IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 82014

IN RE: D.O.T. 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,

v.

THE STATE OF NEVADA DEPARTMENT OF TAXATION; INTEGRAL ASSOCIATES, LLC D/B/A ESSENCE CANNABIS DISPENSARIES; ESSENCE TROPICANA, LLC; AND ESSENCE HENDERSON, LLC

Respondents.

THE ESSENCE ENTITIES' ANSWERING BRIEF

On appeal from the Eighth Judicial District Court, Clark County
The Honorable Elizabeth Gonzalez, Department XI
District Court Case No. A-19-787004-B and Consolidated Cases.

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that judges of this Court may evaluate possible disqualification or recusal.

Currently, Respondents Essence Tropicana, LLC and Essence Henderson LLC are 100% owned by Respondent Integral Associates, LLC which is 100% owned by GTI Core, LLC of which more than 10% is indirectly owned by the Canadian publicly traded company Green Thumb Industries Inc.

The law firm whose partners or associates have or are expected to appear for the Essence Entities are Pisanelli Bice PLLC, Maier Gutierrez & Associates, and Hymanson & Hymanson.

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JURISDICTIONAL STATEMENT

This Court initially lacked jurisdiction over this appeal. Appellants tried to appeal from separate "Findings of Fact and Conclusions of Law" from the first two phases of an incomplete three-phase trial. The third trial phase has not yet started. The Essence Entities filed a Motion to Dismiss or Stay Appeal Pending Cure of Jurisdictional Defect and this Court ordered supplemental briefing on the question. (Order, June 8, 2022.) The Court noted that "[i]ncluded with the supplemental briefing, the parties shall bring to this court's attention any stipulation or certification that has subsequently been filed in the district court that may resolve any potential jurisdictional issues." (*Id*.)

After the Court's order, the Essence Entities filed a Motion to Certify Trial Phases 1 and 2 and Final Under NRCP 54(b), which the district court granted on August 4, 2022. (16SA003934-3954.) Thus, even though Appellants' respective appeals were premature and without jurisdiction, that defect has now been cured. On August 25, 2022, the Court entered an Order Reinstating Briefing. (Order, Aug. 25, 2022.)

ROUTING STATEMENT

This case is presumptively retained by the Nevada Supreme Court because it originates in business court. NRAP 17(a)(9).

ISSUE PRESENTED FOR REVIEW

1. Should the district court be affirmed on the alternative grounds that Appellants lack standing to challenge the entire recreational marijuana licensing process and the award of licenses to individual successful applicants like the Essence Entities?

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants[1] are unsuccessful applicants from the State's 2018 recreational marijuana licensing process. After being denied licenses, Appellants and about thirty other losing applicants sued the State in a barrage of cases, hurling outlandish accusations about corruption and improprieties. The losers' requested relief was as bizarre as their factual allegations; they asked the courts to either take away licenses from the successful applicants and give them to the losers or, alternatively, to order a do-over of the entire application process. Worse, the losing applicants sought these extreme forms of relief without naming the winning applicants as parties to the lawsuits. The losers effectively sought to challenge the winners' valuable licenses *in absentia*.

Respondents Integral Associates LLC d/b/a Essence Cannabis Dispensaries, Essence Tropicana, LLC, Essence Henderson, LLC (together "the Essence Entities") are among the group of successful applicants that swiftly intervened in the litigation to protect their licenses and to defend against Appellants' baseless allegations. From the very beginning of this case, the Essence Entities repeatedly argued that

[1] Unless otherwise specified throughout, "Appellants" refers to all Appellants. The term "TGIG" collectively refers to 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. Early in the proceedings, the TGIG Plaintiffs were referred to as the "Serenity Plaintiffs."

Appellants – as unsuccessful applicants – do not have standing to challenge the licenses awarded to others and cannot order a new licensing process. That is, the Essence Entities argued that the unsuccessful applicants did not meet the prerequisites of standing *for the relief they sought*: Appellants lack cognizable injuries, causation, and redressability.

At most, disappointed applicants have standing to challenge nondiscretionary mathematical scoring errors on their *own* applications. If fixing the math on an applicant's application causes someone to move up the "standings," the State may be required to reshuffle licenses. But a losing applicant does not have standing to attack the discretionary scoring decisions related to another applicant's application or to claim someone else's license for its own.

The district court continually rejected the Essence Entities' standing objections. The district court decided that the public's generalized interest in a "fair process," and the alleged "market share" of medical marijuana license holders was sufficient to confer standing. The district court relied on the language of an unrelated statute that no plaintiff invoked for a cause of action. The case spiraled out of control. Other successful applicants intervened, and the district court ordered the plaintiffs to add any missing winners as necessary and indispensable parties to their respective complaints. Multiple separate cases were consolidated and eventually the action involved almost fifty parties. The litigation careened from a months-long

preliminary injunction hearing to a six-week marathon bench trial during COVID – all followed by a judicial review proceeding.

Even at trial, Appellants failed to prove their standing. Appellants voluntarily refused to enter their own *unredacted* applications into evidence. Only one of Appellant's (THC's) client representative testified in their case-in-chief. Appellants failed to establish that their own applications did not suffer from the very same defects that they accused the winners of having. In other words, Appellants did not show that they satisfied the basic application requirements to be awarded a license under any type of application process. Put differently, Appellants neglected to show that they would not have been disqualified by their own arguments. If anything, Appellants may themselves have been a member of the enjoined class of applicants under the so-called Five Percent Rule or other purported deficiencies. A party does not have standing to challenge misconduct that they are engaging in themselves.

Appellants failed to show their standing at trial in other ways too. The district court found Appellants' alleged market share too speculative to support an injury. Appellants also did not prove that their supposed injuries – the failure to win a license – were ***caused by*** any of their alleged defects in the application process. No plaintiff testified or could show that they would have won a license ***but for*** the alleged irregularities. They did not demonstrate that any particular alleged defect – whether the address requirement or otherwise – was the reason another applicant

won a license or was the reason that they did not obtain a license. Appellants thus failed to establish the causation necessary for standing.

The trial's outcome also demonstrates that Appellants lacked standing. The relief they sought and received did not ***redress*** their supposed harm. Appellants' supposed injury was the failure to receive a license (and the related perceived loss of market share). Among other things, Appellants sought a re-do of the entire application process. Yet, even if they somehow obtained a second chance, a new process would not have remedied their injury because there is no certainty that they would have won a license in a do-over. Appellants (and the district court) could only speculate. And many of the Appellants finished so far down the rankings that they had no hope of receiving a license even if the district court somehow revoked the licenses of some winners. Finally, despite receiving an injunction on a narrow statutory issue for the Five Percent Rule, Appellants *still* do not have licenses and *still* are not entitled to a redo of the entire licensing process. Appellants' supposed injuries were not redressed by the relief they sought or obtained. The lack of redressability proves they do not possess standing.

