Nevada Cannabis Compliance Board
Special Meeting Minutes September 15, 2022

The Nevada Cannabis Compliance Board (CCB) held a public meeting at 555 East Washington Ave, Room 2450, Las Vegas, Nevada and 1919 College Parkway, Meeting Room 100, Carson City, Nevada beginning at 9:02 a.m. on September 15, 2022.

Cannabis Compliance Board Members Present:

Michael Douglas, Chair
Jerrie Merritt
Riana Durrett
Bryan Young
Dennis Neilander

Chair Douglas called the meeting to order, and Director Klimas took roll. Chair Michael Douglas and Member Durrett, and Member Merritt were present in Las Vegas. Member Young was present in Carson City. Member Neilander was present via video connection.

I. Public Comment.
Paul Michael Burgess provided comments on the dangers and public health of cannabis Delta-8. Mr. Burgess stated he had provided documentation on a mobile application that would work in that area. Mr. Burgess would be happy to demonstrate this to the Board and show how it would benefit the CCB and Nevada.

Senator Pete Goicoechea spoke about the legislative intent that every jurisdiction could have access in limited way to cannabis licensure. Mr. Goicoechea commented on the petition from White Pine County for a medical cultivation license and requested that the Board promulgate the required regulations. There were counties that did not put in for the first round, but it has become apparent that there is an economic benefit. There is a particular company that the Board of White Pine County Commissioners has endorsed and petitioned for their licensure. Mr. Goicoechea stated he was available should the Board have any questions.

II. Consideration of Pending Motions in the matter of Cannabis Compliance Board vs. Cannex Nevada, LLC now known as Lettucetest, LLC (Case No. 2020-27) (for possible action)

Chair Douglas introduced the matter. Kimberly Maxson-Rushton appeared on behalf of the Lettucetest, LLC and stated the company goes by the acronym LTL. Ms. Rushton added that the other acronyms commonly used are SOD, statement of deficiencies, and CAP, corrective action plan. Ms. Rushton stated the owners Mr. Rob Richardson and Mr. Ric Rushton were present, as well as the scientific lab director, Dr. David Luttrell.

Ms. Rushton stated the most important function of any regulator and most important criteria for any licensee in a privileged license capacity is compliance. This is established in NRS 233B, the Administrative Procedures Act. Ms. Rushton noted that the acts alleged in the 2021 complaint occurred in 2019. Ms. Rushton spoke of the law and the respondent's actions. Chair Douglas interrupted and directed Ms. Rushton to the purpose of the motion under consideration, not the re-argument of the motion to dismiss itself at this point. Chair Douglas directed Ms. Rushton to tell the Board why they should give consideration to allowing Ms. Rushton to argue the dismissal the ALJ, administrative law judge, determined that is part of the objection.

Ms. Rushton responded that the basis for the request for consideration of the motions to dismiss is based on the tradition and procedural history of cases whereby the courts will entertain dispositive motions, motions to dismiss, in advance of hearing or going to trial or an evidentiary hearing. The point was to

avoid the obligation of a lengthy trial if the moving party justifies the basis for the dismissal of the action. In this case, the dispositive motions were ordered by the ALJ to be filed by March and the beginning of April 2021, 14 to 20 days in advance of the evidentiary hearing. The motions were timely filed and not considered until moments before the hearing. Ms. Rushton added that the nature of the motions, based on claim and issue preclusion, referred to as res judicata, was that the matter was completed. The other basis was what is called laches. The complaint was filed in 2021 and evidence was lost, witnesses were gone, and there was a material change to the law. The second motion to dismiss and third claim was the jurisdictional claim as to whether this body has the authority to reach back into another agency's now repealed laws and prosecute licensees for violations. Ms. Rushton argued that there was no savings clause. Because of the nature of those motions, they warrant reconsideration by the Board.

Ms. Rushton added that the ALJ failed to hear the motions in advance and did not provide specifics when she ruled on them. The ALJ determined that it did not meet the criteria of claim and issue preclusion and doesn't meet laches. With respect to the repeal argument, the ALJ pointed to a section of the legislative bill and said that section means that they could go back and get you under the regs that have been repealed. Ms. Rushton submitted that the analysis required is a substantive process.

