Case No. 82014

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: D.O.T. LITIGATION

TGIG, LLC; NEVADA HOLISITIC MEDICINE, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; THC NEVADA, LLC; HERBAL CHOICE, INC.; RED EARTH LLC; NEVCANN LLC, GREEN THERAPEUTICS LLC; AND GREAN LEAF FARMS HOLDINGS LLC,

Appellants/Cross-Respondents,

v.

THE STATE OF NEVADA DEPARTMENT OF TAXATION, ET AL.

Respondent/Cross-Appellant,

and

INTEGRAL ASSOCIATES, LLC D/B/A/ ESSENCE CANNABIS DISPENSARIES; ESSENCE TROPICANA, LLC; ESSENCE HENDERSON, LLC; AND LONE MOUNTAIN PARTNERS, LLC,

Cross-Respondents.

TGIG APPELLANTS' OMNIBUS REPLY BRIEF TO LONE MOUNTAIN PARTNERS, LLC, ESSENCE ENTITIES and THE STATE OF NEVADA DEPARTMENT OF TAXATION ANSWERING BRIEFS

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I. INTRODUCTION

A. Promises Made and Promises Unkept

In 2016, the people of the State of Nevada approved a constitutional amendment legalizing recreational use of marijuana (Cannabis). In 2017, the legislature passed enabling legislation via NRS Chapter 453D to decriminalize the use and sale of Cannabis and to regulate what had previously been an illegal industry. In 2018, the Nevada Department of Taxation promulgated regulations governing the issuance, suspension, or revocation of retail recreational marijuana licenses at NAC 453D. Because this activity had been criminalized under various felony provisions for decades, and because companion crimes such as money laundering were an integral part of the formerly illegal businesses, the State of Nevada, through the three measures identified immediately above, promised all Nevadans that this former criminal activity would be regulated on a very high and strict level, much the same as the State's history of the regulation of gaming. This public policy principle must predominate in any analysis of the three measures. As discussed below, the district court only partially followed this public policy consideration.

The commencement of the regulatory process was an abject failure. Multiple defects in the application and licensing processes broke the inherent promises for a professionally and strictly regulated industry.

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B. Attempts Made to Salvage the Promise

The initial licensing process led to multi-party suits in district court on behalf of losing Applicants, all of whom had been licensed previously through the "medicinal marijuana" program in 2014. The coordinated cases were set to be tried in three "Phases." Phases 1 and 2 have been tried to final decision and are the subject of these Appellate proceedings. Phase 1 encompassed all of the plaintiffs' claims for judicial review and Phase 2 encompassed claims regarding the "[l]egality of the 2018 recreational marijuana application process (claims for Equal Protection, Due Process, Declaratory Relief, Intentional Interference with Contractual Relations and Permanent Injunction"). As stated in the Opening Brief, the Covid Pandemic caused a number of scheduling issues that reached this case. In this, Phase 2 was tried first ahead of Phase 1 – both concluding in September of 2020. Phase 3 has yet to be tried. Appellants are not parties to the Phase 3 claims.[1]

Despite concluding that incomplete or improper ownership disclosures violated the constitutional amendment itself, and despite enjoining the DOT from granting permanent licenses to entities with unidentified shareholders, partners or

[1] During the pendency of this appeal, the Essence Entities raised a jurisdictional issue arguing the Orders as to Phase 1 and Phase 2 were not final appealable Orders. The district court has certified the Findings of Fact, Conclusions of Law and Order for both Phase 1 and Phase 2 as final pursuant to NRCP 54(b).

members,[2] the district court found other constitutional and statutory violations but refused similar injunctive relief on the ground that everyone in the original application process was treated unfairly in basically the same way. The DoT argument on this point constitutes Confession of Error.

C. The Promise Remains Broken

As stated in the Opening Brief, the mission statement of the constitutional amendment was largely undermined in the initial licensing process. This led to losses of market share to the detriment of the rejected applicants; failures to fashion remedies consistent with the ballot initiative as was done with the ownership disclosures; sales to minors, shortcomings in investigations of licensees, etc. The various TGIG plaintiffs below sought multiple forms of relief including setting aside the initial process in total; remanding the matter back to the DoT for further development of an administrative record on the issue of "completeness" of the applications; and/or obtaining licenses under theories set forth in the Opening Brief in this case. In addition, the DOT was ultimately allowed certify its own compliance with the original injunction.[3]

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[2] As set forth in the Opening Brief, the district court improperly permitted the DoT to conclusively certify its compliance with the injunction rather than conducting its own independent evaluation of compliance.

[3] The DoT contends that there was nothing amiss in its certification of compliance. In this, the DoT conflates its statement of compliance with the district court's duty to conduct an independent analysis and impartially determine the claims of compliance and/or non-compliance.