Although the Essence Entities ultimately prevailed on every issue at trial and were not affected by the Five Percent Rule injunction, none of the significant time and expense of this litigation should have been spent. The Essence Entities have been successfully operating throughout this case and since trial. But Appellants have

tried to keep a cloud over the Essence Entities' licenses with this litigation even though Appellants' cases should never have gotten out of the starting blocks.

A ruling on standing grounds would not require the Court to wade into the thicket of the underlying merits of this case and would prevent the judiciary from being embroiled in messy and unseemly litigation every time the State conducts an open licensing process related to marijuana (or anything else). The Court should affirm the district court's decision on other grounds supported by the record. Simply, Appellants lack standing to revoke or challenge their competitors' licenses. For all other issues and arguments, the Essence Entities join in the Answering Briefs filed by the State.[2]

II. STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. Unsuccessful Applicants Sue to Impair the Winners' Licenses

In late 2018 and early 2019, the unsuccessful applicants in the State's recreational marijuana licensing process filed at least eight separate cases seeking to overturn the entire licensing process or, at least, revoke certain winner's licenses and award the licenses to themselves. Initially, the losing applicants only named the State as a defendant and tried to obtain the effective revocation of the winners' licenses without their participation. Once alerted to Appellants' strategy, the

[2] The term "State" refers to the government Respondents State of Nevada, ex rel. Department of Taxation and the Cannabis Compliance Board and the two Answering Briefs that they have filed.

Essence Entities (and other winners) moved for, and were granted, intervention in certain cases. (16SA003852-3857.) The Essence Entities were awarded the most licenses during the application process and finished in first or second place in all the jurisdictions in which they submitted applications. (IIRA402-408.)

At first, the various cases (and a lengthy preliminary injunction hearing) were "coordinated," but Chief Judge Bell later entered an order consolidating all cases in Department 11, the Honorable Judge Gonzalez presiding on December 6, 2019. (16SA003858-3569.) Judge Gonzalez determined that the successful applicants were necessary and indispensable parties under NRCP 19 and ordered all the plaintiffs to name all successful applicants as parties to their respective complaints. (16SA003870.).

Following consolidation, the plaintiffs filed amended complaints naming the Essence Entities and other successful applicants as defendants. In addition to judicial review claims, the complaints asked the Court to enter various types of relief against the State that would have redone the entire licensing process or would have had the practical effect of revoking the winners' licenses. (*See, e.g.*, 53PJA006589-6609, 006602.) Because of the limited number of recreational licenses available, Appellants' requested relief would have necessarily stripped the Essence Entities and other winners of their licenses.

For example, the TGIG Appellants' fifth cause of action in their Second Amended Complaint asserts that the Essence Entities and other "Defendant Applicants received conditional recreational retail marijuana establishment licenses issued by the Department" and TGIG "contend[s] that ***they are entitled to the same conditional licenses*** …." (49PJA006045.) (emphasis added); *see also* IIRA263-358 (ETW's Third Amended Complaint requesting "a declaratory judgment from this Court that . . . . several of the Successful Applicants had incomplete of deficient applications, making the grant of a conditional license to them void.").) The plaintiffs sought to rescind the winners' licenses either through individual invalidation or by tossing the entire licensing process out the window.

B. The Essence Entities Continually Object that Plaintiffs' Lack of Standing.

After the plaintiffs filed amended complaints naming the winners as necessary and indispensable parties, on February 11, 2020, the Essence Entities filed a Motion to Dismiss or, Alternatively, Motion for Judgment on the Pleadings of All Plaintiffs' Operative Complaints. (IIRA359-373.)[3] The Essence Entities argued "Plaintiffs lack standing to challenge the entire application process and

[3] The Essence Entities participated in the earlier preliminary injunction proceeding and protested the plaintiffs standing. (45PJA005328-5339.). As with this appeal, the Plaintiffs asserted that NRS Chapter 598A conferred standing under a market share theory even though none of them asserted a claim under that chapter. (45PJA005447-5449.)

cannot seek revocation of the winners' licenses, including the conditional licenses conferred on the Essence Entities." (IIRA360.) "At most," the Essence Entities continued, "Plaintiffs have standing to challenge the State's treatment of their own applications but only to the limited extent that the State made nondiscretionary, ministerial scoring errors." (IIRA360.)

Plaintiffs opposed the motion and, on March 19, 2020, the district court denied it.[4] The district court's minute order notes that the Essence Entities "argued for dismissal [that] there was no standing to challenge the licenses …. Court ordered, motion denied. [The] Court finds they had a right to expect fairness, therefore, they have a right to challenge the process." (16SA003871-3874.)

Again, at the summary judgment stage, the Essence Entities attacked the plaintiffs' lack of standing. The Essence Entities asserted that plaintiffs had not presented any evidence creating a genuine issue of material fact showing that any of the purported complaints about the application process ***caused*** them to fail to obtain a license. (16SA003875-3887.) The Essence Entities highlighted that the plaintiffs conceded in discovery that "they have no evidence or facts that the allegedly unlawful regulations or purported errors in the application process had any bearing on why their applications were unsuccessful." (16SA003877.)

[4] It does not appear that a written order was entered on this motion.

Likewise, plaintiffs had "no evidence or facts their applications were in any way superior to any of the winning applicants" and they had no evidence that "they would have been granted a license under a different process, one that would purportedly satisfy their own preferred standards." (16SA003877.) The Essence Entities concluded that "whether it be for standing or for the substantive elements of Plaintiffs' claims, Plaintiff must prove causation between the alleged unlawful acts and the injury for which they seek judicial relief." (16SA003877.)

The Plaintiffs once again opposed and the district court denied the motion on May 15, 2020. (16SA003888-3891.) In its minute order, the district court stated "the applicants were entitled to a fair process, but there remain genuine issues of material facts as to the Plaintiffs' claims, *the causation*, and the damages. For that reason, the remaining motions are denied without prejudice to be renewed at the conclusion of Plaintiffs' case at trial." (16SA003891.) (emphasis added).[5]

Although the district court denied the Essence Entities' motion for summary judgment, the court separately granted summary judgment in favor of the plaintiffs on the so-called Five Percent Rule. (16SA003891.) The district court concluded 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

[5] It does not appear that a written order was entered on this motion.

checks for all prospective owners, officers, and board members regardless of ownership interest. (16SA003891.) Nonetheless, the Five Percent Rule injunction did not affect the Essence Entities because they had no prospective owners, officers, or board members with less than a 5% stake and all appropriate people were subject to background checks.

