-7506(office) | (702) 862-8400(fax)
mdzarnoski@ClarkHill.com | www.clarkhill.com

From: Jordan T. Smith <JTS@pisanellibice.com>
Sent: Thursday, February 17, 2022 10:58 AM
To: Dzarnoski, Mark <mdzarnoski@ClarkHill.com>; Todd Bice <tlb@pisanellibice.com>
Cc: RAISULI1@AOL.COM; Bain, Tanya <tbain@ClarkHill.com>
Subject: RE: DOT Appeal: Jurisdictional Issue

[External Message]

Mark,

Following up a final time. The deadline for the Respondents' answering briefs is approaching. We'll have to file a motion if the jurisdictional issue isn't sorted out as we discussed on the phone a couple months ago.

Thanks,

Jordan T. Smith
Partner
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100
fax 702.214.2101

From: Jordan T. Smith
Sent: Friday, January 21, 2022 5:16 PM
To: 'Dzarnoski, Mark' <mdzarnoski@ClarkHill.com>; Todd Bice <tlb@pisanellibice.com>
Cc: RAISULI1@AOL.COM; Bain, Tanya <tbain@ClarkHill.com>
Subject: RE: DOT Appeal: Jurisdictional Issue

Mark,

Following up again. We'd like to avoid a motion.

Thanks,

Jordan T. Smith
Partner
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100
fax 702.214.2101

From: Dzarnoski, Mark <mdzarnoski@ClarkHill.com>
Sent: Thursday, January 6, 2022 11:28 AM
To: Jordan T. Smith <JTS@pisanellibice.com>; Todd Bice <tlb@pisanellibice.com>
Cc: RAISULI1@AOL.COM; Bain, Tanya <tbain@ClarkHill.com>
Subject: RE: DOT Appeal: Jurisdictional Issue

CAUTION: This message is from an EXTERNAL SENDER.
I should have an answer early next week. FYI, yesterday, all appellants agreed not to oppose a motion by the DOT to extend deadline for Answering Briefs for 60 days.

Mark Dzarnoski
Senior Counsel
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mdzarnoski@ClarkHill.com | www.clarkhill.com

From: Jordan T. Smith <JTS@pisanellibice.com>
Sent: Thursday, January 6, 2022 11:26 AM
To: Dzarnoski, Mark <mdzarnoski@ClarkHill.com>; Todd Bice <tlb@pisanellibice.com>
Cc: RAISULI1@AOL.COM; Bain, Tanya <tbain@ClarkHill.com>
Subject: RE: DOT Appeal: Jurisdictional Issue

[External Message]

Mark,

What's your plan to address the jurisdictional issue? The clock is running on our answering briefs.

Thanks,

Jordan T. Smith
Partner
Pisanelli Bice PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101
tel 702.214.2100
fax 702.214.2101

From: Dzarnoski, Mark <mdzarnoski@ClarkHill.com>
Sent: Tuesday, December 21, 2021 4:33 PM
To: Jordan T. Smith <JTS@pisanellibice.com>; Todd Bice <tlb@pisanellibice.com>
Cc: RAISULI1@AOL.COM; Bain, Tanya <tbain@ClarkHill.com>
Subject: RE: DOT Appeal: Jurisdictional Issue

CAUTION: This message is from an EXTERNAL SENDER.
I'll check on those tomorrow. We weren't talking about them but they might just work. Thanks.

Mark Dzarnoski
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From: Jordan T. Smith <JTS@pisanellibice.com>
Sent: Tuesday, December 21, 2021 2:51 PM
To: Dzarnoski, Mark <mdzarnoski@ClarkHill.com>; Todd Bice <tlb@pisanellibice.com>
Cc: RAISULI1@AOL.COM; Bain, Tanya <tbain@ClarkHill.com>
Subject: RE: DOT Appeal: Jurisdictional Issue

[External Message]

Mark,

Perhaps I misunderstood but I thought you were talking about the November 2020 orders denying the motions to retax where Judge Gonzalez noted the lack of finality. I've only seen a minute order on those motions but I could be overlooking it.

Jordan T. Smith
Partner
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tel 702.214.2100
fax 702.214.2101

From: Dzarnoski, Mark <mdzarnoski@ClarkHill.com>
Sent: Tuesday, December 21, 2021 1:40 PM
To: Jordan T. Smith <JTS@pisanellibice.com>; Todd Bice <tlb@pisanellibice.com>
Cc: RAISULI1@AOL.COM; Bain, Tanya <tbain@ClarkHill.com>
Subject: DOT Appeal: Jurisdictional Issue

CAUTION: This message is from an EXTERNAL SENDER.
In finishing up the Opening Brief, I have found that a written order denying our Motion to Amend FFCL was entered. Somehow, this order was "lost" to us in the record but is now "found." In our discussion, that was the vehicle we planned on using to resolve the

jurisdictional issue. I.e. we would submit a written order which included the 54(b) certification. That vehicle no longer exists.

We now believe that we will have to proceed either by Motion for Certification or by Stipulation. Please let me know if you want to make the effort of obtaining unanimous support for a Stipulation from your "group." If not or if you can't get agreement, we will prepare and submit a Motion.

Best Regards,

Mark Dzarnoski
Senior Counsel
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(702) 697-7506(office) | (702) 862-8400(fax)
mdzarnoski@ClarkHill.com | www.clarkhill.com

EXHIBIT 3

From:	Dzarnoski, Mark
To:	Jordan T. Smith
Cc:	Bain, Tanya; RAISULI1@AOL.COM
Subject:	DOT Appeal: Jurisdictional Issue
Date:	Friday, February 25, 2022 3:04:15 PM
Attachments:	Order Granting Motions to Re-Tax.pdf

CAUTION: This message is from an EXTERNAL SENDER.
JORDAN:

Each time I think I have a resolution for the jurisdictional issue, I find something new. Please see attached which is a written order on the Motions to Retax which neither of us remembered.

I now think that the only avenue to address the disparate views on the final order issue is a Motion for 54(b) certification on order shortening time. However, I want to highlight that our jurisdictional statement in our Opening Brief cites two basis for jurisdiction as follows: (1) NRAP 3A(b)(1) final order or judgment and (2) NRAP 3A(b)(3) order granting or refusing to grant an injunction. Even if we are wrong that a final appealable order exists pursuant to 3A(b)(1), appellate jurisdiction would still exist pursuant to 3A(b)(3).

I need to readjust my focus to the 54(b) motion and should have it in draft form for you by close of business Monday. I thought I would have something to you today but the route I was following has led me to a dead end.

Best Regards,
Mark Dzarnoski
Senior Counsel
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(702) 697-7506(office) | (702) 862-8400(fax)
mdzarnoski@ClarkHill.com | www.clarkhill.com

EXHIBIT 4

Electronically Filed
7/2/2020 11:27 AM
Steven D. Grierson
CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

In Re: D.O.T. Litigation,	**Case No.** : A-19-787004-B **Dept. No.**: XI **CONSOLIDATED WITH:** A-785818 A-786357 A-786962 A-787035 A-787540 A-787726 A-801416 **AMENDED TRIAL PROTOCOL NO. 2** Trial Date: July 13, 2020

The Court having met with counsel for the parties, and after consideration of the proposal for Trial Protocol submitted by the parties, the written status reports provided by counsel, the issues posed by the current public health emergency and hearing comments of counsel, the Court adopts the following as its amended trial protocol:

I. COURTROOM ETIQUETTE

A. Pursuant to Administrative Order No. 06-05, this Court permits counsel and their staff to use wireless communications; however, such devices shall be placed away from recording devices and microphones and must be turned off or placed on airplane mode to ensure that no sounds are emitted from the device that may interrupt the proceedings. If the Court determines a particular device is interfering with the sound and/or recording equipment, the Court may order all electronic devices turned off.