Moreover, the administrative process over licensing was subverted by refusals to admit clearly admissible record evidence. Thus, the regulatory scheme from the start through its execution was a miasma of short staffing and improper abuses of discretion in the enforcement of the regulatory scheme as promulgated by the DoT.

D. Keeping the Promise`

While the cultivation, production, distribution, sale and licensing of Cannabis enterprises are now operating under a third regulatory construct – through the Cannabis Compliance Board, the ruling below must be reversed and remanded back to the district court for submission and consideration of record evidence wrongfully refused in support of judicial review under the then-existing statutory and regulatory environment. Remand must also include revisitation of remedies for the constitutional violations that the district court failed to provide in licensing unqualified applicants

This appeal provides the vehicle for fulfillment of the regulatory promise made at the outset of the recreational marijuana program.[4]

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[4] In a procedural quirk, TGIG Plaintiffs filed their Notice of appeal on October 23, 2020. In response to challenges to appellate jurisdiction, the district court certified the orders as final pursuant to NRCP 54(b). However, after such 54(b) certification, the DoT filed a cross-appeal on September 6, 2022. TGIG Plaintiffs are not responding herein to anticipated arguments to be raised by the DoT on its cross-appeal when and if it files its Opening Brief. Rather, TGIG reserves the right to do so at the appropriate time.

II. ARGUMENT

A. Injunctive Relief Awarded Below – Phase 2 of the trial

The TGIG Plaintiffs received the following injunctive relief concerning identification of each prospective owner, officer and board member in applications for recreational marijuana licenses:

> 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 per cent or greater standard in NAC 453.255(1). This decision by the DoT was not one they were permitted to make as it resulted in a modification of BQ2 in violation of Article 19, Section 2(3) of the Nevada constitution. [JPA Vo. 333 : 046848-046877 at 046876].
>
> The State is permanently enjoined from conducting a final inspection of any of the conditional licenses issued in or about December 2018 for an applicant who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6). [JPA Vo. 333 : 046848-046877 at 046876].

The "Five Per Cent" Rule

The DoT defends the so-called Five Per Cent Rule – allowing publicly traded entities to forgo disclosing minority shareholders so that such companies could be more easily licensed. The Department's point was that the initiative made such licensing impractical and placing a 5% threshold on disclosure was reasonable to ease this burden of licensing. But easing the burden of a prospective licensee is not part of the DoT's mission with regard to this regulatory scheme when substantive

regulatory requirements are at stake. It was certainly fair for the people of this State to prohibit such legerdemain and to require full ownership disclosure. Importantly, strict adherence to the ownership disclosure requirements makes sense – "silent partners" are almost always a problem in an enterprise that has the propensity to stimulate collateral illegal activity. The district court correctly found the rule to be unconstitutional, regardless of how it came into being.[5]

Plaintiffs also sought similar injunctive relief with respect to successful applicants who failed to tender complete applications that accurately provided the actual physical address of their proposed marijuana establishments and who used mail drops or P.O. Boxes as their locations. The district court ruled that:

> 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.

[5] Nevada's early gaming statutes and regulations similarly required background checks of all owners of a gaming license applicant. These statutes and regulations made it impracticable for public companies to own and operate gaming establishments in Nevada. Ultimately, the legislature adopted new regulatory schemes which did not require background checks of non-controlling shareholders with de minimus holdings. That BQ2 made it impracticable for public companies to own and operate marijuana establishments because of statutory requirements to background check all owners cannot be remedied by contrary ad hoc decisions by licensing authorities. As with gaming regulation, only the legislature had the ability to amend the regulatory construct after the time period had passed preventing amendment of a ballot initiative.

> [FFCL 60 at JPA Vol. 333: 046848-046877 at 046878. See also FFCL 100 at JPA Vol. 333: 046874].

The district court, despite finding that the DoT's actions respecting disclosure of an actual physical address contributed to an unfair process, provided no relief to Plaintiffs and failed to enjoin the DoT from issuing final permits to applicants that failed to truthfully disclose the physical address of the proposed establishment and those who falsely disclosed mail drops and P.O Boxes as the physical location of the business thereby rendering their applications incomplete, as a matter of law, as of the date of submission.

B. The District Court Then Ratifies the Substandard Regulatory Scheme

The DoT questions the validity and requirement for strict compliance with the statutory and regulatory language. The following was the district court's justification for strict compliance with the initiative:

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

[JPA Vol. 333: *046848-046877 at 046871*].

To coin a phrase used by the State,[6] the actions involved in the original application process were not "even close" to meeting the high standards for this regulatory construct. Notwithstanding expressing the criticism of the process implemented by the DoT, the district court went on to deny injunctive relief with regard to numerous licenses that were awarded to applicants who disclosed false locations in their applications. See FN 4 of the Opening Brief. It is undisputed that the DoT awarded licenses where multiple applicants used the same base UPS Store addresses in their applications.