C. Appellants Fail to Prove Standing at Trial.

In July 2020, Judge Gonzalez entered Amended Trial Protocol No. 2 and divided the trial into three separate phases. (IIRA381-401at 393.) The first phase was to address claims based on petitions for judicial review. (IIRA393.) 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)." (IIRA394.)

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." (IIRA395.) Other disappointed 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* 16SA003924-3928; 16SA003929-3933.)

The trial started with Phase 2 (not Phase 1) on July 17, 2020. Appellants – except for THC – did not take the witness stand to testify in the plaintiffs' case-in-chief. (311PJA044691.) Nor did Appellants introduce their unredacted applications into evidence. Instead, citing commercial sensitivity and confidentiality concerns, Appellants introduced only heavily redacted versions of their applications. (1-16SA000001-3829.) Due to the redactions, Appellants failed to establish the bare minimum needed to show standing. Neither the Court nor Defendants could tell whether the Appellants submitted complete and compliant applications. Thus, Appellants did not show that they were entitled to a license at all. Moreover, the redactions prevented anyone from determining whether Appellants' applications contained the very same ownership, address, diversity, or other deficiencies that they claimed tainted the application process.

None of the Appellants testified or introduced any evidence suggesting that they were more qualified than any of the winning applicants. They did not contend that their applications were superior to the Essence Entities (or anyone else) or that Appellants would have obtained a license ***but for*** any of the purported defects in the licensing process. Appellants did not – because they could not – say that any supposed irregularity was the reason a winner won a license or, conversely, was the reason a loser did not win a license.

Rather than prove their standing, Appellants spent most of trial slinging mud at the successful applicants like the Essence Entities. For example, TGIG – who took the laboring oar for the plaintiffs at trial – frequently maligned the Essence Entities and tried to prove they should not have been awarded a license and should have their licenses revoked. TGIG criticized the communications and professional relationship between the Essence Entities' outside counsel and the former licensing official for the State – even though TGIG hired and used the same outside counsel. (327PJA045966-45970)

TGIG asserted, falsely, that somehow the Essence Entities got "inside" information from the state and Essence Entities' outside counsel. (327PJA045988-45990, 45994-45996.) TGIG claimed, again falsely, that something untoward "must" have occurred because the Essence Entities were awarded the most licenses. (327PJA045981-45982.) THC similarly argued, without evidence, that Essence Entities' outside counsel had insider knowledge about the application process, including information about the application's address requirement. (327PJA046029-46030.)

In closing, TGIG urged Judge Gonzalez that the only just outcome would be a complete redo of the licensing process. TGIG implored "*There has to be a redo because it's tainted*, Judge. . . It may not be financial corruption, but it's a corruption of a process. And it happened clearly. There is no doubt about it."

(327PJA046002.) (emphasis added). Herbal Choice took a similar approach. After maligning the Essence Entities and their outside counsel, Herbal Choice asked the district court to require the State to throw out the entire process for a redo. (327PJA046020-46026.)

D. The Essence Entities Move for Judgment on Partial Findings at the Close of the Appellants' Case.

Once the plaintiffs rested their case, the Essence Entities moved for judgment in their favor under NRCP 52(c). On August 10, 2020, the Essence Entities filed a Brief Regarding Judgment on Partial Findings Against Plaintiffs Pursuant to NRCP 52(c). (16SA003892-3896.) Again, the Essence Entities argued that plaintiffs failed to establish standing. The Essence Entities pointed out that plaintiffs "presented no evidence that they themselves submitted complete and compliant applicants that were capable of qualifying for the award of licenses." (16SA003895.) The Essence Entities argued that "Plaintiffs have been fully heard …[y]et, Plaintiffs have failed to proffer even the slightest amount of evidence connecting the purported errors in the licensing process with their supposed injury." (16SA003894-3895; *see also* 16SA003897-3923 (the Essence Entities' closing argument PowerPoint arguing lack of standing).)

The district court entertained argument on the Essence Entities' motion on Day 17 of the bench trial. (331PJA045333-45380.) The Essence Entities emphasized that plaintiffs showed no causal connection between "the errors they

claim [and] their failure to win a license." (331PJA045341.) The Essence Entities underscored the astonishing fact that "the plaintiffs have failed to prove any such necessary element [for standing]. There is no evidence of their own applications. They didn't even submit evidence of their own applications. There's only one of the plaintiffs that actually even testified in the case." (331PJA045341.)

The Essence Entities provided a helpful illustration. If Appellants' view is correct, they could have submitted a scribbled Post-It note as their application and managed to give themselves standing. (331PJA045369-45370.) Still, the plaintiffs were so far down the rankings that they would not obtain a license even if some of the winners' licenses were revoked. (331PJA045341-45343; IIRA402-408.) Because of their low ranking, the Essence Entities explained, Appellants were not actually injured. (331PJA045343.)[6]

Appellants orally resisted the Essence Entities' motion. As it had before, TGIG contended that it had standing and "a protected property interest under NRS 598A" – Nevada's Unfair Trade Practice Act under which TGIG ***brought no claim*** – and its "market share." (331PJA045359.) Oddly, TGIG contended that it was not required to show any actual injury to possess standing. TGIG posited that "what the share of the market as to any one individual might be is not really relevant

[6] The State also argued that there is an administrative process to follow if it finds any affirmative misrepresentation in an application. (331PJA045379-45380.)

because it is what it is to them." (331PJA045359.) TGIG suggested that it need not show the "market share" of the unsuccessful applicants *before* the recreational licenses were issued or show that any unsuccessful applicant's market share *would actually decrease after* the recreational licenses were issued. (331PJA045368.)

TGIG also bluntly argued it was not required to show causation: "[w]e don't need to prove that we would have otherwise been successful in obtaining a license." (331PJA045361.) Perhaps recognizing the absurdity of this claim, TGIG retreated to generalized "right to a fair procedure" as a basis for standing. (331PJA045359.)

For its part, THC asserted that the district court should rule the same as it did on the Essence Entities' prior motion for summary judgment. (331PJA045364.) Relying on a generalized "process" concept and the same market share theory, THC declared that it had standing because it was "deprived of a fair process and opportunity to be involved. They have the protected property interest right by virtue of being a successful operator for several years, in fact, in the community." (331PJA045364.)

The district court denied the Essence Entities' motion. It explained, "we have genuine issues related to the fairness of the process which have [been] presented during the plaintiffs' case in chief. And at this stage I am not in a position to weigh the evidence to make that determination." (331PJA045380.)

