BEFORE THE CANNABIS COMPLIANCE BOARD
STATE OF NEVADA

STATE OF NEVADA, CANNABIS COMPLIANCE BOARD, Petitioner, vs. CANNEX NEVADA, LLC, now known as LETTUCETEST, LLC, Respondent.	Case No. 2020-27

FINAL ORDER OF THE CANNABIS COMPLIANCE BOARD INCLUDING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND IMPOSING DISCIPLINE

This matter came before the Cannabis Compliance Board (the "CCB" or the "Board") on February 15, 2024, for final adjudication of disciplinary Case No. 2020-27 pursuant to NCCR 4.135. This order shall be referenced herein as the CCB's "Final Order" and sets forth Board's findings of fact and conclusions of law as to which violations Respondent has committed and the civil penalty and discipline imposed for those violations in CCB Case No. 2020-27.

1. **Procedural Background.**

Petitioner issued a Complaint for Disciplinary Action on January 26, 2021. Respondent filed an Answer on January 28, 2021, and requested a hearing. The matter was referred to the hearing officer, Dena C. Smith, Chief Administrative Law Judge for the State of Nevada, Department of Taxation (the "Hearing Officer"), for disciplinary hearing by Order dated January 29, 2021, pursuant to Nevada Cannabis Compliance Regulations ("NCCR") 2.020, 2.070, 4.085, and 4.095. Respondent waived the 45-day hearing provision in Nevada Revised Statutes ("NRS") 678A.520(4).

The hearing before the Hearing Officer was held by videoconference over 20 days between April 16, 2021, and October 18, 2021. L. Kristopher Rath, Senior Deputy Attorney General, and Ashley A. Balducci, Senior Deputy Attorney General,

acted as legal counsel for Petitioner. Kimberly Maxson-Rushton, Esq. with Cooper Levenson, and Brent Carson, Esq., acted as legal counsel for Respondent.

On November 12, 2021, the Hearing Officer issued her Findings of Fact, Conclusions of Law, and Recommendation for Discipline ("FFCL"), as required by NCCR 4.095(3).

On November 15, 2021, the CCB provided notice to the Petitioner and Respondent (collectively, "the Parties") for an adjudication hearing to take place on December 3, 2021. The Parties were given an opportunity to file their objections to the FFCL and to respond to the other party's objections. On November 16, 2021, Respondent filed a motion to continue the adjudication hearing. On November 18, 2021, the Chair of the CCB approved a stipulation and order between the Parties to waive the 30-day requirement for adjudication under NCCR 4.135(5) and to waive the 60-day requirement for the CCB to render its final written decision on the disciplinary action under NRS 678A.590(1). The stipulation and order provided that the CCB would set a new date for the adjudication after January 3, 2022.

The Parties subsequently submitted their Objections and Responses to Objections to the FFCL. That process was completed on January 13, 2022.

On July 29, 2022, the CCB sent the Parties a notice of an adjudication hearing to take place on September 15, 2022. On August 5, 2022, Respondent filed a motion requesting the CCB hear Respondent's motions to dismiss, previously denied by the Hearing Officer, prior to the adjudication hearing. After further briefing from the Parties on this issue, on September 7, 2022, the CCB issued a notice to the Parties that the CCB would hold a hearing regarding Respondent's motions to dismiss on September 15, 2022.

On September 15, 2022, the Board heard argument on Respondent's motions to dismiss, decided to consider the motions prior to the adjudication, and deferred deliberations on the motions to dismiss until September 27, 2022. On September 27, 2022, the Board voted 4-0 to deny the motions to dismiss. On December 2, 2022, the

CCB issued its written order denying Respondent's motions to dismiss.

On January 4, 2023, the CCB issued a notice to the parties that the adjudication proceeding would take place on February 15, 2023.

On February 15, 2023, the Parties appeared before the Board for the adjudication proceeding. At that time, the Chair of the Board notified the Parties that the adjudication hearing would be bifurcated. The Board would first hear arguments from the Parties regarding whether violations had been committed. After deciding whether and which violations had been committed, the Board would then hear argument on what discipline would be imposed for the violations found. The Board then heard argument from the Parties as to whether violations had been committed and questioned counsel for each party on their arguments. After hearing said arguments, the Board decided to reconvene at a later date, after the transcript of the February 15, 2023, hearing had been completed, to deliberate on the first phase of the adjudication and decide whether violations had been established.