Ms. Rushton asked for consideration for two reasons. Ms. Rushton claimed that the ALJ does not have the jurisdiction and authority to rule on dispositive motions as the Board is the only body that can dismiss a complaint. Ms. Rushton stated the ALJ gave an incomplete ruling, and her decision is an incomplete recommendation for the Board's consideration. Ms. Rushton requested that the Board entertain the motions to dismiss and proceed with those before launching into a disciplinary hearing relative to LTL.

Chair Douglas asked to hear from counsel.

Senior Deputy Attorney General L. Kristopher Rath addressed the initial question of whether these motions should be heard and will discuss the second motion to dismiss. Ms. Balducci will discuss the first motion to dismiss.

Mr. Rath stated that the motions should not be heard today as it was an administrative action and not a civil action in the District Court. NCCR 4.125 allows for motions but does not specifically allow for dispositive motions. Under the regulations, both sides have the right to present their evidence before the hearing officer first and before the Board disposes of charges. Granting dispositive motions before that deprives the party of those rights. NCCR 4.135, disposition of the charges is only to be done at an adjudication in which the Board hears from each of the parties and does not say that the charges can be disposed of by motion alone. It does not provide for dispositive motions. Only after the final adjudication and a final order be issued on everything, and only that final order would be subject to judicial review. Mr. Rath thought that the motion for consideration was an end-around to try to get an interlocutory judicial review, which is completely inappropriate.

Mr. Rath pointed to a recent and similar case of Nevada Gaming Commission vs. Wynn in March of 2022. Wynn filed a motion to dismiss for lack of jurisdiction which the Commission denied. Mr. Wynn then tried judicial review which was denied because there was no final order from the Commission. Chair Douglas commented that in this case the argument had not been made to the Board yet, only to the ALJ for recommendations. Mr. Rath replied that it followed our regulations which indicates there has to be a final order which can only occur at the adjudication in which both sides get to speak before the Board. The disposition of charges can't be done by motion alone.

Chair Douglas stated the Board would need to make a decision on what has been requested before going forward with anything else.

Ms. Rushton noted that pursuant to NRS 678A.600 and 678A.610, the ALJ did not have the authority to

rule on dispositive motions. The ALJ set forth a procedural order regarding filing of dispositive motions. It was the expectation that the motions would be considered prior to the hearing. Ms. Rushton noted that agencies handle this matter differently. Ms. Rushton stated that she and co-counsel Mr. Carson asked the ALJ is she would produce an order to take to the Board for consideration with the objective that if the motions to dismiss were granted, there would not be a hearing.

Ms. Rushton believed the matter was completed, and they shouldn't be here; if it was wasn't completed, then it took too long and they could not properly defend themselves; and the law doesn't allow because of jurisdictional issues. Ms. Rushton added that the second motion to dismiss pertaining to judicial infirmity was an important matter to consider. Ms. Rushton noted that the Board has imposed fines on individuals for failing to file timely tax returns from when the Marijuana Enforcement Division was in place. Ms. Rushton did not think that the Board had that authority. NRS 453A and D were repealed. Ms. Rushton requested the Board to consider the motions to dismiss and grant the motions.

Chair Douglas asked for questions from the Board. Member Durrett had question for Attorney Generals.

Chair Douglas noted that comments were made unrelated to this hearing as to the ability of the Board to deal with outstanding tax issues. Chair Douglas stated that they are a licensing board. If a party does not meet all of the requirements to be licensed and has an outstanding issue, it can deny the license. It is the obligation of the Board to make sure licensees are in compliance, or it can deny their license or the renewal of the license.

Member Durrett asked Ms. Rushton for a response to the comment that if this was disposed of by dispositive motions, then the parties don't get the right to a hearing. Ms. Rushton responded that there was a 21-day hearing in 2021 and the motions to dismiss have not been raised before the Board until now. Member Durrett stated again that the parties get a right to a hearing before the Board, so if it was disposed of with dispositive motions, then it would cut off their right to a hearing. Ms. Rushton responded that would depend on the Board's ruling but if was a complete dismissal there would be no hearing. Ms. Rushton noted that the complaint and disciplinary action are identical except for four counts. The Board could have a hearing on those four.