E. The District Court Enters Findings of Fact and Conclusions of Law for Phases 2.

Following trial, the district court entered Findings of Fact, Conclusions of Law, and Permanent Injunction on September 3, 2020. (333PJA046848-46877.) The district court acknowledged the need for a justiciable controversy before awarding relief. (333PJA046870.) Importantly, the district court determined that plaintiffs' "market share" theory was unsupported by the evidence and too speculative. After hearing from plaintiffs' expert witnesses, the district court held that "[g]iven the number of variables related to new licenses, the claim for loss of market share is too speculative for relief." (333PJA046869.) The district court also ruled that "[n]o monetary damages are awarded given the speculative nature of the potential loss of market share." (*Id*.)

Despite finding the evidentiary basis for Appellants' standing theory to be too speculative and conjectural, the district court still reached the merits of the plaintiffs' claims. Even so, the district court determined that the plaintiffs were not entitled to overturn the entire licensing process for a do-over and could not take the winners' licenses for themselves. The district court held that any irregularities in the licensing process "are in and of themselves insufficient to void the process as urged by some of the Plaintiffs." (333PJA046873.)

The district court observed that the application process could have run more smoothly but it concluded that "[t]his was not an appropriate basis for the request

relief as the [State] treated all applicants the same in the grading process." (333PJA046874.). As a result, the plaintiffs did not prove "that there is a substantial likelihood they would have been successful in the ranking process." (333PJA046870.) "After balancing the equities among the parties," the district court said, "the Court determines that the balance of the equities does not weigh in favor of the [Plaintiffs] on the relief beyond that previously granted in conjunction with the partial summary judgment order entered on August 17, 2020 [about the Five Percent Rule]." (333PJA046870.)

Using similar reasoning, the district court granted Plaintiffs' equal protection claim in part. It found the State "acted beyond its scope of authority" and "the decision by the [State] to arbitrarily and capriciously replace . . . the background check of each owner, officer and board member with the 5 percent or greater standard in NAC 453.255(1) … created an unfair process." (333PJA046876.) The district court therefore did not grant any additional relief beyond its previous summary judgment ruling. It permanently enjoined the State "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)." (*Id.*)[7]

[7] During trial, certain plaintiffs settled with the State and some defendants. The settlement was eventually finalized after Cannabis Compliance Board approval on August 7, 2020. The Essence Entities did not participate in the settlement. Following

F. The District Court Enters Findings of Fact and Conclusions of Law for Phases 1.

On September 8, 2020, the district court conducted Phase 1 for the petitions for judicial review. (332PJA046818-46829.) The Findings of Fact and Conclusions of Law was entered September 16, 2020. (*Id.*) Judge Gonzalez denied the petitions for judicial review under NRS 233B.130 in their entirety, stating "the Record does not support Plaintiffs' Petition." (332PJA046828-46829.) The district court noted that the record in a judicial review proceeding is limited to the administrative record and TGIG (and the other Plaintiffs) redacted their own applications and concealed whether they complied with the statutes and regulations. (332PJA046826-46828.) TGIG did not cite any evidence in the record to support its claims. (332PJA046828.)

Phase 3 of trial has not started. It involves only one non-appealing plaintiff's Section 1983 claim and it will be tried to a jury. Because some claims between parties remain pending below, the district court recently certified Judge Gonzalez's Phase 1 and Phase 2 rulings as final to confer jurisdiction on this Court. (16SA003934-3954.).

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trial, the district court confirmed that its trial decisions on the merits applied to all parties, even the settling parties. (*See* 340PJA047863-47882.)

III. ARGUMENT

A. Standard of Review

This Court reviews *de novo* whether a party has standing. *Nevada Pol'y Rsch. Inst., Inc. v. Cannizzaro*, 138 Nev. Adv. Op. 28, 507 P.3d 1203, 1207 (2022) (citing *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011)). Indeed, standing is a jurisdictional prerequisite that must be present throughout the case. *See Leavitt v. Siems*, 130 Nev. 503, 506, 330 P.3d 1, 3 (2014) ("Leavitt lacks standing because litigated matters ("must present an existing controversy, not merely the prospect of a future problem.'").

Standing may even be challenged for the first time on appeal. *See Jones v. U.S. Bank Nat'l Ass'n as Tr. for TBW Mortg.-Backed Pass-Through Certificates, Series 2006-3*, 136 Nev. 129, 132 n.2, 460 P.3d 958, 962 n.2 (2020) (stating standing can be challenged for the first time on appeal); *Garmong v. State*, 2021 WL 1100366, at *2 n.3, 482 P.3d 1221 (Nev. App. 2021) (unpublished disposition) ("However, because standing is a jurisdictional requirement, the district court may raise it sua sponte, and indeed, it may even be raised sua sponte for the first time on appeal.") (citing *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011)); *see also Superpumper, Inc. v. Leonard , Tr. for Bankr. Est. of Morabito*, 137 Nev. Adv. Op. 43, 495 P.3d 101, 106 n.2 (2021).

While the district court ruled in favor of the Essence Entities on the merits, this Court may affirm the district court on any ground supported by the record, even if it is not the reason given by the district court. *See Saavedra-Sandoval v. Wal-Mart Stores*, 126 Nev. 592, 598, 245 P.3d 1198, 1202 (2010); *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("this court will affirm the order of the district court if it reached the correct result, albeit for different reasons.").

The Court can – and should – affirm the district court because Appellants lack standing.

B. Appellants Lack Standing as a Matter of Law and Did Not Prove it at Trial.

"Although state courts do not have constitutional Article III standing, 'Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.'" *In re Amerco Derivative Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) (quoting *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)). Like Article III, standing is a prerequisite to the "case" requirement of Article VI, Sections 4 and 6 of the Nevada Constitution. Nev. Const. art. 6, §§ 4, 6; *see also Stockmeier v. Nevada Dep't of Corr. Psychological Rev. Panel*, 122 Nev. 385, 392, 135 P.3d 220, 225 (2006), *abrogated by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).

There are three elements to standing under both the Nevada and federal constitutions: injury-in-fact, causation, and redressability. "[A] requirement of

standing is that [1] the litigant personally suffer injury that [2] can be fairly traced to the allegedly [unlawful act] and [3] which would be redressed by [the requested remedy].” *Morency v. Dep't of Educ.*, 137 Nev. Adv. Op. 63, 496 P.3d 584, 588 (2021) (quoting *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988)); *Miller v. Ignacio*, 112 Nev. 930, 936 n.4, 921 P.2d 882, 885 n.4 (1996) (stating federal requirements).

A plaintiff must demonstrate standing for each claim and form of relief that it advances. *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011). And the plaintiff must maintain its standing for each claim and requested relief through all stages of the proceeding. *See Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (‘a controversy must be present through all stages of the proceeding”); *Jones*, 136 Nev. 132 n.2, 460 P.3d 958, 962 n.2 (standing may be address on appeal for the first time).