On April 13, 2023, the CCB sent a notice to the Parties that it would resume the first phase of the adjudication on May 10, 2023. After Respondent's request for a continuance, the CCB issued a new notice for said hearing for May 23, 2023, at its regularly scheduled monthly meeting.

On May 23, 2023, the Board members deliberated and decided upon the violations that had been established by a preponderance of the evidence. On July 14, 2023, the Board issued its Preliminary Order Regarding Findings of Statutory and Regulatory Violations ("Preliminary Order").

On November 9, 2023, the Board issued a notice to Petitioner and Respondent that it would hold Phase 2 of the adjudication to determine what discipline and penalties would be imposed on Respondent based on the findings of violations in the first phase of the adjudication. This notice set Phase 2 of the adjudication for December 12, 2023. Respondent subsequently requested a continuance of the December 12, 2023, hearing.

The Board then sent notice to the Petitioner and Respondent on December 1, 2023, re-setting the hearing for Phase 2 of the adjudication for January 18, 2024. Respondent subsequently requested another continuance, and the Board then sent notice to Petitioner and Respondent on January 12, 2024, re-setting the hearing for Phase 2 of the adjudication to February 15, 2024.

On February 15, 2024, the Board held Phase 2 of the adjudication. At that time, the Board heard argument from both Petitioner and Respondent as to the discipline and civil penalty to be imposed for the violations found in the Preliminary Order. The Board now issues its findings of fact and conclusions of law regarding the violations Respondent has committed and the appropriate disciplinary action and civil penalties it imposes on Respondent.

This Final Order is a final order and decision of the Board pursuant to NRS 678A.590 and NRS 678A.610. This Final Order is effective upon its service on Respondent and Petitioner, pursuant to NRS 678A.590(1).

2. <u>Findings of Violations and Imposition of Discipline.</u>

The CCB confirms that each of its members who have participated in the deliberation and voting in this adjudication have read and reviewed the entire record of this disciplinary hearing before the Hearing Officer, and that the following Board members are qualified to vote on the violations at issue and the disciplinary actions and civil penalties imposed in this disciplinary proceeding, pursuant to NCCR 4.135(1): (1) Chair Adriana Guzmán Fralick; (2) Vice Chair Rianna Durrett; (3) Member Michael Douglas; and (4) Member Jerrie Merritt.[1]

The CCB adopts the findings of fact and conclusions of law with respect to the violations found and the disciplinary actions and penalties recommended by the Hearing Officer as set forth in the FFCL only as set forth in this Final Order. The

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[1] Member Dr. Vicki Mazzorana was newly appointed by Governor Lombardo on February 14, 2024, and abstained from the deliberation and voting on this matter.

Board has modified the recommendations for violations and discipline set forth in the FFCL as set forth in this Final Order.

Based on its review of the entire record, the CCB hereby enters its findings of fact and conclusions of law, finds that Respondent committed the following violations, and sets forth the disciplinary actions and civil penalty to impose on Respondent as follows:

1. As to Paragraph 83 of the Complaint, the Board adopts (by a 5 - 0 vote[2]) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 83 that as of the 2019 Inspection, Respondent "did not have a designated security manager or director" who had "undergo[ne] specific training, including training in theft prevention, emergency responses, and security services" as required by NAC 453D.434(7) or have an approved security plan as required by NAC 453D.905(3)(d)(6).[3] The evidence of record established that as of the 2019 Investigation, Respondent did not have a designated security manager or director who had received the requisite training until after the 2019 Inspection and Respondent did not have, and follow, an approved security plan.
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> Effective February 27, 2018, Nevada cannabis establishments were required to implement certain "security measures, equipment and personnel."[4] Relevant here, they were required to ensure that the security manager or director and at least one employee or a third-party security contractor had undergone certain training.[5] Additionally, cannabis establishments were required to have and follow an "approved security plan" (i.e., approved by the Department).[6]
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> During the 2019 Investigation, Mr. Rushton identified Mr. Haun and Director Yin to Investigator Mota as Respondent's security directors.[7] However, Respondent failed to provide documentation to show that these individuals had completed the required security training or that Respondent had obtained approval for, and followed, an