Member Durrett asked the State for clarification on the timing of the motions to dismiss. Mr. Rath noted that there wasn't an objection to the hearing officer hearing those motions initially, until the respondent lost them. Mr. Rath stated that there was no disagreement that they can make these arguments at the adjudication, which is where they should be made. The regulation does not indicate that you can dispose of the case by motion along. If it was granted today, the state would lose its right under the adjudication regulation to present its case at the adjudication.

Member Durrett asked if it was wasteful to hearing the motions to dismiss the same day as the adjudication. Mr. Rath responded that it was his recollection that there were a lot of motions and they all agreed to have them heard at the start of the hearing and they were fully argued and briefed before the hearing officer. If the hearing officer granted those motions, the state would go to the adjudication because the Board would make the final decision.

Member Durrett asked if the party could have made a recommendation to the Board to hear the motion to dismiss without going forward with adjudication? Mr. Rath responded that he did not know that there is an interlocutory appeal in the process. The hearing officer could decide to grant them and then it would go to the Board without a hearing, or to not grant them and then hold the hearing. It is efficient for the Board to sort it all at once.

Chair Douglas commented that that Board must convene on the open record and asked for thoughts.

Member Neilander asked Ms. Rushton if she was arguing that she did not have the opportunity to present the motions before the ALJ or is it just too much timing. Ms. Rushton responded that it was their position that the ALJ does not have the authority to rule on a dispositive motion. The ALJ can make a recommendation, but the decision as to whether they could be granted resides with the Board. Ms. Rushton thought that an order should have been issued which could have been taken to the Board, and if granted a hearing could have been avoided. Member Neilander asked if Ms. Rushton had an opportunity for briefing and full oral argument. Ms. Rushton answered that she did.

Chair Douglas asked for discussion amongst the Board. Member Durrett commented that she would want the opportunity to ask questions but was not saying that the ALJ did anything wrong. Member Neilander thought that the Board should grant the initial motion to consider it and see where it goes. Member Neilander added that the record was clear from the transcripts, but the Board would need to deal with this on the merits or now. It was considered at the time and briefed by both parties. There was a full oral argument and decision.

Chair Douglas stated his position was that the Board should consider the motions and noted that there was hearing and motions to dismiss 1 and 2 were considered. The ALJ made a decision on the record. The ALJ provided the Board with findings of fact, conclusions of law and recommendations. The parties have a right to dispute those recommendations. For judicial economy, Chair Douglas thought it was appropriate to hear the arguments made by the parties as to why or why not the motions should or should not have been granted. The law is clear, but the record is not as clear as it should be in terms of what parties advocated and meeting burdens. Chair Douglas thought it was appropriate, and as Member Durrett indicated, for the Board to rehear the argument, ask questions, and make written ruling.

Member Neilander agreed with Chair Douglas and would support a motion to consider.

Member Neilander moved to grant the motion to consider. Member Durrett seconded the motion. Chair Douglas noted that was the dispositive motions. Member Neilander stated yes. All Members said aye. Motion carried.

Chair Douglas stated the Board was now in a position to move forward. Chair Douglas asked if the Board Members had reviewed both motions, attached information and transcripts, and if they were comfortable to hear the motions at the meeting. Member Neilander, Member Durrett, Member Young, and Member Merritt were all ready to hear.

Chair Douglas asked if the parties were ready to go forward. Ms. Rushton responded that the respondents were ready to proceed.

Chair Douglas called for a recess at 9:47 a.m. The Board came back on the record at 9:55 a.m.

Chair Douglas asked Ms. Rushton if she would argue the motions jointly or separately. Ms. Rushton responds that she would argue them jointly.