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

1. The lack of training for Graders compromised objective and impartial evaluation of applications;
2. Under the authority to evaluate completeness of an application, the DoT did little or nothing to verify the identity of owners, officers and board members of the applicants.
3. Grading organizational structure, including diversity requirements, was poorly confirmed or documented without penalty. Conditional licenses

[6] See Opening Brief and discussion infra.

were issued despite non-compliance -- with the caveat that the applicant bring the application into conformity with DoT records.

4. Failure to provide guidance to potential applicants or temporary employees.
5. The DoT's decision to eliminate the requirement to disclose the dispensary locations was evidence of a lack of a fair process and violated duly promulgated regulations.
6. In eliminating the requirement to disclose the dispensary location, the graders could not adequately assess graded criteria.
7. The DoT failed to properly train Independent Contractors hired to assist with grading the applications and failed to establish any quality assurance or quality control of the grading done by Independent Contractors.

The current CCB is in the process of addressing these issues. But the regulatory construct in place at the time of the original recreational Cannabis licensing needs to be judicially remedied. Just because the licenses are in place does not make this impossible.

In short, this appeal is designed to remediate the substandard system put in place by the original regulators. More to the point, this appeal is designed to create the system actually contemplated by the electorate in 2016. This is also being

prosecuted to avoid crippling an industry that was legalized to eliminate costly impacts on the criminal justice system and society as a whole.

C. <u>The DoT's Position</u>

The DoT has taken the position in this appeal that the TGIG Plaintiffs provided totally inadequate applications and were not "even close"[7] to scoring high enough to be awarded additional licenses.

The DoT also criticizes TGIG and/or its affiliated plaintiffs for arguing that the process for disclosing addresses violated the constitution when one of the TGIG Plaintiffs took advantage of the 5% rule and one of the TGIG Plaintiffs also submitted P.O. Boxes as its physical location. One might ask another question: [W]hy wouldn't the TGIG plaintiffs take these opportunities when every other applicant had that option? Given that the TGIG parties never contended they were entitled to issuance of a license and that their injuries are sustained by virtue of the loss of market share through unconstitutional means, these arguments are irrelevant to the appeal. A fair process would have given a fair chance at licensure – this is different than proving that TGIG's application would have been approved. See discussion immediately below.

Criticism was also lodged because one of the appellants, TGIG, had the same personal access to the regulators through its compliance counsel as did every other

[7] See p. 18 of the DoT Answering Brief.

applicant who engaged said counsel. TGIG has abandoned the "undue influence" argument in this appeal.

D. Plaintiffs Have Standing to Assert Their Claims

The DoT makes a completely spurious argument that TGIG Plaintiffs have no standing because they suffered no individual quantifiable monetary damages. The DoT complains that the TGIG parties never alleged or proved that, but for the alleged flaws in the process, each of them would have been successful in obtaining licenses. See p. 22 of the DoT Answering Brief. But, how does one prove such a thing? The Department has thus taken a "heads I win, tails you lose" approach to the licensing process. Citing *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Hum. Servs., Div. of Pub. & Behav. Health*, 134 Nev. 129, at 134, 414 P.3d. 305, at 310 (2018), the DoT claims almost unbridled authority to provisionally license an applicant, even if the Applicant fails to meet important application requirements. *See* p.p. 25-26 of the DoT Answering Brief herein. This cannot have been the intent of the people and their legislature.

Similarly, the Essence and Lone Mountain Answering Briefs advance the argument that each of the seven (7) TGIG Plaintiffs lack standing to pursue their claims. In doing so, both Essence and Lone Mountain, following the DoT's lead, set up a strawman which is a total mischaracterization of the claims made and the injury alleged by the TGIG Plaintiffs. They then flog the strawman with arguments

and precedent not applicable to the actual claims and injuries alleged by the TGIG parties to this Appeal.

The Essence Answering Brief characterizes the alleged injury as follows: "Appellants' request for an entire do-over of the licensing process will not heal their purported injuries — the failure to obtain a license." [Essence Answering Brief at p. 42]. Lone Mountain focuses upon the false premise that the TGIG Plaintiffs' alleged injury was simply the denial of a license. [See Lone Mountain Answering Brief at p. 12: "Simply put, the failure to win licenses in a competitive application process is not an injury in fact and Appellants' alleged injuries are far too speculative to establish standing."] Indeed, as Appellants did not win RME licenses, they do not have any property interest or entitlement to a license under Nevada law. *See Malfitano v. Cty. of Storey By & Through Storey Cty. Bd. of Cty. Comm'rs,* 133 Nev. 276, 282, 396 P.3d 815, 820 (2017)."