At trial, the plaintiff must introduce evidence proving its standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (“And at the final stage, those facts (if controverted) must be (“supported adequately by the evidence adduced at trial.”’). This Court has affirmed a district court’s NRCP 52(c) judgment on partial findings when a plaintiff failed to prove its standing at trial. *See Centennial Gateway, LLC v. Home Consignment Ctr.*, 2020 WL 3469884, at *1, 465 P.3d 218 (Nev., June 24,

2020.) (unpublished disposition) *opinion superseded on reh'g*, 476 P.3d 440 (Nev. 2020).

Other courts have demanded that unsuccessful applicants challenging a marijuana licensing scheme satisfy the constitutional requirements of standing. *Yatooma v. Birch Run Twp.*, No. 1:22-CV-10870, 2022 WL 1913601, at *1 (E.D. Mich. June 3, 2022), reconsideration denied, No. 1:22-CV-10870, 2022 WL 3701164 (E.D. Mich. Aug. 26, 2022) (applicants lacked injury, causation, and redressability required to challenge allegedly discriminatory marijuana licensing criteria); *Georgia Atlas, Inc. v. Turnage*, No. 1:21-CV-03520-SDG, 2022 WL 903195, at *5 (N.D. Ga. Mar. 28, 2022) (applicants for medical marijuana license lacked injury, causation, and redressability); *JG City LLC v. State Bd. of Pharmacy*, 183 N.E.3d 522, 536 (Ohio Ct. App. 2021) (applying constitutional standing requirements to marijuana dispensary applicant and finding that it failed to demonstrate causation).[8]

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[8] TGIG, THC, and Herbal Choice cite and rely on *Matter of the Application for Medicinal Marijuana Alternative Treatment Ctr. for Pangaea Health & Wellness, LLC*, 465 N.J. Super. 343, 243 A.3d 688 (App. Div. 2020). (TGIG Opening Br. at 52, 61; THC/Herbal Choice Opening Br. at 33-34.) However, this case involved a judicial review-like appeal of a department's final agency decision. *Id.* at 362, 243 A.3d at 698 ("Pangaea, Harvest, Liberty, Bloom, GGB, Altus, and Compassionate Care appeal the Department's final agency decisions."). Standing was not at issue. Unlike here, there was no evidentiary hearing or full airing of the licensing process at a trial. *Id.* at 381, 243 A.3d at 711-12. Nonetheless, the court did not accept similar efforts to characterize other applicants as "highly unethical" or "criminal" or engaging in "bribes." *Id*. at 394-95, 243 A.3d at 718. Like here, the court noted that

As unsuccessful applicants for a recreational marijuana dispensary license, Appellants did not establish any of the three elements of standing at trial. Accordingly, the Court should affirm the district court.

1. Appellants Have Suffered No Injury-In-Fact

To satisfy the injury-in-fact requirement, the alleged harm must be sufficiently concrete so as to yield an actual case or controversy. *See Hernandez v. Bennett-Haron*, 128 Nev. 580, 586 n.3, 287 P.3d 305, 310 n.3 (2012) (citing *Herbst Gaming, Inc. v. Sec'y of State*, 122 Nev. 877, 887, 141 P.3d 1224, 1231 (2006). The injury must be severe enough and of a type acknowledged as legally cognizable so that there is any kind of lawsuit to be brought at all. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) *accord Schulte v. Fafaleos*, 2917 WL 2591346, at *3, 133 Nev. 1071 (Nev. App. 2017) (unpublished disposition). A party must also "show a personal injury and not merely a general interest that is common to all members of the public." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894.

Appellants identify two areas of supposed injury. First, they contend that issuing licenses to the successful applicants diminished or hurt their market share. Second, Appellants claim that they suffered injury to their generic interest in a "fair"

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its review was hampered by redactions to the applications. *Id.* at 378-79, 243 A.3d at 709. Significantly, the court did not order any specific remedy and remanded the matter back to the agency *only* with regard to the applications of the appellants. *Id.* at 381, 243 A.3d 688, 710-11; *Id.* at 400, 243 A.3d at 731-22 ("We therefore vacate the final agency decisions *in question*.") (emphasis added).

or "competitive" licensing or bidding process. Appellants failed to prove both purported injuries as a matter of law and as a matter of fact.

The district court correctly rejected Appellants' market share theory of standing. The district court determined that Appellants' market share – and any claimed decrease – was too speculative. (333PJA046869.) As an initial matter, Appellants had no property interest in their *expected or anticipated* licenses. When the application process occurred, NRS Chapter 453D did not require the State to approve all applications it received for a recreational marijuana license. On the contrary, the statutory scheme expressly stated that the applications may be denied and gave the State authority to adopt regulations necessary to issue licenses. *See* NRS 453D.200.

The statutory framework provided that that the State must "use an impartial numerically scored competitive bidding process to determine which application or applications among those competing will be approved." NRS 453D.210. NRS Chapter 453D did not give Appellants any legitimate entitlement or expectation of winning a license sufficient to meet the injury requirement of standing. *See Malfitano v. Cty. of Storey By & Through Storey Cty. Bd. of Cty. Comm'rs,* 133 Nev. 276, 284, 396 P.3d 815, 821 (2017) (a temporary license holder's application for a permanent license did not give rise to a legitimate claim of entitled to the licenses sufficient to establish a property interest); *Haines-Marchel v. Washington State*

Liquor & Cannabis Bd., 406 P.3d 1199, 1217 (Wash. App. 2017) (applicant had no entitlement or property interest in retail marijuana license).

NRS Chapter 598A – Nevada's Unfair Trade Practices Act – does not serve as a substitute for Appellants' lack of property interest. (*See* TGIG Opening Br. at 32.) No Appellant asserted a cause of action under that chapter and the protection of *other* persons from anticompetitive conduct in *other* circumstances does not give Appellants a protectable property interest for standing purposes in *this* case. Doing so would turn NRS Chapter 598A on its head.

The purpose behind Nevada's Unfair Trade Practices Act is to prevent anticompetitive practices and provide a free and open market. Appellants are trying to use those statutes for the opposite purpose – harming their successful competitors. Appellants endeavor to coopt NRS Chapter 598A for the *anti-competitive* purpose of insulating their "market share" from competition to the detriment of consumers.[9] *See S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, No. 11-CV-04175-NKL, 2012 WL 123051, at *3 (W.D. Mo. Jan. 17, 2012)("economic interest in preventing loss of . . . market share is essentially a desire to avoid the

[9] Appellants refuse to recognize that Nevada's Unfair Trade Practices Act does not apply to "[c]onduct which is expressly authorized, regulated or approved by [a] statute of [Nevada]." NRS 598A.040(3)(a). This exemption would apply to the State authorized licensing process.

competition . . . [s]uch an interest fails to rise to the level of a legally protectable interest, for purposes of standing.").