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[2] The Board's vote in May, 2023 to decide upon the violations that had been established by a preponderance of the evidence (i.e. Phase 1) included participation by all five members of the Board at that time. Phase 2's vote included participation by four Board members after Dr. Mazzorana's abstention.
[3] Complaint p. 34.
[4] NAC 453D.434.
[5] NAC 453D.434(7).
[6] NAC 453D.905(3)(d)(6).
[7] Petitioner's Exhibit 141.

approved security plan.[8]

Prior to the hearing, Respondent identified Michael Moore as Respondent's security director. However, in his affidavits Mr. Moore did not identify himself as Respondent's security manager or director.[9] Mr. Moore's role was as a third-party consultant who installed and inspected Respondent's surveillance system (security cameras and access control system) and notified Respondent when repairs to that system needed to be made.[10]

Respondent also provided a document titled Security Plan on RSR letterhead as evidence of a security plan.[11] However, Respondent provided no evidence that this undated plan had been approved by the Department and implemented by Respondent. And Respondent failed to explain why this document was not provided to the investigators at the time of the inspection. Respondent failed to show this was, in fact, its security plan.

On the question of whether its employees received the required security training, Respondent provided certificates from Invictus Training and Readiness Solutions for an eight-hour course titled Cannabis Site Security Fundamentals ("Invictus Training").[12] But the certificates were issued to RSR Analytical Laboratories, Ric Rushton, Joseph Haun, and Robb Richardson on January 27, 2020, after the 2019 Inspection. Respondent did not produce evidence of training prior to the 2019 Inspection.

During the hearing, Mr. Rushton claimed he and Mr. Moore were responsible for carrying out the duties of a security director.[13] Mr. Rushton did not explain why he failed to identify himself or Mr. Moore to Investigator Mota during the 2019 Inspection. Additionally, Respondent failed to show that Mr. Moore or Mr. Rushton received any security training prior to the 2019 Inspection.

Petitioner established that Respondent failed to comply with NAC 453D.434(7) and NAC 453D.905(3)(d)(6). Respondent failed to present mitigating evidence for this violation.

2. Also, as to Paragraph 83 of the Complaint, the Board (by a 3 - 1 vote[14]) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent

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[8] A security director was not identified on the organizational chart that was provided to the Department. Petitioner's Exhibit 75 p. 1609.
[9] Respondent's Exhibit 3(a) and Petitioner's Exhibit 136.
[10] Mr. Moore's affidavits are silent as to his security training.
[11] Respondent's Exhibit 3(b) and Petitioner's Exhibit 138.
[12] Respondent's Exhibit 3(c) and Petitioner's Exhibit 139.
[13] Hearing Transcript May 20, 2021 pp. 19 and 113.
[14] Phase 2's vote included participation by four Board members after Dr. Mazzorana's abstention.

committed a Category III violation under NAC 453D.905(3)(d)(6). Under NAC 453D.905(4)(d)(1), the Board hereby imposes a civil penalty of $2,500, as Respondent's first Category III violation.

3. As to Paragraph 84 of the Complaint, the Board (by a 5 – 0 vote) adopts the FFCL of the Hearing Officer and finds no violation as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 84 that as of the 2019 Inspection, Respondent "fail[ed] to maintain a required surveillance system" as required by NAC 453A.420(1)(c), NAC 453D.434(1)(a)(3)(V) & (2)(b), and NAC 453D.905(3)(b)(14) because Respondent's "security camera's coverage was blocked by a refrigerator." [15] Although the evidence of record established that the camera and refrigerator were in the locations alleged by Petitioner, Petitioner failed to establish that the view of the camera was obscured.
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> In support of this allegation, Petitioner offered the testimonies of Investigator Wayman and Investigator Perez who observed the location of the camera and refrigerator.[16] Petitioner also offered photographs of the camera and refrigerator.[17] Although the Investigators were aware of the potential problem and Investigator Wayman accessed Respondent's video camera system during the 2019 Inspection, Investigator Wayman did not access the view from that camera to determine if the camera was in fact obscured by the refrigerator.[18] Further, although the video camera system had the capability to capture and print the views from cameras, Investigator Wayman failed to capture the view from the camera in question on the date of the inspection.
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> The evidence presented by Petitioner concerning the blocked camera is sufficient for an instruction to a licensee to inspect that camera and to regularly ensure that it maintains visibility from all cameras in its video camera system. However, to warrant discipline, Petitioner must present more than testimony that infers the camera was blocked – it must present evidence that the camera was, in fact, obstructed. It is recommended that the Board find that Petitioner failed to establish a violation.