However, the injury to the TGIG Plaintiffs was, in actuality, alleged to be the loss of market share caused by the arbitrary, capricious, and unconstitutional implementation of flawed processes by the DOT in the award of licenses. [See Second Amended Complaint at paragraphs 54-61: JPA. Vol. 49:006025-006047]. It is not the license applied for that constitutes the property interest of the TGIG Plaintiffs as Essence and Lone Mountain try to argue to the Court. Here, quite apart from any question as to whether the TGIG Plaintiffs had a statutory entitlement to

acquire additional licensing by prevailing under the proper application of the voter initiative and licensing scheme at issue, TGIG Plaintiffs clearly had a *preexisting* property interest in its *previous marijuana licensing* and the *preexisting* market share arising from the fruits of its endeavor conducted pursuant thereto. And therefore, by improperly permitting competing Applicants to effectuate an *incursion* upon that *preexisting* market share by unlawfully *granting* them new licenses, state administrative action has served to *diminish* that *preexisting* market share under color of state law and has thereby effectuated a due process violation.

To be certain, the State of Nevada was directed by voter initiative to establish and utilize a fair and constitutional process to award additional licenses to Applicants which may or may not have had the effect of decreasing a current licensee's market share. However, under Nevada law, the market share of all then-current licensees was a protectable interest such that the State of Nevada was not entitled to take actions that arbitrarily, capriciously and unconstitutionally diminished the market share of the TGIG Plaintiffs.

The uncontested evidence at trial established that the issuance of new, additional licenses pursuant to the flawed, arbitrary, capricious and unconstitutional processes utilized by the DOT increased the number of competing recreational marijuana establishments throughout the state and this increase in the number of competing establishments negatively impacted the TGIG Plaintiffs' market share.

Whether or not the TGIG Plaintiffs would have received a new license if the District Court had ordered the DOT to redo the entire application process is entirely irrelevant to whether TGIG Plaintiffs have suffered a deprivation of constitutional rights resulting in the injury to their market share by the process actually used. Indeed, without knowing all of the elements and nuances of a new, fair and constitutional re-do of the application process, it is impossible for the TGIG Plaintiffs, the DOT, Essence, Lone Mountain or any other Applicant to know which Applicants would obtain a license in a new process that passed constitutional muster.

A do-over of the licensing process might not result in the issuance of a license to any or all of the TGIG Plaintiffs. However, a do-over will remedy the loss of market share caused by the constitutionally infirm process actually utilized. If a TGIG Plaintiff obtained a license in the do-over, that might maintain or increase their market share. If a TGIG Plaintiff did not obtain a license in a do-over, at least, the monetary loss associated with a loss of market share would be suspended until the new, fair and constitutional process was completed and new licenses awarded.

DoT, Essence and Lone Mountain argue that TGIG Plaintiffs suffered no damages. To the contrary, TGIG provided uncontested testimony through their experts that they suffered loss of market share. What they could not prove was the actual amount of individual monetary damages each suffered as a result. In this, the

district court concluded that market-share damages were too speculative to frame a damage award on that basis. However, as set forth in TGIG's Opening Brief, one significant reason that experts in the case could not quantify the actual market-share monetary damages from the opening of the new dispensaries was that DoT arbitrarily and capriciously eliminated the statutory and regulatory requirement for Applicants to disclose the physical location of their proposed establishments. Without knowing the location of the proposed facility (which was a required disclosure in the applications and which requirement DoT arbitrarily ignored), the experts could not calculate actual monetary damages for each TGIG Plaintiff.

The "standing" argument advanced by the DoT, Essence and Lone Mountain relies heavily upon the notion that the TGIG plaintiffs and the other Applicants have no basic right to a license in this affair. Licenses under this program are privileged. But that is entirely beside the point. All of the Applicants, including TGIG plaintiffs, had a right to a process that satisfied the constitution and that did not arbitrarily and capriciously damage their pre-existing market shares. This process failed miserably – partly because the administrative and judicial decisions in this case wrongly depended upon the false proposition that the flawed process treated all Applicants the same way and, thus, ***must have been fair***. See pp. 6-7 of DoT's Answering Brief. This non sequitur must be rejected because the process can only be fair if it passes constitutional muster. The compromises made by the Pupo group were not

authorized by the constitution. The result, a sloppy and ad hoc regulatory practice that undermined the purpose of providing high level regulation of what was previously an illegal enterprise.

E. Market Share is a Protectable Property Interest in Nevada and TGIG Plaintiffs Have Standing to Pursue Their Claims

The issue of standing was fully briefed before the District Court. The District Court denied Lone Mountain's motion to dismiss on standing by Order dated May 5, 2020 [JPA. Vol. 62:007940-007941].