B. The Court expects counsel to be punctual for all proceedings.

C. Counsel will be civil to one another as well as to all parties, witnesses, and court personnel at all times. Do not interrupt.

Case Number: A-19-787004-B

D. Opposing counsel should not engage in extended conversations with each other when court is in session. The Court will allow counsel to have a private conversation if it is requested and efficient. Counsel should never argue with either opposing counsel or the Court.

E. Counsel will stand when addressing the Court or when examining witnesses. Counsel must stand near a microphone and may not crowd the witness.

F. Counsel may approach a witness with the permission of the Court. If counsel needs to approach the witness many times, the Court may instruct the attorney that he or she need not continue to ask. Nonetheless, once the attorney has accomplished his or her reason for approaching the witness (however many times), he or she should return to the place from which he or she is questioning.

G. The Court does not permit speaking objections. Counsel should give the basis for the objection in a word or phrase (e.g., "hearsay").

H. Counsel must state every objection for the record. Counsel may join an objection for purposes of the record. The Court does not permit continuing objections.

I. Counsel has the responsibility to advise their witnesses to comply with any orders granting motions in limine.

J. Counsel should advise all witnesses that they are not to begin any answer until the question has been completed. Department XI does not require counsel to use Court Call for telephonic appearances. Counsel must contact the Department one (1) day prior to the hearing to setup the telephonic appearance. If multiple counsel elect to appear telephonically, counsel shall set up a conference call number for use by all participating counsel

K. Counsel may appear by alternate means upon request.

L. All counsel will comply with Administrative Order 20-17 related to face coverings and social distancing. Screening requirements by marshal(s) will be posted and enforced. Given the large number of participants, this proceeding will be conducted off-site in a location provided by the Court that allows compliance with social distancing requirements and provides only those amenities which are identified as Court critical for conduct of the proceedings.

M. Given the suspension of proceedings referenced in Administrative order 20-17 and its

predecessors, many of the items referenced to be completed under the original trial protocol were near completion. As a result the Court has compressed the final deadlines for the completion of those items.

II. PRETRIAL MOTIONS

COMPLETED

III. EXHIBITS

A. The Parties shall prepare a joint list of exhibits, based upon the exhibits used during any depositions and documents properly disclosed during discovery, which will be pre-marked with an identification number in the range of 1-999. The Parties will create a joint list of potential trial exhibits that may later be offered for admission at trial and create an electronic storage device for each party and the Court containing these exhibits. The proposed trial exhibit list will mirror the numbering of the deposition exhibits and any withdrawn deposition exhibit will have at the corresponding number a reference to either "reserved" or "withdrawn." Prior to providing such trial exhibits to the Court, the Parties will meet and identify exhibits that can be withdrawn or are duplicates. If all Parties agree a deposition exhibit can be eliminated, it will be removed from the preliminary trial exhibit list. If any party does not agree to eliminate a deposition exhibit, it will be marked as a proposed trial exhibit.

B. For non-joint exhibits, the Parties will utilize the range of exhibit numbers assigned to each party for identification of the exhibits. Each exhibit shall also bear the production number of the document or item that was used during discovery to ensure that it is a properly, previously produced document or other identifier that can be appropriately cross-referenced by the Parties. If during the course of discovery a document was produced with an alphanumeric designation, the discovery alphanumeric designation will be included on the exhibit list. If a party intends to use a document as an exhibit at trial that was not given an alphanumeric designation (that all Parties were previously provided access to), and was not utilized as an exhibit to a Court filing, the designating party must identify the document in a manner that enables other parties to verify the prior production and/or disclosure of the document and to locate such document.

C. The numbering system shall differentiate between evidentiary trial exhibits and

illustrative aids/demonstrative exhibits, with the illustrative aids/demonstrative exhibit identification number containing the letter D preceding the identification number.

D. All exhibits shall be listed on a form used by Department XI to record such evidence attached hereto as Exhibit "1."

E. After numbering the joint exhibits, non-joint trial exhibit number ranges will be utilized by each side (ranges of 1,000 exhibits to each side). The numbering convention to be used for trial exhibits will be strictly numeric. Each side shall designate a representative to eliminate duplicate exhibits for the Plaintiffs and the Defendants, respectively. Each side is assigned a range of exhibit numbers for their own exhibits.

1. Joint Proposed Exhibits (including deposition exhibits) 1-999

2. Proposed Non-Joint Exhibit Ranges for Each Side:

a) Plaintiffs 1,000-1,999.

b) Defendants 2,000-2,999.

If any additional party indicates an intention to participate in the trial by filing and serving a notice with a courtesy copy delivered to the Court before the final pretrial conference on July 10, 2020, the Court will make a determination as to additional ranges of exhibit numbers.

F. Each party must make its pre-trial disclosures under NRCP 16.1(a)(3) on or before June 26, 2020. Each party's pre-trial disclosure must contain a list of their own proposed trial exhibits in Excel format (including columns with the bates number, date, description, will call, and may call) that can be integrated into a single Joint Exhibit List, and providing a complete set of the exhibits to all the other Parties on an electronic storage device.

G. Each party will designate a paralegal and/or attorney to work together to coordinate with the vendor on the production of the deposition exhibits and discovery documents to trial exhibits, coordinate in the preparation of the Joint Trial Exhibit List, and ensure the Parties are complying with the Court's requirements for marking exhibits for trial. The Parties' representative(s) should be designated by June 29, 2020 so they can begin discussing Court's requirements for marking exhibits and the Joint Exhibit List, and pricing and logistics with the vendor. The Parties' Joint Exhibit List shall be finalized on or before July 2, 2020.

H. Given Administrative Order 20-17, the electronic exhibit protocol attached as Exhibit "2" will be utilized by the parties.

I. All received exhibits shall be stored in the custody of the Court. Charts, summaries or calculations sought to be admitted into evidence under NRS 52.275, along with the originals of the voluminous documents or electronic information, shall be made available to other Parties at the calendar call prior to trial, or, if created during the course of trial, at least one (1) days prior to offering or using said chart, summary or calculation.

J. Enlargements of any exhibits sought to be used at trial, shall be handled in the same manner as other exhibits. Any exhibit may be enlarged and utilized in a hard format if desired by a Party but must contain the proposed trial exhibit number for reference.

K. The proposed electronic exhibits shall be submitted in portable document format (.PDF).

L. Objections to each party's proposed pre-trial exhibits will be served pursuant to NRCP 16.1(a)(3)(B) on or before July 1, 2020 to facilitate the creation of the Joint Exhibit List. Counsel will be familiar with the basis for any objection made pursuant to NRCP 16.1(a)(3)(B) and shall address the objections at the final pretrial conference. Objections not disclosed in accordance with NRCP 16.1(a)(3), other than objections under NRS 48.025 and 48.035, shall be deemed waived unless excused by the court for good cause shown.

M. All exhibits proposed for use in trial will be cross referenced to exhibits sought to be introduced by all other parties and sides. Counsel shall eliminate duplicative exhibits.

N. All documents the Parties anticipate using at trial, but for rebuttal documents, impeachment documents, and documents related to unanticipated issues, will be disclosed prior to the start of trial. Documents that are not identified in pre-trial disclosures will be handled on a case by case basis with the understanding that a party seeking to use any document that was not identified in pre-trial disclosures must show good cause.

O. Certain documents and material, which the Parties shall have need to use and present to the Court, have been produced in this Action pursuant to the Confidentiality Agreement and Protective Order filed on December 20, 2019. Parties shall consult to redact, if appropriate, trial

exhibits previously designated as confidential during discovery.