Ms. Rushton noted again that the alleged violations contained in the 2021 complaint occurred in 2019. Ms. Rushton noted that when the matter started in December of 2019 pursuant to an audit and inspection, the inspectors ordered the respondent to make changes which they did at the time. That included ceasing retesting of microbials on December 11, 2019, and before the summary suspension was issued. An answer was filed to the summary suspension and the respondent requested a hearing. Between the time of issuance of summary suspension, the answer, and setting of hearing date, a statement of deficiencies was issued containing 13 known violations and 2 possible violations. The respondent submitted a corrective action plan that addressed the issues in the summary suspension and the 13 violations and 2 possible violations and started making changes. On the day of the hearing, the parties decided to forgo the hearing

and move forward with completing the corrective action plan to lift the suspension. Ms. Rushton asked why they were here if they complied with what the law required at the time.

Chair Douglas asked if the corrective action plan was in response to a summary suspension, the right to operate at that time, or was it just complying with the alleged deficiencies? Ms. Rushton responded that it was in response to both the summary suspension and the statement of deficiencies. The statement of deficiencies specifically pertained to the retesting of microbials and numerous other violations. Ms. Rushton explained the process under the law and Marijuana Enforcement Division at that time. Ms. Rushton added that at the time of the hearing, the objective was to lift the summary suspension, proceed with the corrective action plan to demonstrate compliance, meet the statutory standard, and complete the matter.

Ms. Rushton believed that the case should be dismissed for what is referred to as res judicata. The Nevada Supreme Court breaks it down into claim preclusion and issue preclusion. There are certain factors that a party has to demonstrate in order to prove that the matter should be disposed of because it has already been heard, specifically same parties to the matter. The State of Nevada, Marijuana Enforcement Division, and LTL, respondents, are both relative to the statement of deficiencies and the summary suspension in the 2021 complaint. Ms. Rushton thought that there is disposition on the merits of that summary suspension which mirrors what is in the 2021 complaint. Ms. Rushton argued that the matter should be dismissed because in 2019 and 2020, the respondents demonstrated compliance. Ms. Rushton noted that in 2020 at the time of the hearing, there was a partial lifting of the suspension. When that was completed in February 2020, it is their position that the matter was concluded. The matters should be disposed of based on the demonstration of compliance and completion of the disciplinary action that started in 2019.

Ms. Rushton stated that the second argument lodged by the respondents relative to the motion to dismiss is called laches. In a matter like with no statute of limitations, one looks at laches to determine whether or not the Marijuana Enforcement Division or the CCB took too long to file the complaint. Agents made requests for changes, which the respondents made. When the summary suspension was issued, the respondents asked what more they need to do considering they were told to stop two and half weeks prior. When the statement of deficiencies was issued, it was more expansive and the respondents adamantly disagreed with findings of the audit investigation, both scientifically and legally. Ms. Rushton agreed that even if the respondents didn't agree, they had the obligation to demonstrate compliance to the satisfaction of the agency that holds the license. Ms. Rushton alleged that the respondents were prejudiced as evidence was no longer there and the health advisory noticed called out the respondents by name, and those were based on retests conducted by competitor labs. Ms. Rushton stated the State will say that the evidence was not important to the complaint; Ms. Rushton stated it was important to the respondent as it served as the basis of a suspension and two health notices that named the respondent.

Ms. Rushton added that witnesses were lost as they left the jurisdiction and there was a material change to the law. There were no longer the protections of 233B and the right to discovery was denied. They were precluded from the ability to view the investigative files and denied the ability to call witnesses that made decisions relative to the summary suspension. Ms. Rushton argued that they were not able to properly defend themselves. Ms. Rushton did not see a reason why a complaint was not filed sooner. Ms. Rushton alleged that it was for purposes of delay. Ms. Rushton stated the case was not an administrative hearing in which rules of evidence are relaxed and the general standard is relevance. Laches applied because of the significant and severe prejudice that the respondents suffered.

Ms. Rushton provided background on the Assembly Bill 533. The Bill stripped the Board of the ability to adhere to 233B. The ALJ pointed to section 240, that there was a savings clause that carried over the ability of the CCB to continue disciplinary actions. Ms. Rushton did not believe that the State's interpretation of that because the section stated that upon promulgation of the NCCR, 453A and D went

away. It was Ms. Rushton's position that at the time the complaint was filed, it was based on NRS 453A and D and NAC 453A and D which were repealed at the time of the filing of the complaint, and the jurisdictional authority of the Board was extinguished at that time.