The Nevada Constitution guarantees every person's right to acquire possess, and protect their property. *State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark*, 131 Nev. Adv. Op. 41, 9, 351 P.3d 736, 741 (2015). "The Nevada Constitution contemplates expansive property rights" and "our State enjoys a rich history of protecting private property owners against government takings." *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 670, 137 P.3d 1110, 112 (2006).[3] In this sense, the property protections of the Nevada Constitution are broader than those of the United States Constitution. *McCarran Int'l Airport*, 122 Nev. at 669-70, 137 P.3d at 1126-27.

NRS Chapter 598A codifies statutory regulation pertaining to "Unfair Trade Practices" in the State of Nevada. To that end, NRS § 598A.030 (Legislative declaration) provides:

> 1. The Legislature hereby finds that:
> *(a) The free, open and competitive production and sale of commodities and services is necessary to the economic well-being of the citizens of the State of*
> *Nevada.*
> *(b)* The acts of persons which result in the restraint of trade and commerce:
> (1) Act to destroy free and open competition in our market system and, thereby, result in increased costs and the deterioration in quality of commodities and services to the citizens of the State of Nevada.
>
> (2 Result in economic hardships in the form of increased consumer prices and increased taxes upon many citizens of the State of Nevada least able to bear such increased costs.
> 2. It is the policy of this state and the purpose of this chapter to:
> (a) Prohibit acts in restraint of trade or commerce, *except where properly regulated* as provided by law.
> *(b) Preserve and protect the free, open and competitive nature of our market system.*
> (c) Penalize all persons engaged in such anticompetitive practices to the full extent allowed by law, in accordance with the penalties provided herein.

Id. (emphasis added).

> And NRS § 598A.090 (Jurisdiction of district courts) provides:
>
> The district courts have jurisdiction over actions and proceedings for violations of the provisions of this chapter and may:
> *1. Issue temporary restraining orders and injunctions* to prevent and restrain violations of the provisions of this chapter.
> *2.* Impose civil and criminal penalties and award damages as provided in this chapter.
> *3. Grant mandatory injunctions* reasonably necessary to eliminate practices which are unlawful under the provisions of this chapter.

Id., (emphasis added).

Lost market share of a business as a result of the conduct of a competing business being pursuant to an invalid license is an injury sufficient to establish a claim under NRS 598A. See *Law Offices of Matthew Higbee v. Expungement Assistance Servs.,* 214 Ca1.JPA.4th 544, 565, 153 Cal.Rptr.3d 865 (Cal.Ct.JPA.2015). That a constitutionally protectable property interest exists regarding the current market share of a going legitimate business has been found unassailable in many contexts. *Merced Irrigation District v. Barclay's Bank PLC,* 165 F. Supp 3rd 122, 144 (S.D.N.Y., 2016); *Grand River Enterprises Six Nations, Ltd. v. Pryor,* 481 F. 3rd 60, 67 (2nd Cir. 2011); *Novartis Consumer Health Inc., v. Johnson & Johnson-Merck Consumer Pharmaceuticals,* 290 F. 3rd 578, 596 (3rd Cir. 2002); *In re Goldcoast Partners, Inc. v. Nationsbank N.A.,* 1998 WWL 34069489 (Bat-11u S.D. Fla. 1998) (The Bank's lien applied to the Debtor's intangible property rights—goodwill going concern value, and market share value—and therefore the Bank's lien also applied to the proceeds from the sale of those rights.) (emphasis added); *In re SRJ Enterprises, Inc.,* 150 B.R. 933, 940-41(Bankr. N.D. Ill. E.Div. 1993).

Moreover, injury suffered from the loss of market share is irreparable. See *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH,* 237 F.3d 1359, 1368 (Fed.Cir. 2001) (likelihood of price erosion and loss of market position are evidence of irreparable harm); *BioTechnology Gen. Corp. v. Genentech, Inc.,* 80 F.3d 1553, 1566

(Fed.Cir. 1996) (loss of revenue, goodwill, and research and development support constitute irreparable harm); *Polymer Technologies, Inc. v. Bridwell,* 103 F.3d 970, 975-76 (Fed.Cir.1996) (loss of market opportunities cannot be quantified or adequately compensated, and is evidence of irreparable harm). Thus, while the Essence Entities and Lone Mountain Partners argue that the TGIG Plaintiffs provided insufficient evidence as to the actual amount of damages (and the District Court found the amount of damages to be speculative [Finding of Fact 73: JPA. Vol.333:046830-046844]), the irreparable nature of the injury and the inability to quantify a specific monetary amount of damages supports the granting of an injunctive remedy in this case.[8]