Appellants also failed to establish at trial the amount of their "market share" or that any individual license holder would actually experience a decrease in market share stemming from the alleged improprieties. One of Appellants' experts, Jeremy Aguero, conceded that evaluating whether additional dispensaries would dilute market share is a complicated task involving many factors like the emerging nature of the industry, growth of the economic base, and idiosyncratic factors about each store like location. (318PJA045323-45233.)

Aguero testified that he was "not able to qualify how much of a decrease in market share any particular license holder dispensary would have based on the addition of new licenses." (318PJA045218.) Mr. Aguero did not even review specific data or information from any individual plaintiff. (318PJA045218.) He did not look at any of the Plaintiffs' particular stores or locations. (318PJA045219; 318PJA045245.) Mr. Aguero stated:

> Q. Set – set aside the rural jurisdiction reallocation, you don't know for certain whether TGIG would experience a market share decrease, even from the 2018 application licenses?
>
> A. Also correct. Yes sir.

(318PJA045239-45240.) Aguero admitted that the dilutive effect, if any, must be considered on a case-by-case basis and its possible that a current license holder

may not experience any dilutive effect from the additional licenses. (318PJA045244-45245.) In fact, one of his central opinions was that additional recreation dispensary licenses will *increase the overall size of the marijuana market in Nevada*. (318PJA045235-45237.) In layman's terms, this is the "if you build it, they will come" principle. (318PJA045236.) For Appellants THC and Herbal Choice, who were only cultivators without any dispensaries, their market share could not be diluted because it was already zero. (318PJA045245-45246.)

Appellants' other expert, Ronald Seigneur testified similarly. He also did not calculate the market share or value of any of the plaintiffs' or Appellants' specific dispensaries. (309PJA044032-44033.) The Appellants did not provide him with the necessary information to render those opinions. (309PJA044049.) Seigneur acknowledged that the extent of any cannibalization for any particular licensee "would be dependent upon the – the specifics of that license and where it's going to be located in relation to current license holders." (309PJA044033; 309PJA044052.) He agreed that no license holder is guaranteed a certain or fixed percent of market share. (309PJA044047.) Seigneur was unable to opine about the extent of any negative impacts to any individual licensee. (309PJA044051-44052.) He conceded that "it's possible that an unsuccessful applicant might not even experience market share dilution." (309PJA044048.)

Based on the testimony and opinions of Appellants' own experts, there is substantial evidence supporting the district court's holding that Appellants' market share is too speculative. *See Dynamic Transit v. Trans Pac. Ventures*, 128 Nev. 755, 761, 291 P.3d 114, 118 (2012) (stating that a district court's findings of fact will not be disturbed unless the lack substantial evidence, which is evidence that "a reasonable mind might accept as adequate to support a conclusion.").

It is clear from the Findings of Fact and Conclusions of Law that the district court did not "view[] Plaintiffs' claim respecting market share through the lens of a damages claim" (TGIG Opening Br. at 34.) It was a comprehensive conclusion. TGIG cites one finding related to monetary damages but ignores another more complete statement that "[g]iven the number of variables related to new licenses, the claim for loss of market share is too speculative for relief" – any relief, not just damages. (333PJA046869.) While rightly rejecting Appellants' market share theory, the district court misapprehended that Appellants failed to prove their standing for the same reasons. They were unable to quantify their individual market share or show that they would actually suffer a decline *i.e.* and injury.

Lastly, Appellants generalized interest in a "fair" application process does not confer standing. Appellants continually analogized the licensing process to other open, competitive bids for public works. (*See* TGIG Opening Br. at 10; THC/Herbal Choice Opening Br. at 26-28.) But NRS Chapter 453D's licensing process was

discretionary, just like Nevada's other competitive bidding procedures. *See Douglas Cty. Bd. of Cty. Comm'rs v. Pederson*, 78 Nev. 106, 108, 369 P.2d 669, 671 (1962) (determination under Nevada's competitive bidding statutes is "a judicial and not a ministerial function; deliberation was required and discretion was to be exercised."). Appellants had no guarantee of a license just as unsuccessful bidders have no guarantee for a public contract. In similar circumstances, the majority of jurisdictions hold "that disappointed bidders do not have a property interest unless the applicable law or regulation mandated that the contracting body accept the bid and gave it no discretion whatsoever to reject the bid." *Carroll F. Look Constr. Co. v. Town Of Beals*, 802 A.2d 994, 999 (Me. 2002); *see also Kim Const. Co. v. Bd. of Trustees of Vill. of Mundelein*, 14 F.3d 1243, 1247 (7th Cir. 1994).

The rationale behind the rule against standing for unsuccessful "bidders" is that such open and competitive processes are designed to benefit and protect the public, not individual competitors. *Independent Enterprises Inc. v. Pittsburgh Water & Sewer Authority*, 103 F.3d 1165, 1178 (3d Cir. 1997) ("Pennsylvania courts have long held that such laws are for the benefit of the public only and do not give a low bidder standing to challenge a municipality's failure to award a contract in accordance with the statute."); *Fariello Bus Serv., LLC v. Old Bridge Bd. of Educ.*, No. CIV.A. 09-4200 FLW, 2011 WL 2470630, at *6 (D. N.J. June 17, 2011) (same applying New Jersey law).

Nevada law is in accord. "The purpose of bidding is to secure competition, save public funds, and to guard against favoritism, improvidence and corruption. Such statutes are deemed to be for the benefit of the taxpayers and not the bidders, and are to be construed for the public good." *Gulf Oil Corp. v. Clark Cty*., 94 Nev. 116, 118- 19, 575 P.2d 1332, 1333 (1978). Any generic interest in a "fair" process is indistinguishable from the general public's interest that all laws be followed.

Appellants' interest in an amorphous "fair process" is no different from the millions of individuals and entities that did not submit an application or participate in the licensing process but who would like to see that all laws are followed. It is common to everyone. (TGIG Opening Br. at 52 ("In addition, among the winning and losing Applicants, the general public could not determine whether the most suitable candidates were selected.").) Appellants' asserted interest in a "fair" process is not personal enough to Appellants and is too generalized to support standing. *Schwartz*, 132 Nev. at 743, 382 P.3d at 894; *see also Georgia Atlas, Inc*., 2022 WL 903195, at *5 (rejecting competitive bid analogy to marijuana licensing context and finding no injury in fact from inability to obtain a license to sell contraband).