Member Durrett asked for clarification on the argument surrounding 453A and D and 233B. Ms. Rushton explained that 233B.127(3) states that you can't proceed with revocation and suspension until you give the licensee the ability to demonstrate compliance. But in the instance of a public health or safety emergency, the agency may issue a summary suspension as part of other proceedings. Ms. Rushton stated that the disciplinary action consistent with the latter part of the statutes was done upon demonstration of compliance. Ms. Rushton had asked the ALJ for the matter to be reopened based upon the issuance of another health advisory notice and was told the matter was closed. Member Durrett commented that then the State would never be allowed to do a summary suspension; it would hurt the industry if they would not be allowed to be reinstated while the disciplinary action was pending. Ms. Rushton responded that it was a matter of agreement between the parties. The same provision stated the matter must be concluded with 45 days.

Member Durrett asked why the letter was sent to preserve the samples. Ms. Rushton explained that after the second health advisory was issues, they requested to preserve the samples. Ms. Rushton asked if the Marijuana Enforcement had the authority to issue a health advisory notice and why in this instance when the practice had stopped.

Member Durrett asked why Ms. Rushton could not bring the witness from out of state, and what portion of NRS 453 A or D would allow her to have access to investigative files. Ms. Rushton responded that they did subpoena witnesses, but they had no obligation to return to the state. They did not know where Mr. Ozzie Ruiz went. The scientific lab director Haifei Yin left the jurisdiction and was clear on not coming back. The other two lab directors moved across the country and did not come back. Ms. Rushton did not provide the section of statute. Ms. Rushton had concerns with the chain of custody of the samples and thought it was important to have access to the samples.

Chair Douglas provided questions for Ms. Rushton to respond to later. Chair Douglas stated that Ms. Rushton had the burden the moving party. Chair Douglas asked whether or not in this motion, even if the motion isn't granted, is Ms. Rushton precluded from raising any of these issues at a hearing on the individual counts.

Ms. Balducci appeared on behalf of the petitioner. Ms. Balducci stated she would address the arguments in the first motion to dismiss which included res judicata, issue preclusion, claim preclusion, collateral estoppel, and laches. Mr. Rath would address the legal argument regarding what procedure and substantive law should apply. Ms. Balducci stated that the Board should, like the hearing officer, deny the motions to dismiss for the reasons stated by Mr. Rath, the reasons that the hearing officer ruled, and for the following five additional reasons.

First, Ms. Balducci stated there was no global settlement agreement that resulted in a full and final adjudication of all violations being investigated. Ms. Balducci stated the party's moving papers do not say what the respondent or respondent's counsel argue that they say. There were two global settlement offers made during the summary suspension and both of those were rejected. Two of the documents the respondent is relying on to say that they were a statement of deficiencies, one was part of one of the global settlement offers. The other was titled "Response and Rebuttal to Corrective Action Plan" (Exhibit 2); it doesn't say approved corrective action plan. The respondent argued that the stipulation and order regarding summary suspension resolved all violations being investigated, but the term settlement agreement is nowhere in the document. This document listed corrective action that the respondent needed to do to lift the summary suspension. None of the violations identified as still being investigated were referenced in that document. It does not state that the Division would not pursue any further disciplinary

action or proceedings. The summary suspension was partially lifted in order for the respondent to do the corrective actions listed and for the Division to then later reinspect and confirm that the respondent complied. Respondent's counsel tried to call the stipulation and order regarding summary suspension a settlement agreement, which the Division rejected. Ms. Balducci also stated in an email that it was not a settlement agreement, but that it was a stipulated corrective action plan to lift the summary suspension and that the respondent was still being investigated.

Second, an order of summary suspension is different from a complaint for disciplinary action. The order of summary suspension is when the agency makes the finding that public health and safety imperatively require emergency action; it becomes effective immediately and notice of the order is provided to the licensee only after it is issued. A complaint for disciplinary action does not impose discipline until after the licensee received notice, a hearing, and the Board adjudicates disciplinary action. There is no statute of limitations on an agency for when it may bring a complaint for disciplinary action. The respondent can't argue that NRS, 233B, NAC 453D, or the NNCR, that a summary suspension precludes a revocation or other disciplinary action. The plain language of these statutes and regulations contemplates further proceedings.