Contrary to Essence's and Lone Mountains' argument, *Malfitano v. County of Storey,* 133 Nev. 276, 396 P.3d 815 (2017), is not dispositive to the SAC's first claim for relief. In Malfitano, the Nevada Supreme Court held that the denial of a liquor license application did not violate the Applicant's procedural due process rights. In *Malfitano, supra,* no findings were made regarding whether there is a tangible property interest in market share. Notably, what the Malfitano Court did say is that

[8] This Court should remain cognizant of the fact that the TGIG experts could not calculate the specific amount of the loss of market share suffered by the TGIG Plaintiffs because the DOT arbitrarily and capriciously eliminated the statutory and regulatory requirement for each applicant to disclose the actual business location of the proposed marijuana establishment. The nearer the newly licensed establishments would be to existing TGIG Plaintiff establishments, the greater the expected cannibalization of the TGIG Plaintiffs' market share.

to have property interest in a benefit, a business must have a legitimate claim of entitlement to it. Id. at 820. Plaintiffs allege that they have an entitlement to their respective market shares which have been interfered with by the State and the procedures attendant upon that deprivation were not constitutionally sufficient. See SAC, ¶¶ 53-79, at 12:21 to 16:2.

Based upon the above and foregoing, the evidentiary record and the pleadings establish that the TGIG Plaintiffs (1) suffered an injury in fact (loss of pre-existing market share); (2) caused by the issuance of new licenses pursuant to an unfair, arbitrary, capricious and unconstitutional application/licensing process; and (3) which is redressable through issuance of an injunction invalidating the newly issued licenses pursuant to the flawed and unconstitutional process. The TGIG Plaintiffs have standing and were not required to demonstrate that they would have received or will receive a license in a fair, open, competitive and constitutionally permissible process. Again, the claims are that the TGIG parties sustained an impairment of existing market share by an unconstitutional process. The point is not that the TGIG parties were refused recreational licenses. The point is that the actual monetary loss attributable to loss of market share could not be proved because of defective applications by other Applicants that failed to identify actual addresses of operation. Lack of locations prevented proof of the reasonable value of the lost market share sustained by TGIG in its market area. This entitled TGIG to injunctive relief

F. The Physical Location of the Proposed Marijuana Establishment

Neither the DoT nor Lone Mountain offer any compelling rebuttal to TGIG's arguments respecting the arbitrary and capricious deletion of the regulatory requirement that Applicants for licensing "MUST" set forth the actual physical location of the proposed marijuana establishment **IN THEIR APPLICATION**.[9] In a refrain repeated throughout these proceedings, every time this issue has been raised, Defendants primary response is that the decision in *Nuleaf CLV Dispensary, LLC v. State Department of Health & Human Services, Division of Public & Behavioral Health*, 134 Nev. 129, 134-35, 414 P.3d 305, 310 (2018), conclusively holds that the disclosure of the physical location of the proposed marijuana establishment in the application was not required. Nuleaf contains no such holding.

The Nuleaf Court framed the issue presented therein as follows: "we are asked to determine whether NRS 453A.322(3)(a)(5)'s requirement must be satisfied before an Applicant can receive a registration certificate." *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Hum. Servs., Div. of Pub. & Behav. Health*, 134 Nev. 129, 130, 414 P.3d 305, 306 (2018). The "requirement" at issue in that case involved compliance with applicable local zoning restrictions and business requirements. See

[9] The Essence Entities'' Answering Brief ignores the issue entirely.

Id. The question involved a determination of when local government certification needed to be obtained.

The key to the Nuleaf decision was the Court's finding that the statute was ambiguous as to when local government approval had to be obtained. ("Here, the plain language of the three interrelated statutes is ambiguous as to whether the Department can issue a certificate for an Applicant who fails to satisfy NRS 453A.322(3)(a)(5)'s requirement." *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Hum. Servs., Div. of Pub. & Behav. Health*, 134 Nev. 129, 134, 414 P.3d 305, 309 (2018)). Citing *Nev. Attorney for Injured Workers v. Nev. Self–Insurers Ass'n,* 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010). The Court wrote: "When the language of a statute is plain and subject to only one interpretation, we will give effect to that meaning and will not consider outside sources beyond that statute."*Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Hum. Servs., Div. of Pub. & Behav. Health*, 134 Nev. 129, 133, 414 P.3d 305, 309 (2018).