Thus, Appellants lack an injury to any protectable property interest. Competitors simply do not have standing to challenge the granting of license to their competitors. *See Nat'l Wine & Spirits Corp. v. Indiana Alcohol & Tobacco Comm'n*, 945 N.E.2d 182, 187 (Ind. Ct. App. 2011) (affirming dismissal for lack of standing

because a liquor licensee has no property interest in the certificate of compliance issued to its competitors); *Hauer v. BRDD of Indiana, Inc*., 654 N.E.2d 316, 319 (Ind. Ct. App. 1995) (wholesaler did not have standing because it had no property interest in the certificates of compliance issued to its competitors).

2. Appellants Did Not Establish Causation or Traceability.

In addition, the Appellants failed to show at trial that their supposed injuries (if any) were *caused* by any of the purported defects in the licensing process. A plaintiff must prove that its injury is "traceable" to the unlawful action. *Cannizzaro*, 138 Nev. Adv. Op. 28, 507 P.3d at 1207. There must "be a causal connection between the injury and the conduct complained of." *Miller*, 112 Nev. at 936 n.4, 921 P.2d 885 n.4. The connection cannot be speculative or conjectural. *Id.*; *Ecological Rts. Found. v. Pac. Lumber Co.,* 230 F.3d 1141, 1152 (9th Cir. 2000) ("the causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties"). The plaintiff must establish causation, not merely correlation. *See Stockmeier*, 122 Nev. at 392, 135 P.3d at 225.

Courts and commentators understand that causation for standing purposes is most often lacking when the plaintiffs were ineligible for the same desired benefits, failed to satisfy some precondition, or whose injuries were due to their own fault. *See, e.g.,* 13A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3531.5 (3d ed.).

Here, Appellants made no effort to show that the purported "unfair" licensing process led to their failure to obtain a license or to their perceived loss of market share. Appellants also did not show any causal link between any of the alleged defects in the licensing process and their failure to win a license. Indeed, Appellants made the strategic decision and refused to introduce the most basic piece of evidence to establish their claims: *they did not enter their unredacted applications into evidence.*

Appellants only introduced heavily redacted or incomplete versions of their applications. (1-16SA000001-3829.) Without entering unredacted versions of the applications into evidence, Appellants could not show that their applications were complete and compliant with the requirements. *See* NRS 453D.210(5)(a) ("The Department shall approve a license application if: [t]he prospective marijuana establishment has submitted an application in compliance with regulations").

Nor could Appellants demonstrate that they were qualified and would have received a license ***but for*** the alleged improprieties or other supposed irregularities**.** There was no evidence that Appellants were otherwise qualified or suitable to receive a license on their own merits. And because of the redactions, the district court could not determine whether Appellants' applications contained the same problems that they were attacking. *See Matter of the Application for Medicinal Marijuana Alternative Treatment Ctr. for Pangaea Health & Wellness, LLC*, 465

N.J. Super. at 378-39, 243 A.3d at 709 (observing that judicial review was hampered by redactions to marijuana applications). For instance, Appellants were not entitled to any relief if their own applications ran afoul of the same defects, including the Five Percent Rule, address requirement, diversity, or any of the imagined irregularities. 13A Wright & Miller, § 3531.5.

Equally as bad, only one plaintiff put a witness on the witness stand during their case-in-chief. There was no oral testimony to patch over Appellants' refusal to provide their full unredacted applications. The testimony of the one witness who appeared live at trial – Mr. Allen Puliz for THC – illustrates that none of the Appellants could prove causation. Puliz testified that THC had no existing dispensary and had no market share to protect. (314PJA044766-44767.) Puliz recognized that the redactions on THC's application made it difficult for the Court or other parties to determine if it was complete or if it met the basic requirements. (314PJA044777.) Puliz admitted that one of his applications had similar defects like the ones the Appellants were criticizing, including a "mistake," location issues, self-reported violations, and others. (314PJA044772,44779-44787,44789-44790.) The redactions potentially concealed other problems with THC's application. (314PJA044780.) (agreeing the unredacted version was necessary to confirm compliance).

Application redactions aside, Puliz stated that he did not know if the State's process was the reason that he did not obtain a license. Specifically, Pulitz testified that he was unaware whether he would have received a license under the State's process or even if the State were to adopt an entirely different process. (314PJA044725,44768.)

On the other hand, Puliz agreed that he did not know why any of the successful applicants received a license. (314PJA044775.). He could not say that the way in which the State applied the location requirement, the diversity scores, or the Five Percent Rule *caused* the winners to win or the losers to lose. (314PJA044775-44776.) Puliz did not know whether the location requirement, diversity score, or the Five Percent Rule was the reason THC did not obtain a license. (314PJA044776.) (stating he did not know whether any particular factor was the reason THC did not receive a license). Puliz acknowledged that he had no evidence that THC was more qualified or more deserving of a license than other applicants. (314PJA044805-44806.) Puliz did not consider THC to a superior applicant to any of the other winners. (314PJA044724.)

Puliz clarified the relief THC sought. THC was not asking for the State to re-score his application and he was not suggesting that THC would have gotten a license if his application was scored "properly." (314PJA044829.) ("Q. Are you here submitting that you would have gotten a license if this was scored properly? A. I am

not."). In other words, Puliz had no idea what *caused* THC to be unsuccessful. He also had no clue what *caused* the Essence Entities or the other winners to be successful. Puliz did not – and could not – establish a causal link between any of the State's purported unlawful acts and his unsuccessful application.

Even though no other Plaintiff (or Appellant) representative voluntarily appeared live at trial, the defense called other plaintiffs as witnesses or played their videotaped depositions. Those witnesses testified nearly identically to Puliz. For instance, Demetri Kouretas for TGIG testified that he did not believe that TGIG was a superior or better applicant than any of the winners. (321PJA045449,45453.)

Kouretas admitted that TGIG's application used the same physical address approach as many of the winning applications – the same requirement TGIG is challenging on appeal. (321PJA045435-45436.) TGIG knew the address location was not going to be scored. (321PJA045438.) TGIG also used an advisory board solely for purposes of applying for the license and increasing its scores. (321PJA045493.) TGIG's application had ownership problems under its own view of the requirements. (321PJA045492.) ("Q. So if we accept what you and Mr. Ritter were trying to urge upon the State, according to you, you were disqualified; correct? A. Sure.").

Kouretas conceded that TGIG failed to disclose all of its officers to the State and therefore they did not undergo the background checks under the Five Percent

Rule. (321PJA045497-45498.) ("you disclosed none of these people as officers to the State; isn't that right? A. That is correct. And I should have."); (321PJA045500,322 PJA045522.) He recognized that the ownership structure submitted to the State was wrong under TGIG's interpretation of the law offered in this appeal because there were many undisclosed LLCs and trusts involved. (321PJA045507-45510.) As a result, TGIG cannot trace any of its injuries to these issues because they were doing the very same things and would have been included in the same enjoined class of applicants.