IV. FINAL PRETRIAL CONFERENCE

A. Pursuant to EDCR 2.67(a) counsel shall meet and discuss all issues required by the rule on or before July 9, 2020.

B. In accordance with NRCP 16.1(a)(3)(B)(i), the parties shall designate their trial witnesses on or before July 2, 2020.

C. Designations of Depositions to be Used in Lieu of Live Testimony

1. The Parties are discouraged from reading depositions at trial unless absolutely necessary.

2. The Parties anticipate a number of depositions or prior testimony from the preliminary injunction hearing will be utilized at trial in lieu of live testimony due to the unavailability of the witness or for any other permitted reason under NRCP 32. In accordance with NRCP 16.1(a)(3)(A)(ii), the Parties will identify testimony to be provided via deposition or transcript and provide initial transcript designations on or before June 29, 2020. Any party wishing to make a counter-designation will do so on or before July 2, 2020. Any rebuttal deposition designations are to be made on or before July 6, 2020. Objections to any deposition designation, counter-designation, or rebuttal designation will be made on July 8, 2020.

3. The Court will rule on any objections to the designations at the Final Pretrial Conference.

4. The Parties recognize that there may be a need to alter and/or amend depositions designations based on testimony provided during trial. Accordingly, any changes to deposition designations must be provided to the Parties and the Court no less than one (1) judicial day before the deposition testimony is intended to be presented at trial unless good cause is shown for the failure to do so. This procedure does not alter or change evidentiary limitations.

5. Any video deposition to be shown to the Court shall be edited to streamline the presentation of evidence. The Parties can present excerpts in the order approved by the Court at the Final Pretrial Conference. All portions of a video deposition used in lieu of live testimony presented during a certain phase will be shown together.

6. For impeachment or rebuttal purposes, advance notice of the portions of the deposition depicting inconsistent testimony is not required. Proposals for the presentation of deposition transcripts are still subject to evidentiary limitations.

7. To avoid delays during trial, counsel will notify the clerk of any depositions anticipated to be used prior to the start of the day's proceedings. Failure of counsel to do so may result in the Court refusing to permit counsel to utilize a particular deposition.

D. Proposed Findings of Fact and Conclusions of Law

1. At the commencement of each phase, counsel will file proposed findings of fact and conclusions of law pertaining to that portion of the trial.

2. A copy of the proposed findings of fact and conclusions of law will be emailed to the Court in Word format at the time of filing.

E. Pursuant to EDCR 2.67(b), on or before 4:00 p.m. on July 9, 2020, counsel shall submit a joint pretrial memorandum executed by all counsel including all issues required by the rule.

F. Final Pretrial Conference

1. The Court will conduct the final pretrial conference on July 10, 2020 at 9 a.m.

2. Counsel are required to bring all items identified in EDCR 2.69(a) to the final pretrial conference and exchange all items identified in EDCR 2.69(a) by July 8, 2020.

3. Exhibits will be pre-admitted to the extent practicable at the Final Pretrial Conference. All documentary exhibits will be presented in electronic format in accordance with Exhibit "1". Photographic evidence may be presented in hard copy form but must also be submitted in electronic format. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits.

4. Any planned demonstrative exhibits including data summaries, compilations or exemplars anticipated to be used must be disclosed prior to the final Pre-Trial Conference. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to individual proposed exhibits. Any additional demonstrative exhibits that arise during trial shall be disclosed to all parties at least 24 hours in advance.

5. Any Power Point or computer animation anticipated to be used during the

presentation of evidence to illustrate a witness's testimony must be disclosed two (2) days prior to the Final Pretrial Conference. At the time of the Final Pretrial Conference, the Court will rule on any objections to the Power Point or computer animation. An electronic version of the Power Point or computer animation must be presented to the Court at that time.

6. Unless impracticable to present evidence electronically, the Parties are required to use trial presentation software to electronically and simultaneously display evidence to everyone in the courtroom. The Parties will also be allowed to utilize traditional paper form presentation of evidence as long as the other provisions are satisfied, i.e., the paper form presentation of evidence has already been submitted electronically to the Court and other Parties, the hard copy bears the same identifiers as the electronic copy, and hard copy documents of such presentations are made available to the other Parties.

7. The Parties may hire an operator to provide, and upon the request of a party to operate, the trial presentation software to avoid the complications of different systems, different switching systems, and delays in presentation. All exhibits will be on one computer system with traditional designations of potential exhibits and admitted exhibits. Each party is required to use the software selected. A Party may contract with the provider for a person to operate the system during trial or may take on the responsibility of hiring and training a person to operate the system for that party during trial. Parties shall insure that non-admitted exhibits are blocked from viewing by the Court until the Court directs the non-admitted exhibit to be disclosed for the Court's view.

8. Prior to the commencement of each phase, the Court will rule on any objections to the deposition designations, counter-designations and editing of video deposition to be used in lieu of live testimony. Any use of depositions will require publication of the original transcript prior to reading or playing portions of the deposition.

V. TRIAL SCHEDULE

A. Days and Hours

1. All trial participants shall be punctual and prepared to proceed on schedule. To minimize interruptions, attorneys may be permitted to enter and leave the courtroom discreetly during the proceedings.

2. Court sessions will be held from 8:30 a.m. to 5:00 p.m., with a morning break, a lunch recess, and an afternoon break, Monday through Friday, unless there is a recognized judicial holiday as set forth below. If an issue arises that must be addressed prior to the commencement of the next day of trial, counsel will notify all parties. Counsel will report at 8:00 a.m. to resolve any issues that need to be addressed before the presentation of evidence and testimony.

3. The Court will recess on the following dates:

a) August 13-14, 2020.

b) September 7, 2020.

B. Weekly Conferences During Trial

1. To expedite the trial, it is advisable to devote the entire trial day to the uninterrupted presentation of evidence. To the extent possible, objections (other than to a question asked a witness), motions, and other matters that may interrupt the presentation of evidence, should be raised at a time set aside by the Court. To the extent possible, objections, motions and other matters that must be raised during the presentation of evidence shall be stated briefly.

2. Any issues to be addressed will be addressed on Friday sessions at 8:00 a.m. The Court will permit counsel to communicate to the Court to plan the week's proceedings and fix the order of witnesses and exhibits, avoiding surprises and ensuring that the Parties will not run out of witnesses. These Weekly Conferences will also be utilized to hear written motions, to resolve other issues and the Court may hear offers of proof and arguments accordingly in order to resolve the same.

VI. CONDUCT OF TRIAL

The trial will be conducted in Phases as defined by the Court. This Order will apply to each individual phase.

A. The use of trial briefs in this matter will be governed by EDCR Rule 7.27.

B. Opening Statements

1. Opening Statements, if any, shall commence on the first day of each phase.

2. The group of parties seeking affirmative relief in that phase shall be time

limited in Opening Statement to a total of three (3) hours. These parties shall agree among themselves on the split of the time. If no agreement is reached the Court will allocate the time among the group. No more than one attorney may address the Court during Opening Statement for each party or similarly represented group of parties.[1]

3. The group of parties participating in a phase not seeking affirmative relief in that phase shall be time limited in Opening Statement to a total of three (3) hours. These parties shall agree among themselves on the split of the time. If no agreement is reached the Court will allocate the time among the group. No more than one attorney per party group represented by a single team of counsel may address the Court during Opening Statement.

4. The Parties shall be allowed to deliver their Opening Statements in the order of the presentation of the Parties' cases.

5. During Opening Statements, the Parties will be permitted to utilize charts and other demonstrative aids not then in evidence; however, any such Power Points, charts or aids shall be provided to opposing counsel at least one (1) judicial day prior to commencement of the corresponding phase in order to allow any party to file any objection it may have to the same.