As set forth in TGIG's Opening Brief, the statutory requirement for disclosing the physical address of the proposed marijuana establishment was set forth in BQ2 and NRS 453D.210(5) which provided that the DoT shall approve a license application if, among other things, "the physical address where the proposed marijuana establishment will operate is owned by the Applicant or the Applicant has the written permission of the property owner to operate the proposed marijuana

establishment on that property." While the statute did not set forth the timing for the disclosure as to a physical address, the DoT went through a lengthy process of rule-making pursuant to the Nevada Administrative Procedures Act and adopted regulation NAC 453D.265(1)(b)(3), which required that the application itself MUST include the physical address where the proposed marijuana establishment will be located and the physical address of any co-owned or otherwise affiliated marijuana establishments.

If any ambiguity existed as to the timing and process for the disclosure of the physical address of the proposed marijuana establishment under the statute, such ambiguity was eliminated by rule-making upon the adoption of this regulation. Pursuant to duly enacted regulation, zero ambiguity exists that the actual physical location MUST be included in the application, or the application does not conform to regulatory requirements. Applications that failed to disclose the actual physical location of the proposed marijuana establishment were incomplete and should never have been submitted for scoring and possible license award. Applications that falsely disclosed the actual physical location should have been summarily denied for providing false information. Having duly adopted a regulation pursuant to the Nevada Administrative Procedures Act, the DoT was required to comply with it and its personnel were not free to pick and choose which regulations they would enforce. The DoT, Lone Mountain and the Essence Entities are largely silent as to the legal

significance of the DoT personnel arbitrarily and capriciously determining that the duly enacted regulation was bad policy and choosing not to enforce it.

As noted in the Opening Brief, the Essence Entities falsely disclosed P.O. Boxes and mail drops as the actual physical location for their proposed marijuana establishments. In its Answering Brief, Lone Mountain acknowledges that its applications for various licenses in several jurisdictions did not disclose a physical address.[10] The evidentiary record supports the conclusion that more than 70% of all licenses granted statewide were incomplete for failure to disclose the actual physical address of the proposed marijuana establishment or for failure to list all owners. These applications should never have been submitted for competitive scoring and possible license award.

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[10] Trial Exhibits 1135 and 3291 at JPA. Vol 330: 046424-046445 and JPA. Vol 331: 046549-046564 respectively set forth the addresses as listed in the relevant applications and confirms that Lone Mountain merely stated "TBD" in their application for several licenses that they were ultimately awarded. Lone Mountain claims that it could not submit actual physical locations because of moratoriums enacted by several local jurisdictions. Lone Mountain ignores the obvious that it could have secured the right to utilize particular locations contingent upon such moratoriums being subsequently lifted. Further, the first version of the application did not contain any requirement that the applicant own or have the legal right to operate an establishment at the address disclosed. The second version, which violated the express, unambiguous terms of the regulations, only required disclosure of the proposed physical address if the applicant owned or had a lease to operate a marijuana establishment at the location. In actuality, the DoT personnel simply ignored the requirement to disclose an address regardless of which version of the application an applicant used.

What the DoT and no Applicant could do is to simply ignore a clear and unambiguous regulatory requirement adopted after appropriate rule-making to disclose the actual physical address of the proposed marijuana establishment **in the application**. As set forth in the Opening Brief, the amendment, modification or other ad hoc change of the regulatory requirement by DoT personnel is impermissible rule-making and is arbitrary and capricious.

G. Confession of Error

The district court found several flaws in the DoT's application process. These included such things as absence of a single point of contact, the late decision to change the original physical address requirements,[11] and the insufficient training of the graders. But the district court concluded that the flaws were "insufficient to void the [application] process." ***The district court and the DoT justify this result on the ground that regardless of the flaws, the DoT equally subjected all of the Applicants to the illegal grading process. That is a confession of error.***

First, the supreme court has clearly stated the primacy given to the language of initiative petitions; second, the intent of legalization was to provide a first-class regulatory scheme – not a shoddy ad hoc approach to implementation; third, the disparate treatment of flaws in the ownership and location disclosure requirements

[11] The district court and DoT erroneously took the position that the changes by Mr. Pupo to the physical address requirement eliminated the requirement altogether.

violated the rules of construction of ballot initiatives; fourth, both the universe of Applicants and the people who voted for this measure fully expected much higher standards for this regulatory process.

H. <u>Phase 1 of the Trial</u>

The implementation of the regulation of the Cannabis industry fell short of the licensing process expected from a strict regulatory construct. The DoT argues that TGIG Plaintiffs were not entitled judicial review as this was not a contested case. This argument is double-speak. The TGIG Plaintiffs rest upon the arguments in their Opening Brief which fully anticipated and respond to DoT's Phase 1 arguments.

The remedy sought is compatible with the remedies sought in Phase 2. At a minimum, the DoT should have remanded the case to the DoT requiring it to consider and develop an administrative record demonstrating that it considered "completeness" of an application prior to submitting the application to the scoring process for award of a license. If the application was not complete because it failed to identify all owners and/or failed to disclose the actual physical location of the proposed marijuana establishment, issuance of a final license should be barred since it never should have been submitted into the scoring process for evaluation.