Other representatives of the Appellants testified similarly and failed to prove causation. 322PJA045552 (MediFarm/MediFarm IV admitting it took advantage of the Five Percent Rule); 322PJA045553 (MediFarm/ MediFarm IV admitting it "can't identify any defect in the process that made it unfair"); 322PJA045554 (MediFarm/MediFarm IV stating it was unable to "give [] any specific reasons about why any of their individual scores were incorrect"); 322PJA045554 (MediFarm/MediFarm IV stating it was unable to describe how the process should have been different); 322PJA045555 (MediFarm/MediFarm IV admitting it has no evidence of corruption). 322PJA045606 (Fidelis stating it has no evidence that Five Percent Rule had any impact on who won or lost a license); 325PJA045793-45794 (Fidelis stating it was unaware if it was disadvantaged by physical address requirement); 325PJA045795 (Fidelis admitting that it was not contending its

application was superior); 325PJA045805 (Fidelis stating it was unaware if it would have won a license under a different process); 322PJA045646-45647 (Nevada Holistics admitting certain persons were not disclosed on its own application); 325PJA045652-45653 (Nevada Holistics admitting it possessed no facts or evidence of preferential treatment or attempts to unduly influence the process); 325PJA045743 (Nevada Pure admitting it has no evidence that it would have won a license even under a different process); 325PJA045743 (Nevada Pure stating it would be speculation that it would have won a license even under the process as it wanted it); 325PJA045745 (Nevada Pure stating that it did not believe that the address requirement was advantageous or disadvantageous to any applicant); 325PJA045785-45786 (Herbal Choice testifying that it does not know whether it would have still been denied a license under its preferred process or if the successful applicants would have still received a license.).[10]

In short, Appellants presented zero evidence at trial that the physical address requirement *caused* them not to get a license, or the Five Percent Rule *caused* them not to get a license, or the State's scoring process *caused* them not to get a license or anything else *caused* them not to get a license. Likewise, Appellants presented no

[10] Appellants GBS, Gravitas, Red Earth, Nevcann, Green Therapeutics, and Green Leaf Farms presented no witnesses at trial and absolutely no evidence of causation (or the other standing requirements).

evidence that these supposed issues *caused* the winners to be successful. Appellants' inability to show a causal connection between any alleged unlawful act and their failure to obtain a license – rather than their own deficient or non-compliant applications or actions – reveals that they lack standing. *See Yatooma*, 2022 WL 1913601, at *3 ("the seven allegedly discriminatory criteria are not the cause of Plaintiff's inability to obtain a retail marihuana license. Those criteria—whether given only to Plaintiffs or taken only from the other applicants—would not result in Plaintiffs' receipt of a retail marihuana license."); *Georgia Atlas, Inc*., 2022 WL 903195, at *5 (medical marijuana applicant failed to show causal connection for standing between failure to obtain a license and alleged unfairness in process).

3. Appellants Purported Injury is Not and Was Not Redressable Through the Relief Sought.

The last prerequisite for standing is redressability. *Morency*, 137 Nev. Adv. Op. 63, 496 P.3d at 588. Appellants must show that the relief they seek will remedy their alleged injuries. *Id*. "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 663–64 (D.C. Cir. 1996). "[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision."' *Lujan* v, 504 U.S. at 561.

Appellants' request for an entire do-over of the licensing process will not heal their purported injuries – the failure to obtain a license. For example, TGIG has "sought the remedy of declaring the entire 2018 Application Process invalid and subject to a redo" and "a more limited injunction impacting only those Applications that failed to satisfy the disclosure of the actual physical location." (TGIG Opening Br. at 30-31.) THC and Herbal Choice want to revoke the licenses of the winning applicants. (THC/Herbal Choice Opening Br. at 22.)

But neither form of relief would lead to any Appellant obtaining a license. As described above, Appellants acknowledged that there was no certainty that they would receive a license under any new or different process. They also did not assert that they were superior applicants who would have won *but for* any irregularity. Accordingly, Appellants' injuries (if any) are not redressable by the rulings they want from this Court.

The only cause of action that *might* redress an unsuccessful applicant's injuries are mandamus if there are *clear non-discretionary scoring errors on its own applications. See State Dep't of Health & Human Servs. Div. of Pub. & Behavioral Health Med. Marijuana Establishment Program v. Samantha Inc.*, 133 Nev. 809, 815-16, 407 P.3d 327, 332 (2017) ("Our holding that a disappointed applicant for a medical marijuana establishment registration certificate does not have a right to judicial review under the APA or NRS Chapter 453A does not place the

Department's processes beyond the reach of the judiciary. As the Department itself acknowledges, other forms of judicial relief, including but not limited to mandamus and declaratory relief, may be available if warranted."); *cf. Round Hill Gen. Imp. Dist. v. Newman,* 97 Nev. 601, 603, 637 P.2d 534, 536 (1981) ("writ of mandamus will issue when the respondent has a clear, present legal duty to act.").

If the State makes a non-discretionary scoring error, it may have to readjust rankings as a collateral effect or knock-on effect of correcting its mistake. But an unsuccessful applicant who does not identify a clear scoring error cannot challenge its competitors' licenses.

The Court need look no farther than the injunction against the Five Percent Rule. Appellants succeeded on this narrow ground, yet the injunction gained them nothing. Appellants still do not have licenses even though the State was affirmatively enjoined to prevent some competitors from opening. THC and Herbal Choice openly acknowledge that the injunction gave them no relief. (THC/Herbal Choice Opening Br. at 5, 33.) The absence of redressable relief is not an indictment of the district court – it is proof that Appellants do not have standing for the relief they asked for. *See Yatooma*, 2022 WL 1913601, at *3 (holding retail marijuana applicant's injury was not redressable even if the court "enjoin[ed] Defendant from effectuating its licensing ordinance or to void the ordinance's seven allegedly discriminatory criteria").

Merely throwing out the entire process or invalidating individual winners' licenses did not (and would not) provide Appellants any remedy. In the absence of evidence that Appellants would have received a license or somehow increased their "market share," no court could or should grant them relief. Appellants do not have standing because their asserted harms are not redressable by the judicial orders they seek.

IV. CONCLUSION

For these reasons, the Essence Entities respectfully request that the district court be affirmed because Appellants lack standing.

DATED this 29th day of September 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2007 in size 14 font in Times New Roman.

I further certify that I have read this brief and it complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 9,639 words.

Finally, I hereby certify that to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of September 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice, PLLC, and that on this 29th day of September, 2022, I electronically filed and served by electronic mail a true and correct copy of the above and foregoing **THE ESSENCE ENTITIES' ANSWERING BRIEF** properly addressed to the following:

/s/ Shannon Dinkel
An employee of PISANELLI BICE PLLC