C. Presentation of Evidence

1. The Court, counsel and the witness shall be permitted to view a displayed non-admitted exhibit prior to its formal admission.

2. Counsel shall advise the clerk prior to the commencement of the trial day of any deposition transcripts anticipated to be used for publication.

3. Parties are encouraged to use trial aids such as glossaries, indexes, time lines, graphics, charts, diagrams, and computer animations to permit the Court a better opportunity to understand the evidence. To the extent practicable, the Parties shall endeavor to prepare joint exhibits for glossaries, indexes, and time lines. Any trial aids will be submitted to the Court electronically.

4. Each party shall electronically exchange lists of expected witnesses

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[1] The Court has modified and lengthened the trial week to accommodate the needs of completing this matter in the time frames permitted for use of the offsite location.

(including any depositions to be used in lieu of live testimony) who will be called to testify on one (1) day notice. This list shall estimate the length of direct examination for each witness. Any objections shall be made within one (1) judicial day of service of the disclosure. For impeachment or rebuttal purposes, advance notice of the portions of the deposition depicting inconsistent testimony is not required.

5. Counsel shall give one (1) week notice of their intent to call an adverse party or its employees to testify. If a party will not make an employee available to testify and that employee is beyond the Court's subpoena power, any party may offer that witness's deposition for any purpose, unless it appears that the absence of the witness was procured by the party offering the deposition. Use of any such deposition is subject to the disclosure requirements and any evidentiary limitations.

6. No more than one attorney per party group represented by a single team of counsel may examine a witness or make objection during the examination of the witness.

7. If, for any reason, a break in the proceedings of any phase of more than a week occurs, counsel for the Parties may make an interim statement to the Court prior to the resumption of the presentation of evidence. No more than one attorney per party may make an interim statement. Such interim statement may only be used to explain or summarize evidence and testimony already presented to the Court during that phase.

D. Closing Arguments

1. Counsel should be prepared to begin closing arguments immediately following the close of all evidence in the phase.

2. During Closing Arguments, the Parties will be permitted to utilize Power Point, charts and other demonstrative aids; however, any such charts or aids shall be provided to opposing counsel at least one (1) judicial days prior to Closing Argument in order to allow any party to file any objection it may have to the same. An electronic copy of the Power Point, charts and other demonstrative aids must be provided to the Court.

3. The group of parties seeking affirmative relief in that phase shall be time limited in Closing Statement to a total of six (6) hours. These parties shall agree among themselves

on the split of the time. If no agreement is reached the Court will allocate the time among the group.

4. The group of parties participating in a phase not seeking affirmative relief in that phase shall be time limited in Opening Statement to a total of six (6) hours. These parties shall agree among themselves on the split of the time. If no agreement is reached the Court will allocate the time among the group. No more than one attorney per party group represented by a single team of counsel may address the Court during Closing Argument.

5. Each party with affirmative claims, will have two opportunities to address the Court in closing arguments. Different attorneys may argue the first and second closing arguments for each per party group represented by a single team of counsel. The total time will not be increased.

VII. TRANSCRIPTS AND COURT REPORTING

A. The Parties agree to utilize the Court's JAVs Court Recording System which will be the official record.

B. The Parties agree to equally split the cost of expedited daily transcripts from the Official Court Recorder. Each party shall either commit or decline to receive expedited daily transcripts at the beginning of each Phase of the trial, and costs will be split equally among the Parties that choose to receive the expedited transcripts.

C. Additionally, to facilitate the ability of the Parties to view questions, objections and testimony, the Parties agree to have the proceedings reported on a real-time basis at their own expense. Each party shall either commit or decline access to real-time court reporting at the beginning of each Phase of the trial, and costs will be split equally among the Parties that choose to have real-time access.

D. Should the Parties desire to have real time reporting during any phase of the trial, the parties are required to make their own arrangements with the real time court reporters. The details of any arrangements shall also be provided to the Official Court Recorder, at 702-671-4374. Each party will need to provide its own monitor, device or other equipment for real time reporting viewing.

VIII. PHASES

The trial will be conducted in a series of phases presented to the same judge. The phases shall proceed seriatim, in the order set forth herein. Each phase may begin with an opening statement restricted to the issues to be litigated in that phase and may end with a closing statement. If all issues related to a particular phase have been resolved, the parties will proceed to the next phase with remaining issues.

A. First Phase – Petition for Judicial Review[2]

1. Unless otherwise resolved on the briefing outlined above in Section II, the DH Flamingo Plaintiffs, Serenity Wellness Plaintiffs, ETW Plaintiffs, Nevada Wellness Center, LLC, MM Development Company, Inc., Livfree Wellness LLC and Compassionate Team of Las Vegas, LLC and any other Plaintiffs with such claims will present their affirmative claims related to their claims for Petition for Judicial Review.

a) The Plaintiffs will have one (1) day to present oral arguments based upon the administrative record, unless good cause is shown to extend the time.

b) The administrative record shall be filed by the DOT and include, with appropriate redactions, if necessary, of all records related to the applications and DOT's granting or denial of applications.

2. The DOT and Defendants will present their defenses and affirmative claims, if any, related to the Plaintiffs' claims for petition for judicial review.

a) The DOT and Defendants will have one (1) day to present arguments based on the administrative record against the petitions for judicial review, unless good cause is shown to extend the time.

3. The Plaintiffs will present their rebuttal on their affirmative claims.

a) The Plaintiffs will have one day (1) to present oral arguments based on the administrative record in rebuttal on its claims for judicial

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[2] This phase will follow the presentation of Phase 2.

review, unless good cause is shown to extend the time.

4. The Court will deliberate, review the evidence, and render a decision on the claims raised in the First Phase.

B. Second Phase[3] – Legality of the 2018 recreational marijuana application process (claims for Equal Protection, Due Process, Declaratory Relief, Intentional Interference with Prospective Economic Advantage, Intentional Interference with Contractual Relations, and Permanent Injunction)[4]

1. The Serenity Wellness Plaintiffs, ETW Plaintiffs, Nevada Wellness Center, LLC, Qualcan, LLC and Compassionate Team of Las Vegas, LLC and any other Plaintiffs with such claims will present their affirmative claims related to legality of 2018 recreational marijuana application process, including their claims for equal protection, due process, declaratory relief, and permanent injunction.

a) The Plaintiffs will have four (4) weeks to present testimony and evidence on their affirmative claims, unless good cause is shown to extend the time.

2. The DOT and Defendants will present their defenses and affirmative claims, if any, related to the claims by the plaintiffs.

a) The DOT and Defendants will have four (4) weeks to present testimony and evidence their defenses and affirmative claims, if any, unless good cause is shown to extend the time.

3. The Plaintiffs will present their rebuttal on their affirmative claims.

a) The Plaintiffs will have one (1) week to present testimony and evidence in rebuttal on its affirmative claims, unless good cause is shown to extend the time.

4. The Court will deliberate, review the evidence, and render a decision on the

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[3] This phase will begin on July 13, 2020.

[4] Given the modification to the trial week, the Court has adjusted the time permitted to accommodate use of the offsite facility.

claims raised in the Second Phase.

C. Third Phase[5] – Writ of mandamus (Improper scoring of applications related to calculation errors on the 2018 recreational marijuana application).

1. MM Development Company, Inc. and Livfree Wellness LLC and any other Plaintiffs with mandamus claims will present their affirmative claims related to their writ of mandamus claim based on the allegation of improper scoring of their applications due to calculation errors.

a) The Plaintiffs will have three (3) days to present testimony and evidence their affirmative claims, unless good cause is shown to extend the time.