I. <u>The DoT's Certification of It's Own Compliance With the Injunction</u>

The DoT and Lone Mountain argue that there is nothing wrong with having a party who is enjoined from undertaking some action also being the final arbiter of whether it violated the injunctive language through its actions. Clearly, as the injunction is issued by the district court and constitutes a directive by the court, the district court should determine fairly and impartially and based upon evidence whether the enjoined party is in compliance with the injunction. It is not enough for the enjoined party to simply certify to the district court that "Yes, I am in compliance with the injunction" and for the district court to accept such certification as proof of compliance.

Lone Mountain argues "[F]irst and foremost, Appellants' arguments against Lone Mountain are moot." [Lone Mountain Answering Brief at pg. 21]. The argument is made because the statute was subsequently amended after the application process was complete to make it easier for public companies to become licensees. From this, DoT reasons that its lack of compliance with the original then-existing statute and regulations in the license awards is irrelevant. ***But this simply cannot be an accurate statement of law***. Regardless of subsequent changes in the law, the DoT was required to comply with the then-existing laws when it made the original awards. Thus, while any do-over's will be performed under the amended law, whether the do-over was required in the first place must be determined under the original requirement. Under this construct, the do-over claim is determined under

the original provisions and, if that determination favors a new process, the renewed licensing is controlled by the new provision.

Lone Mountain and the DoT also argue that NRS 453D.210(4) and NAC 453D.272(1) "required the Department – not the district court and certainly not Appellants – to determine whether Lone Mountain's application was complete and in compliance with the law." [See Lone Mountain Answering Brief at pg. 23]. The TGIG Appellants absolutely agree that the DoT was required to determine "completeness" of an application, which included whether all owners and the actual physical addresses of the proposed marijuana establishment were disclosed in the application -- as required by both statute and regulation. Whether the DoT adequately discharged this responsibility involves a judicial determination and not a mere certification of compliance. A determination as to whether DoT personnel arbitrarily and capriciously ignored statutory and regulatory requirements for determining completeness is a judicial function – not exercised in the instance.

Finally, Lone Mountain brazenly asserts that there is no evidence in the record to contest the Department's certification with respect to Lone Mountain. To the contrary, Trial Exhibit 1302 [JPA Vol. 330: 046446-046448] was the initial certification of the DoT that clearly identified Lone Mountain as an Applicant that the DoT could not conclude had submitted truthful and complete ownership information in its application. This relegated Lone Mountain to status as a "Tier 3"

Applicant.[12] And, a second certification removing Lone Mountain from Tier 3 was the product of a negotiated partial settlement and does not adequately establish a factual basis upon which the removal from Tier 3 was based. In reality, certain parties simply agreed that the DoT would remove Lone Mountain from Tier 3 to permit the partial settlement to go forward. This circumvented the judicial role in this process and, importantly, this issue is one that permeates both Phase 1 and Phase 2 proceedings.

J. Harmless Error

Lone Mountain also argues that, if any error occurred, it was harmless as to Lone Mountain. It asserts that no evidence was adduced against Lone Mountain questioning the granting of licenses to it. [Lone Mountain Answering Brief at pg. 31]. As noted hereinbefore, evidence was presented that Lone Mountain failed to fully disclose its ownership in its application and failed to disclose the actual physical address of its proposed marijuana establishment in multiple applications which Lone Mountain conceded in its Answering Brief. The aforementioned licenses unconstitutionally, arbitrarily and capriciously diminished Appellants' pre-existing market share.

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[12] As a Tier 3 designee, the DoT was enjoined from issuing final licensing to Lone Mountain. Upon removal from Tier 3, the DoT maintained that the injunction did not apply to Lone Mountain**.**

III. CONCLUSION

This case provides a remedial mechanism to provide the Nevada Cannabis program with a first-class regulatory construct.

The rulings below against the TGIG plaintiffs must be reversed and remanded back to the district court for submission and consideration of record evidence wrongfully refused in support of judicial review. Remand must also include revisitation of remedies for the constitutional violations that the district court failed to provide in licensing unqualified Applicants and cutting out previously licensed medicinal marijuana providers, such as Appellants in this matter.

Dated this 30th day of November 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 Microsoft Word, Times New Roman style, and a 14-font size. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it is either:

Proportionally spaced, has a typeface of 14 points or more, and contains 6,997 words, starting from the statement of the case.

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

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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 30th day of November 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1(d) on the 30th day of November 2022, I did serve at Las Vegas, Nevada a true and correct copy of, on all parties to this action by Electronic Filing.

/s/ Tanya Bain
Employee of Clark Hill, PLLC