Third, if there is no global settlement agreement, there is no res judicata, collateral estoppel, claim preclusion, or issue preclusion. None of the cases relied on by the respondent in the briefs involved an administrative agency applying res judicata to its own administrative actions. Even for the sake of argument if res judicata applied, the stipulation and order did not result in a full and final adjudication of all the violations being investigated. None of these legal doctrines apply to preclude the CCB's complaint.

Fourth, the CCB did not engage in ad hoc rule making when it issued a cease-and-desist letter. Respondent was routinely reporting results for pesticide mycotoxin testing when the quality controls were failing, which precludes accuracy and has the potential for endangering consumers.

Fifth, the doctrine of laches does not apply. The hearing officer made findings on laches and said there was no delay and no actual prejudice. Ms. Balducci added that the investigation took a year to complete and the CCB approved service of the complaint one month after the investigation was completed. The record of the case contained thousands of documents that the inspectors had to go through. For a disciplinary action, you have to prove by a preponderance of evidence the violations. There is no state or federal due process right to discovery in an administrative proceeding. The respondent was never entitled to obtain the retested samples under the law; and the petitioner never used the retested samples as evidence.

Ms. Balducci stated that as to the availability of witnesses, Haifei Yin was subpoenaed by the petitioner; the respondent objected and excluded her testimony because of delays related to service of the subpoena. The respondent could have figured out how to subpoena witnesses; it is not the CCB's fault that individuals may have moved out of Nevada. As there was no delay or actual prejudice, the doctrine of laches does not apply. Ms. Balducci requested that the Board examine the documents against the respondent's arguments. For these reasons and those provided by Mr. Rath, Ms. Balducci stated the Board should deny the respondent's motions to dismiss.

There were no questions from the Board.

Mr. Rath argued the second motion to dismiss but first addressed the Chair's question to Ms. Rushton on the standard for motion to dismiss. Mr. Rath stated that the standard is extremely high. The respondent or defendant has the burden to show that the other side cannot prevail on any facts alleged. The respondent cannot meet that burden on either motion to dismiss, which is an attempt to find a legal loophole to get around their thousands of violations.

Mr. Rath stated that the hearing officer appropriately ruled that the respondent's reading of the law that they could not be charged for the numerous violations under the NAC can lead to absurd results that the legislature never intended would not allow for the seamless and continuous regulation of the cannabis industry that the legislature attempted. The CCB appropriately charged the respondent with the regulations that existed at the time the violations occurred. It could not charge them under NCCR because those regulations did not exist at the time of the violations.

Mr. Rath added that if the CCB can't charge them under the NAC as they claim and charged them under the NCCR, the argument would be that the CCB applied its new regulations retroactively and unfairly prejudiced the respondent with higher penalties.

The language of the NCCR for the violations alleged in the complaint is the same as the language in the NAC, except instead of making intentionally false statements to the "Department" it says to the "Board." The substance of the violations is essentially the same. If charged under NCCR, the respondent's argument would be that they could not make a false statement to the Board because the Board did not exist. According to the respondent, the CCB couldn't charge them under NAC or the NCCR with providing false information. This is not what the legislature intended. Mr. Rath argued the same for other charges within the complaint, for allowing activity that violates the laws of the state.

Mr. Rath explained that the respondent's reading was to skate on thousands of violations because the CCB cannot complete an investigation that started under the Department of Taxation, finished under the CCB, and was filed when the CCB took over regulatory authority. The respondent benefitted from being charged under NAC because the penalties are lower.

Mr. Rath discussed the two parts to the savings clause. The prospective part is addressed in NCCR 1.010, that the term CCB would replace all references to Department of Taxation, which is when the CCB used the old regulations to apply to violations which occurred after July 1, 2020, but before the NCCRs were in place. The second part of the savings clause states, "Any action taking by the Department of Taxation or its constituent parts pursuant to Chapter 453A and 452D of NRS governing the licensing and regulation of marijuana establishments and medical marijuana establishments before July 2021 remains in effect as if taken by the Cannabis Compliance board or its constituent parts on or after July 1, 2020.