2. The DOT and Defendants will present their defense and affirmative claims, if any, related to the claims by the MM Development Company, Inc. and Livfree Wellness LLC.

a) The DOT and Defendants will have one (1) day to present testimony and evidence its defenses and affirmative claims, if any, unless good cause is shown to extend the time.

3. The Plaintiffs will present their rebuttal on their affirmative claims.

a) The Plaintiffs will have one (1) day to present testimony and evidence in rebuttal on its affirmative claims, unless good cause is shown to extend the time.

4. The Court will deliberate, review the evidence, and render a decision on the claims raised in the Third Phase.

D. Duplication of Testimony

In order to avoid duplication of testimony, if any party desires to use testimony from any phase in a subsequent phase, the party shall inform all parties and the Court of the testimony to be offered via transcript, cite the portions of the transcript to be used, and provide all parties and the Court a copy of the portions of transcript to be used at least three (3) judicial days before the

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[5] This phase has been partially resolved by motion practice. Any remaining issues will be presented following Phase 1.

beginning of the phase in which the testimony will be used in lieu of live testimony.

IX. MISCELLANEOUS ISSUES

The Court may amend this Order upon good cause shown. Any party, upon application to the Court and a showing of good cause, may seek relief from the Court from any provision of this Order.

Dated this 2nd day of July, 2020.

Elizabeth Gonzalez, District Court Judge

Certificate of Service

I hereby certify that on the date filed, this Order was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program.

Jill Hawkins

EXHIBIT 1

Exhibit List

CASE NO:

DEPT NO:

TRIAL DATE:

JUDGE:
CLERK:
REPORTER:
JURY FEES:
COUNSEL FOR PLAINTIFF:

PLAINTIFF

COUNSEL FOR DEFENDANT:

DEFENDANT

Exhibit Number	Identif. of Device or Traditional (put √)	Description of Exhibit	Alphanumeric Designation on Exh.	Stipulated Yes / No	Date Offered	Objection	Date Admitted

EXHIBIT 2

Proposed Administrative Order Regarding Electronic Exhibits for Trial

1. Whenever a party determines and the Court orders that the submission of documentary and/or photographic evidence will be made in electronic format in a particular case, the submission of the proposed exhibits will be made pursuant to this order.

2. The proposed electronic exhibits shall be submitted in portable document format (.PDF).

3. Photographs must have at least a 1 inch border at the top of the page for the clerk to be able to affix the indicator documenting the admission of the photo. If the court deems the quality of the photograph is not of sufficient quality for demonstrative purposes, the photo shall be re-submitted in traditional format.

4. Prior to trial each party will be assigned a range of exhibit numbers for use in naming exhibits. The file name for each proposed electronic exhibit shall be numerical, i.e. 1047.pdf. Each page within the proposed exhibit will be internally and sequentially numbered beginning with the trial exhibit number and the page number will be placed on each page of the proposed electronic exhibit in the lower right hand corner in the following format "1047-001". No letters will be used as exhibit numbers for identifying proposed electronic exhibits.

5. The proposed electronic exhibits shall be submitted on a single electronic storage device, except when the integrity of the proposed electronic exhibit would be corrupted by being on a single electronic storage device or the volume of the proposed electronic exhibit(s) cannot practically be stored on a single electronic storage device. The electronic storage device must have space available for additional storage of electronic data in at least an amount equal to the storage required for the proposed electronic exhibit(s). External hard drives must have a minimum read speed of 33 MBps and minimum write speed of 25 MBps.

6. An exhibit list in substantially the same form as the attachment hereto shall be provided in paper form as well as electronic in Excel format. The electronic (Excel) version of the exhibit list is to be named "Exhibit List" and is to be located on the master electronic storage device only. The font size shall be 12 and the font style to be used is Times New Roman. The list must include the following information in tabular format for each proposed electronic exhibit (please note that traditional "physical"evidence is not to be listed on the electronic exhibit list and should be submitted on a separate exhibit list):

    a. The exhibit number for the proposed electronic exhibit consistent with paragraph 4 above
    b. The identification of the electronic storage device on which the proposed exhibit is stored or a space for the clerk to make notation in the event the Exhibit was submitted in traditional form
    c. A description of the proposed electronic exhibit
    d. Any numeric or alphanumeric designation used on the proposed electronic exhibit during discovery or other pretrial proceedings

draft for discussion purposes only

e. Whether a stipulation to the admission of the proposed electronic exhibit exists
f. A space for the clerk to make notation on the date the proposed electronic exhibits is offered
g. A space for the clerk to make notation on objections made to the proposed electronic exhibits at the time it is offered for admission
h. A space for the clerk to make notation on the admission of the proposed electronic exhibits

7. Absent good cause shown, no exhibits not included in the proffered electronic storage device will be accepted electronically.

8. The proposed electronic exhibit shall exactly match the admitted electronic exhibit. Any change between the proposed electronic exhibit and the admitted electronic exhibit will require the submission of the exhibit as a supplemental proposed electronic exhibit by offering counsel with a new proposed exhibit number in conformance with paragraph 4.

9. The party offering the proposed electronic exhibits shall provide the clerk with two identical sets of the proposed electronic exhibits on separate electronic storage devices. In the event of a jury trial, an additional blank electronic storage device will be required to copy all of the admitted electronic exhibits onto for use by the jury (see paragraph 12). The clerk will maintain one of the electronic storage devices as a master without modification.

10. Prior to the clerk admitting the electronic storage devices, the clerk will perform a virus check on each device in the presence of counsel or their designee.

11. Following admission of a proposed electronic exhibit, the clerk will electronically move the admitted electronic exhibit to a subfolder for all admitted exhibits wherein the clerk will electronically affix an indicator documenting the admission of the proposed electronic exhibit in the case and identifying the case number and date of admission. The admitted electronic exhibit will be protected from any additional attempts to modify the admitted electronic exhibit.

12. Prior to the commencement of deliberations by a jury, if the trial is a jury trial, the party proffering the electronic exhibits will provide a laptop computer and additional monitor with only an operating system and associated programs, an adobe program to permit viewing of the admitted exhibits, and no internet or other research capability. The laptop will be subject to inspection by Court I.T. staff and counsel for compliance prior to it being provided to the deliberating jury.

13. Upon completion of the trial, the clerk will transmit the electronic storage device to the vault for retention in accordance with Part XI of the Supreme Court Rules.

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EXHIBIT 5

Electronically Filed
10/27/2020 6:17 AM
Steven D. Grierson
CLERK OF THE COURT

SCHTO

DISTRICT COURT
CLARK COUNTY, NEVADA

In Re: D.O.T. Litigation, (Phase III)	**Case No.** A-19-787004-B **Consolidated with:** A-18-785818-W A-18-786357-W A-19-786962-B A-19-787035-C A-19-787540-W A-19-787726-C A-19-801416-B **Dept. No.** XI **Date of Hearing:** 10/26/20 **Time of Hearing:** 9:00a.m.

BUSINESS COURT SCHEDULING ORDER and ORDER SETTING CIVIL JURY TRIAL, CALENDAR CALL and PRE-TRIAL CONFERENCE

This **BUSINESS COURT SCHEDULING ORDER AND TRIAL SETTING ORDER** is entered following the Mandatory Rule 16 Conference conducted on 10/26/20. Pursuant to NRCP 16.1(f) this case has been deemed complex and all discovery disputes will be resolved by this Court. The filing of the JCCR has been waived. This Order may be amended or modified by the Court upon good cause shown.

IT IS HEREBY ORDERED that the parties will comply with the following deadlines:

Supplemental Initial Experts Disclosures	**01/22/21**
Rebuttal Experts Disclosures	**02/26/21**
Discovery Cut Off	**04/09/21**
Dispositive Motions and Motions in Limine are to be filed by ***Omnibus Motions in Limine are not allowed***	**05/07/21**

ORDER SETTING CIVIL JURY TRIAL, CALENDAR CALL and PRE-TRIAL

IT IS HEREBY FURTHER ORDERED THAT:

A. The above entitled case is set to be tried to a jury on a **Five week stack** to begin, **June 28, 2021 at 1:30p.m.**

B. A calendar call will be held on **June 22, 2021 at 9:30a.m.** Parties must bring to Calendar Call the following:

(1) Typed exhibit lists;

(2) List of depositions;

(3) List of equipment needed for trial, including audiovisual equipment;[1] and

(4) Courtesy copies of any legal briefs on trial issues.

The Final Pretrial Conference will be set at the time of the Calendar Call.

C. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held on **June 3, 2021 at 9:15a.m.**

D. Parties are to appear on **April 12, 2021 at 9:00a.m.,** for a Status Check on the matter.

E. The Pre-Trial Memorandum must be filed no later than **May 28, 2021**, with a courtesy copy delivered to Department XI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69. Counsel should include the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

F. All motions in limine, **Omnibus Motions in Limine are not allowed**, must be in writing and filed no later than **May 7, 2021. Orders shortening time will not be signed except in extreme emergencies**.

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[1] If counsel anticipate the need for audio visual equipment during the trial, a request must be submitted to the District Courts AV department following the calendar call. You can reach the AV Dept at 671-3300 or via E-Mail at CourtHelpDesk@clarkcountycourts.us

G. No documents may be submitted to the Court under seal based solely upon the existence of a protective order.

Any sealing or redaction of information must be done by motion.

All motions to seal and/or redact and the potentially protected information must be filed at the clerk's office front counter during regular business hours 9 am to 4 pm.

In accordance with, Administrative Order 19-03, the motion to seal must contain the language "Hearing Requested" on the front page of the motion under the Department number.

Pursuant to SRCR Rule 3(5)(b), redaction is preferred and sealing will be permitted only under the most unusual of circumstances.

If a motion to seal and/or redact is filed with the potentially protected information, the proposed redacted version of the document with a slip-sheet for any exhibit entitled "Exhibit ** Confidential Filed Under Seal" must be attached as an Exhibit.

The potentially protected information in unredacted and unsealed form must be filed at the same time and a hearing on the motion to seal set. While the motion to seal is pending, the potentially protected information will not be accessible to the public.

If the motion to seal is noncompliant, the motion to seal may be stricken and the potentially protected information unsealed.

H. All original depositions anticipated to be used in any manner during the trial must be delivered to the clerk prior to the final Pre-Trial Conference. If deposition testimony is anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the portions of the testimony to be offered must be filed and served by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference. Any objections or counterdesignations (by page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the final Pre-Trial Conference commencement. Counsel shall advise the clerk prior to publication.

I. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits. All exhibits must comply with EDCR 2.27. Two (2) sets must be three hole punched placed in three ring binders along with the exhibit list. The sets must be delivered to the clerk prior to the final Pre-Trial Conference. Any demonstrative exhibits including exemplars anticipated to be used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be

prepared to stipulate or make specific objections to individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence.

J. In accordance with EDCR 2.67, counsel shall meet, review, and discuss items to be included in the Jury Notebook. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to items to be included in the Jury Notebook.

K. In accordance with EDCR 2.67, counsel shall meet and discuss pre-instructions to the jury, jury instructions, special interrogatories, if requested, and verdict forms. Each side shall provide the Court, at the final Pre-Trial Conference, an agreed set of jury instructions and proposed form of verdict along with any additional proposed jury instructions with an electronic copy in Word format.

L. In accordance with EDCR 7.70, counsel shall file and serve by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference voir dire proposed to be conducted pursuant to conducted pursuant to EDCR 2.68.

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel is required to advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be given to Chambers.

DATED this 27th day of October, 2020.

Elizabeth Gonzalez, District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of the foregoing Business Court Scheduling Order and Order Setting Civil Jury Trial, Calendar Call and Pre-Trial Conference was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program.

/s/ Dan Kutinac
Dan Kutinac

EXHIBIT 6

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

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

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

FINDINGS OF FACT, CONCLUSION OF LAW AND PERMANENT INJUNCTION

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

The Plaintiffs

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

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

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

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

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

Case Number: A-19-787004-B

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

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

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

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

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

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

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

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

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

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

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

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

The State

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

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

The Industry Defendants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROCEDURAL POSTURE

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

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

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

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

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

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

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

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

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

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

7. BQ2 specifically identified regulatory and public safety concerns:

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

NRS 453D.020(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] The cover letter reads in part:

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

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

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

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

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

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

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

30. Some applicants abided by this procedure.

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

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

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

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

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

Transfers of ownership

Exhibit 1588-052.

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

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

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

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

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

[20] Exhibit 1809-054.

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

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

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

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

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

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

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

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

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

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

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

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

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

[24] The email thread reads:

On Aug 22 at 6:17 pm Amanda Connor wrote

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

On Aug 22 at 8:15 pm Pupo wrote:

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

On Aug 22 at 8:24 pm Amanda Connor wrote

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

On Aug 22 at 8:27 pm Pupo wrote:

Nope. LOCATION IS NOT SCORED DAMN IT!

Exhibit 2064.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[33] The order concludes:

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

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

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

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

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

The claim for equal protection is granted in part:

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

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

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

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

DATED this 3rd day of September 2020.

Elizabeth Gonzalez, District Court Judge

Certificate of Service

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

/s/ Dan Kutinac

Dan Kutinac, JEA Dept XI

EXHIBIT 7

Electronically Filed
9/16/2020 10:28 AM
Steven D. Grierson
CLERK OF THE COURT

FFCL

DISTRICT COURT

CLARK COUNTY, NEVADA

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

FINDINGS OF FACT, CONCLUSION OF LAW AND PERMANENT INJUNCTION

This matter having come before the Court for a non-jury trial on Phase 1 pursuant to the Trial Protocol[1]on September 8, 2020[2]. The following counsel and party representatives participated in this Phase of the Trial:[3]

The Plaintiffs

Mark S. Dzarnoski, Esq. of the law firm Clark Hill, appeared on behalf of TGIG, LLC; Nevada Holistic Medicine, LLC; GBS Nevada Partners, LLC; Fidelis Holdings, LLC; Gravitas Nevada, LLC; Nevada Pure, LLC; Medifarm, LLC; and Medifarm IV, LLC; (Case No. A786962-B) (the "TGIG Plaintiffs");

[1] Phase 1 of the Trial as outlined in the Trial Protocol includes all claims related to the petitions for judicial review filed by various Plaintiffs. Many of the Plaintiffs who filed Petitions for Judicial Review have now resolved their claims with the State and certain Industry Defendants.

[2] Prior to the commencement of Phase 1 of Trial, the Court completed the Trial of Phase 2 and issued a written decision on September 3, 2020. That decision included declaratory and injunctive relief related to many of the same issues raised by Plaintiffs in argument during this Phase. The Court previously limited the petition for judicial review process in this phase to the scoring and ranking of plaintiffs' applications. See Order entered November 7, 2019.

[3] Given the public health emergency Phase 1 of the Trial was conducted entirely by remote means.