Mr. Rath stated that the respondent claimed that there was no legal authority for the argument that "any action" includes investigations and disciplinary actions. The respondent provided no contrary legal authority for that proposition. The respondent failed to meet the burden as the moving party. Mr. Rath reiterated that the appropriate regulations were used to charge and discipline the respondent. There is no time where you can't use either the NAC or the NCCR to proceed with violations against the licensee.

Mr. Rath provided information on the procedural issues, including citing the Landgraf case where changes in procedural rules from the time of commission of the violation to the time of adjudication of the violations are allowed and do not constitute retroactive application of a statue or rule. The respondent's claim that the hearing had to have been held under NAC 453D is meritless. Mr. Rath added that NRS 453D had procedures for disciplinary hearings, which exactly how it happened in this instance. The Dutchess case indicates that there is no right to discovery in administrative actions. NAC 453D states that the respondent does not get the investigative file unless it is produced. It does not allow discovery under the regular disciplinary process. The respondent will get a full adjudication before the Board to affirm or alter the hearing officer's recommendations. The Nevada Tax Commission no longer hears cannabis appeals, so the respondent would have no way for an administrative appeal. Mr. Rath commented that the respondent gets the benefit and more due process under the substantive law of the prior statutes due to the savings clause and under the procedural rules under the NCCR. Mr. Rath stated the motion to dismiss does not provide a legal loophole and the denial of the motion to dismiss should be upheld.

Member Durrett asked for a response to the argument that if 233B applied, the disciplinary hearing would have to happen within 45 days. Mr. Rath responded that was for summary suspensions and not disciplinary action. Member Durrett asked what section to look at for disciplinary actions. Mr. Rath replied to look at NAC 453D and added that under NCCR, disciplinary actions are supposed to take place within 45 days and the respondent waived that.

Member Durrett asked if it was the State's position that there was no right to review the investigative file under 453A, 453D or any body of law? Mr. Rath responded that there was no right to discovery in general in administrative actions under the Dutchess case.

Member Durrett asked Ms. Balducci to read the part of the exhibits where it said that it was still under investigation, or it did not apply. Ms. Balducci responded that it was in part of a redacted email that she sent to Ms. Rushton on January 23, 2020, at 3:24 p.m. Ms. Balducci read, "This is a stipulated corrective action plan to lift the summary suspension and not a settlement agreement. We struck the language yesterday from the SAO because our client did not agree to that term. As previously communicated to you, the Department is not stopping its investigation."

Ms. Rushton responded to the earlier question raised by Chair Douglas. Ms. Rushton stated that Mr. Rath answered the question but added that the standard in this matter was a preponderance of the evidence as set forth in NCCR 4.120. This is the same standard as contained within 233B. Ms. Rushton addressed the Landgraf case and stated as part of the analysis, the Supreme Court held, "Relying on our consistent practice, we order the action dismissed because jurisdictional statute under which it was filed was subsequently repealed." Ms. Rushton argued that 453A and D go away which also is in Regulation 1. NCCR states the authority to bring disciplinary actions of 678A and D. Ms. Rushton stated the regulations evidence that when the statutes and regulations were repealed, they went away and submit that the jurisdiction was lost.

Chair Douglas asked if that encompassed the position as asserted by Mr. Rath as to the term "action." Ms. Rushton replied no, that infers that there is an action taking place. Ms. Rushton added that there was a good faith belief by the respondents at the time that they demonstrated satisfactorily to the Marijuana Enforcement Division that the matter was over; the action was over. Ms. Rushton stated an ongoing investigation doesn't constitute and action because they didn't know.

Chair Douglas asked for comment from Ms. Rushton in light of that statement and what Ms. Balducci provided in the email regarding the language in terms of settlement and operating. Ms. Rushton stated that in order to lift the summary suspension which identified two areas dealing with microbials, that is what had to be demonstrated by the respondent to lift the summary suspension. To complete the matter, the respondent had to demonstrate through a corrective action plan and thereafter the actions to meet the terms of the corrective action plan. Ms. Rushton asked if compliance was demonstrated and that was the law at the time, why are they here? If it was over a fine amount, that could have been offered.