Case Number: A-19-787004-B

Adam K. Bult, Esq. and Maximilien D. Fetaz, Esq. of the law firm Brownstein Hyatt Farber Schreck, LLP, appeared on behalf of ETW Management Group, LLC; Global Harmony, LLC; Just Quality, LLC; Libra Wellness Center, LLC; Rombough Real Estate Inc. dba Mother Herb; and Zion Gardens, LLC; (Case No. A787004-B) (the "ETW Plaintiffs");

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

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

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

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

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

Sigal Chattah, Esq. of the law firm Chattah Law Group, appeared on behalf of Herbal Choice, Inc..

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

Stephanie J. Smith, Esq. of Bendavid Law, appeared on behalf of Natural Medicine, LLC;

Craig D. Slater, Esq. of the law firm Luh & Associates, appeared on behalf of Clark Natural Medicinal Solutions, LLC; NYE Natural Medicinal Solutions, LLC; Clark NMSD, LLC; and Inyo Fine Cannabis Dispensary, LLC; and,

Clarence E. Gamble, Esq. of the law firm Ramos Law on behalf of Rural Remedies, LLC.

The State

Steven G. Shevorski, Esq. and Kiel Ireland, Esq. of the Office of the Nevada Attorney General, appeared on behalf of the State of Nevada, Department of Taxation ("DoT") and Cannabis Compliance Board[4] ("CCB") (collectively "the State").

The Industry Defendants

David R. Koch, Esq. of the law firm Koch & Scow, LLC, appeared on behalf of Nevada Organic Remedies, LLC ("NOR");

Rusty Graf, Esq. of the law firm Black & Lobello, appeared on behalf of Clear River, LLC;

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

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

Jared Kahn, Esq. of the law firm JK Legal & Consulting, LLC, appeared on behalf of Helping Hands Wellness Center, Inc.;

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

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

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

[4] The CCB was added based upon motion practice as a result of the transfer of responsibility for the Marijuana Enforcement Division effective on July 1, 2020. While certain statutes and regulations in effect at the time of the application process have been modified, for purposes of these proceedings the Court evaluates those that were in existence at the time of the application process.

Richard D. Williamson, Esq. and Jonathan Tew, Esq. of the law firm Robertson, Johnson, Miller & Williamson, appeared on behalf of Deep Roots Medical, LLC;

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

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

Having read and considered the pleadings filed by the parties, having reviewed the administrative record filed in this proceeding,[5] and having considered the oral and written arguments of counsel, and with the intent of deciding the remaining issues[6] related to the various Petitions for Judicial Review only,[7] the Court makes the following findings of fact and conclusions of law:

PROCEDURAL POSTURE

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

[5] The State produced the applications as redacted by various Plaintiffs on June 12, 2020 and supplemented with additional information on June 26, 2020. The Court previously denied TGIG's motion to supplement the record by order entered August 28, 2020. The portions of the applications which were redacted varied based upon the decisions made by each individual Plaintiff. These redacted applications do not provide the Court with information needed to make a decision related to the "completeness" issue as argued during Phase 1. During Phase 2 of the Trial an unredacted application by THC was admitted.

[6] The Court granted partial summary judgment and remanded to the DoT, MM and LivFree's appeals which had been summarily rejected by Pupo. See written order filed on July 11, 2020.

[7] While several plaintiffs have reached a resolution of their claims with the State and certain Industry Defendants, the Petitions of the remaining plaintiffs remain virtually the same.

The Attorney General's Office was forced to deal with a significant impediment at the early stages of the litigation. This inability to disclose certain information was outside of its control because of confidentiality requirements that have now been slightly modified by SB 32. Although the parties stipulated to a protective order on May 24, 2019,[8] many documents produced in preparation for the trial and for discovery purposes were heavily redacted or produced as attorney's eyes only because of the highly competitive nature of the industry and sensitive financial and commercial information involved. Much of the administrative record is heavily redacted and was not provided to the Court in unredacted form.

PRELIMINARY STATEMENT

On June 12, 2020, the DOT submitted its Record on Review in Accordance with the Nevada Administrative Procedure Act, including documents showing certain applicants' applications, the scoring sheets, and related tally sheets. On June 26, 2020, the DOT filed a Supplement to Record on Review in Accordance with the Nevada Administrative Procedure Act to add certain information related to the dissemination of the applications. The documents contained within these two filings (collectively, the "Record") provides all relevant evidence that resulted in the DoT's final decision. All Plaintiffs redacted their own applications that are the subject of their Petition for Judicial Review.[9]

FINDINGS OF FACT

1. Ballot Question 2 ("BQ2') was enacted by the Nevada Legislature and is codified at NRS 453D.[10]

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[8] The Court recognizes the importance of utilizing a stipulated protective order for discovery purpose in complex litigation involving confidential commercial information. NRS 600A.070. The use of a protective order does not relieve a party of proffering evidence sufficient for the Court to make a determination on the merits related to the claims at issue.

[9] The Record filed by the State utilized the versions of the submitted applications which had been redacted by the applicants as part of the stipulated protective order in this matter. Applications for which an attorney's eyes only designation had been made by a Plaintiff were not included in the Record. The redacted applications submitted by Plaintiffs limits the Court's ability to discern information related to this Phase.

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

2. BQ2 specifically identified regulatory and public safety concerns:

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

NRS 453D.020(3).

3. 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").

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

5. 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).

6. The DoT posted the application on its website and released the application for recreational marijuana establishment licenses on July 6, 2018.[11]

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

7. The DoT used a Listserv[12] to communicate with prospective applicants.

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

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

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

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

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

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

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

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

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

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

17. NAC 453D.272(1) required the DoT to determine that an Application is "complete and in compliance" with the provisions of NAC 453D in order to properly apply the licensing criteria.[13]

18. In evaluating whether an application was "complete and in compliance," the DoT made no effort to verify owners, officers or board members (except for checking whether a transfer request was made and remained pending before the DoT).[14]

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

[13] The Plaintiffs argue that the failure to provide an actual proposed physical address should render many of the applications incomplete and requests that Court remand the matter to the State for a determination of the completeness of each application and supplementation of the record. As the physical address issue has been resolved by the Court in the Phase 2 decision, the Court declines to take any action on the petition for judicial review with respect to this issue.

[14] As the Plaintiffs (with the exception of THC) have not provided their unredacted applications, the Court cannot make a determination with respect to completeness of this area. As the Court has already granted a permanent injunction on the ownership issue, the Court declines to take any further action on the petition for judicial review with respect to this issue.

20. Pursuant to NAC 453D.295, the winning applicants received a conditional license that would not be finalized unless within twelve months of December 5, 2018, the licensees receive a final inspection of their marijuana establishment.[15]

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

22. In 2019, more than three years from the passage of BQ2, Nevada's legislature repealed NRS 453D.200. 2019 Statutes of Nevada, Page 3896.

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

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

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

26. The Plaintiffs have not identified by a preponderance of the evidence any specific instance with respect to their respective applications that the procedure used by the DoT for analyzing, evaluating, and ranking the applications was done in violation of the applicable regulations or in an arbitrary or capricious manner.

27. To the extent that judicial review would be available in this matter, no additional relief is appropriate beyond that contained in the decision entered on September 3, 2020.[16]

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

[16] The Court recognizes the decision in *State Dep't of Health & Human Services, Div. of Pub. & Behavioral Health Med. Marijuana Establishment Program v. Samantha Inc.* ("*Samantha*"), 133 Nev. 809, 815-16, 407 P.3d 327, 332 (2017), limits the availability of judicial review. Here as the alternative claims not present in that matter have already been decided by written order entered September 3, 2020, regardless of whether the vehicle of judicial relief is appropriate, no further relief will be granted in this matter.

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

CONCLUSIONS OF LAW

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

30. This Court has previously held that the deletion of the physical address requirement given the decision in *Nuleaf CLV Dispensary, LLC v. State Dept. of Health and Human Services, Div. of Pub. and Behavioral Health*, 414 P.3d 305, 308 (Nev. 2018) does not form a basis for relief.[17] .

31. "Courts have no inherent appellate jurisdiction over official acts of administrative agencies." *Fitzpatrick v. State ex rel., Dept. of Commerce, Ins. Div.*, 107 Nev. 486, 488, 813 P.2d 1004 (1991) (citing *Crane*, 105 Nev. 399, 775 P.2d 705).

32. Under NRS 233B.130(1), judicial review is only available for a party who is "(a) [i]dentified as a party of record by an agency in an administrative proceeding; and (b) [a]ggrieved by a final decision in a contested case."

33. A contested case is "a proceeding . . . in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." NRS 233B.032.

34. A valid petition for judicial review requires a record of the proceedings below to be transmitted to the reviewing court within a certain timeframe. NRS 233B.131. The record in such a case must include:

(a) All pleadings, motions and intermediate rulings.
(b) Evidence received or considered.
(c) A statement of matters officially noticed.

[17] The Court remains critical of the method by which the decision to delete the address requirement was made and the manner by which it was communicated. These issues are fully addressed in the decision entered September 3, 2020.

(d) Questions and offers of proof and objections, and rulings thereon.
(e) Proposed findings and exceptions.
(f) Any decision, opinion or report by the hearing officer presiding at the hearing.

NRS 233B.121(7).

35. Judicial review under NRS 233B is to be restricted to the administrative record. *See* NRS 233B.135(1)(b).

36. The Record provides all relevant evidence that resulted in the DoT's analysis of Plaintiffs' applications.

37. The Record is limited and Plaintiffs themselves redacted their own applications at issue.

38. The Record in this case does not support Plaintiffs' Petition.

39. Plaintiffs do not cite to any evidence in the Record that supports their substantive arguments.

40. The Plaintiffs have not met their burden of establishing that the DoT's decisions granting and denying the applications for conditional licenses: (1) violated constitutional and/or statutory provisions; (2) exceeded the DOT's statutory authority; (3) were based upon unlawful procedure; (4) were clearly erroneous based upon the Record; (5) were arbitrary and capricious; or (6) generally constituted an abuse of discretion.

41. The applicants were applying for conditional licensure, which would last for 1 year. NAC 453D.282. The license was conditional based on the applicant gaining approval from local authorities on zoning and land use, the issuance of a business license, and the Department of Taxation inspections of the marijuana establishment.

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

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

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Plaintiffs' Petitions for Judicial Review under NRS 233B.130 is denied in its entirety.

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

DATED this 16th day of September 2020.

Elizabeth Gonzalez, District Court Judge

Certificate of Service

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

/s/ Dan Kutinac
Dan Kutinac, JEA Dept XI

EXHIBIT 8

Electronically Filed
8/30/2021 9:49 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

NOTICE OF ENTRY OF ORDER GRANTING MOTIONS TO RETAX

PLEASE TAKE NOTICE that an Order Granting Motions to Retax was entered on August 30, 2021. A copy of said Order is attached hereto.

. . .

. . .

. . .

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

DATED this 30th day of August, 2021.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Adam K. Bult

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING MOTIONS TO RETAX** to be submitted electronically to all parties currently on the electronic service list on August 30, 2021.

/s/ Wendy Cosby
an employee of Brownstein Hyatt Farber Schreck, LLP

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ELECTRONICALLY SERVED
8/30/2021 9:40 AM

Electronically Filed
08/30/2021 9:39 AM
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

In Re: D.O.T. Litigation,

Case No.: A-19-787004-B
Consolidated with: A-785818
A-786357
A-786962
A-787035
A-787540
A-787726
A-801416

Dept No.: XI

ORDER GRANTING MOTIONS TO RETAX

Hearing Date: November 6, 2020
Hearing Time: In Chambers

On November 6, 2020, in chambers, these matters came on for hearing: TGIG Plaintiffs' Motion to Retax Wellness Connection's Memo of Costs; ETW Plaintiffs', Nevada Wellness Center, LLC's, MM Development Company, Inc. d/b/a Planet 13's, LivFree Wellness, LLC d/b/a The Dispensary's, and Qualcan LLC's Motion to Retax and Settle Costs; and TGIG Plaintiffs' Motion to Retax Lone Mountain's Memo of Costs (collectively, the "Motions to Retax").

And this Court, having considered the relevant briefing and evidence, the relevant legal authorities, the joinders thereto, and good cause appearing, this Court finds as follows:

1. The award of costs is premature under NRS 18.110 as there is not a final judgement in this matter.

2. Final judgment will be issued following completion of Phase 3 scheduled for a jury trial on June 28, 2021.

3. This decision is without prejudice to seek recovery costs at the time of the final judgment.

[ORDER CONTAINED ON THE FOLLOWING PAGE]

BROWNSTEIN HYATT FARBER SCHRECK, LLP
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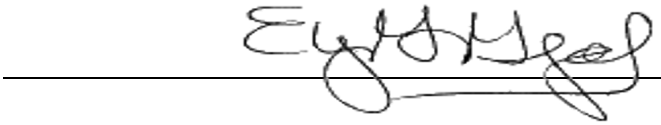
702.382.2101

ORDER

IT IS HEREBY ORDERED that the Motions to Retax are **GRANTED** in full.

Dated this 30th day of August, 2021



0E9 BEF EC69 BA0B
Elizabeth Gonzalez
District Court Judge

Submitted by and approved as to form:

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Cosby, Wendy C.

From: Joel Schwarz <joel@h1lawgroup.com>
Sent: Friday, August 27, 2021 12:25 PM
To: L. Christopher Rose; Fetaz, Maximilien
Cc: Bult, Adam K.; Chance, Travis F.; Cosby, Wendy C.; Kirill V. Mikhaylov; Eric Hone
Subject: RE: In re DOT Litigation: Order re Motions to Retax

You may use mine as well.

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From: L. Christopher Rose <lcr@h2law.com>
Sent: Friday, August 27, 2021 12:24 PM
To: Fetaz, Maximilien <MFetaz@BHFS.com>; Joel Schwarz <joel@h1lawgroup.com>
Cc: Bult, Adam K. <ABult@BHFS.com>; Chance, Travis F. <tchance@bhfs.com>; Cosby, Wendy C. <wcosby@bhfs.com>; Kirill V. Mikhaylov <kvm@h2law.com>; Eric Hone <eric@h1lawgroup.com>
Subject: RE: In re DOT Litigation: Order re Motions to Retax

Max

You may use my electronic signature for this order.

Howard & Howard
law for business

L. Christopher Rose
Attorney

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From: Fetaz, Maximilien <MFetaz@BHFS.com>
Sent: Friday, August 27, 2021 12:01 PM
To: L. Christopher Rose <lcr@h2law.com>; Joel Schwarz <joel@h1lawgroup.com>
Cc: Bult, Adam K. <ABult@BHFS.com>; Chance, Travis F. <tchance@bhfs.com>; Cosby, Wendy C. <wcosby@bhfs.com>; Kirill V. Mikhaylov <kvm@h2law.com>; 'Eric Hone' <eric@h1lawgroup.com>
Subject: In re DOT Litigation: Order re Motions to Retax

CAUTION: EXTERNAL EMAIL

Chris/Joel,

I have attached for your review and approval the Order Granting Motions to Retax. Please let me know if we may affix your e-signature to the attached. Thank you,

Maximilien D. Fetaz
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

In Re: D.O.T. Litigation	CASE NO: A-19-787004-B
	DEPT. NO. Department 11

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Granting Motion was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 8/30/2021

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