Chair Douglas interjected that he did not want to get into why or why not settlement discussion broke down as that is outside the record at this point. Chair Douglas commented that Ms. Rushton wanted to assert that there was a full settlement, but there is not a full settlement document. Chair Douglas questioned how the matter was handled then. Ms. Rushton responded that there was a statement of deficiencies, proposed corrective action plan, and approval of the plan from Marijuana Enforcement Division. The time was set on the hearing the summary suspension. The parties discussed resolving the issue, and the decision was partial lifting and then fully lifting upon demonstration of satisfaction of corrective action plan. Ms. Rushton added that they asked for a hearing when they felt the State did not meet its obligation and the ALJ stated the matter was closed. Ms. Rushton discussed the pattern of their previous disciplinary matters. Ms. Rushton added that they did not scientifically agree with the opinions of staff, but the law requires one to be compliant with the agency's directives. Ms. Rushton stated again

that they came into compliance in response to the statement of deficiencies. They did not think that the actions rose to a level of warranting a summary suspension; they believed that the matter was concluded.

Ms. Rushton added that with respect to laches, the matter was handled akin to a criminal prosecution. No matter what the respondents did to demonstrate compliance, they were ended up with a complaint addressing the issues of 2019 and 2020. Ms. Rushton requested that the Board dismiss the complaint considering that the case was dragged on, the summary suspension, no right to question what the health issue was, and the health advisory notices that called out the lab by name.

Chair Douglas called for a short recess at 11:02 a.m. The Board came back on the record at 11:14 a.m.

Chair Douglas called for Senior Deputy Attorney General Rosalie Bordelove to reread 233B. Ms. Bordelove read into the record NRS 233B.127(3), the summary suspension language, and the timing relating to the proceedings for the summary suspension. Chair Douglas asked if the 45 days was related to the suspension. Ms. Bordelove confirmed that it was.

Chair Douglas asked for discussion from the Board. Member Neilander commented that he thought the Board should hear the case on its merits because they have been touching around the edges of the merits in dealing with the motion. Member Neilander did not think that the burden was met as far as a dismissal. Member Neilander thought that the record in the hearings speaks for itself. Member Neilander thought that both parties made good arguments in terms of which law should or shouldn't apply. Member Neilander thought that the savings clause put him over the threshold because how can they be effective regulators if there wasn't a savings clause that allowed matters to continue as the regulatory authority transitions.

Member Durrett did not think that the legislature's language amounts to a repeal of 453A and 453D in the sense that you couldn't then pursue actions that were pending at the time. It says "pending actions" so it revolves around what is the definition of an action. Member Durrett did not think the legislature meant to give a free pass to anything that was pending at the time. Member Durrett thought the parties were on notice that it was occurring and did not thin it was reasonable to believe that the matter goes away. The disciplinary action was not required to occur within 45 days. The attorney general stated that it was not a settlement. Member Durrett added that one can't say that we can't give the licensees the opportunity to lift the summary suspension and correct, and then not do a disciplinary hearing; that wouldn't benefit the industry. Member Durrett was sensitive to the comment that it was pursued like a criminal case but did not see how that was done here.

Chair Douglas stated that the arguments presented gave him pause, but probably not enough to grant the motion. Chair Douglas wanted to take a better look based on the arguments that were offered. Chair Douglas added that the burden is of the party on the motion to dismiss, but even though they had the hearing, they have the opportunity to come back before the Board as to their position of objecting to the recommendations.

Chair Douglas wanted to hold the matter over until the following week at the next Board meeting. Member Durrett agreed that more time to think about it would not be prejudicial and was in the best interests of the State and fair to both parties.

Chair Douglas made a motion to continue the hearing for a formal resolution until September 27 at the conclusion of the regularly scheduled Board meeting. Member Neilander seconded the motion. All Members said aye. Motion carried.

III. Public Comment

Paul Michael Burgess thanked the CCB staff for their work and thoughtfulness on the webinar for online application of the cannabis consumption lounges. Mr. Burgess asked if it was okay for private business to collaborate with the CCB for federal funds or grants that have to do with cannabis.

IV. Adjournment

Meeting adjourned at 11:30 a.m.