Therefore, the Board imposes no discipline as to Paragraph 84 of the Complaint.

4. As to Paragraph 85 of the Complaint, the Board adopts (by a 5 – 0 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence,

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[15] Complaint p. 34.
[16] Hearing Transcript April 16, 2021 pp. 121-125 and Hearing Transcript April 29, 2021 pp. 30-33.
[17] Petitioner's Exhibit 3A p. 7 (camera) and pp. 9-10 (refrigerator).
[18] Hearing Transcript April 22, 2021 pp. 65-66 and Petitioner's Exhibit 142.

as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 85 that Respondent failed to document disposal of test samples in Metrc between mid-April 2018 and December 2019 as required by NAC 453A.658(4), NAC 453D.426(5), NAC 453D.745(4), NAC 453D.788(4) and NAC 453D.905(3)(d)(4) & (15). The evidence of record established that, although Respondent kept other records of the destruction of the samples in question, Respondent failed to update the information in Metrc to record that the samples were destroyed. The evidence also established that Petitioner notified Respondent of this deficiency following the 2018 Inspection.
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> During the period in question, Nevada law required that "If an independent testing laboratory disposes of a sample received pursuant to this section, the laboratory shall document the disposal of the sample using its inventory control system." [19] Further, "A marijuana establishment shall provide notice to the Department using the seed-to-sale tracking system before rendering unusable and disposing of marijuana or marijuana products." [20] In compliance with these provisions, Respondent created an SOP titled Inventory Control and Chain of Custody which required: "The initial weight, the combined usage weight and the remaining weight of the sample are totaled using spreadsheet for total weight and updated in Metrc within 30 days of sample completion by assigned personnel."[21]
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> Despite this, Respondent's records revealed that Respondent failed to comply with Nevada law and its SOP by failing to update its Metrc inventory when it destroyed samples.[22]
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> Investigator Wayman traced the sample amounts collected from Petitioner's clients to the amounts used in testing and ultimately to the amounts recorded in the Neutralization and Disposal Logs from April 2018 through December 2019.[23] The tracing of the test samples in Respondent's records showed the amounts of the test samples were reduced to zero as Respondent used portions of the samples in testing and ultimately destroyed any remaining amounts. This correlated with the physical inventory observed by Investigator Wayman during the 2019 Inspection.
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> But a comparison of the Disposal Log to Respondent's Metrc entries showed the samples destroyed by Respondent between mid-April 2018 and December 2019 were not recorded as destroyed in Metrc.[24]

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[19] NAC 453A.658(4) and NAC 453D.788(4).

[20] NAC 453D.745(4). Investigator Wayman was alerted to this issue following the 2019 Inspection when counsel for Respondent contacted Investigator Wayman in January 2020 about a Metrc hold on 12,000 samples. Hearing Transcript April 16, 2021 p. 139. Based on the 2019 Inspection, Investigator Wayman knew Respondent did not have that many samples in its physical inventory.

[21] Petitioner's Exhibit 45 p. 1012 (Section 6.5.3).

[22] Hearing Transcript April 16, 2021 pp. 131-149 (Testimony of Investigator Wayman).

[23] Hearing Transcript April 16, 2021 pp. 142-156 and Petitioner's Exhibits 88,89, 90, 93, and 94.

[24] Petitioner's Exhibits 4, 5, and 6.

Consequently, although the Disposal Log indicated that any remaining sample had been destroyed, the amount of test sample in the inventory in Metrc was not reduced to zero and the records in Metrc did not indicate that any sample remaining after testing had been destroyed. During the hearing, Investigator Wayman corrected the information in the Complaint and demonstrated that Respondent failed to properly record the destruction of 10,734 samples – not 12,289 – out of the 14,305 samples destroyed during that period.[25] Respondent was previously cited for this issue following the Department's 2018 Inspection.[26]

Respondent argued that it complied with Nevada law and its SOP but merely neglected to click "Complete" and then "Accept" on the Metrc entries to record the destruction of the samples in question.[27] Respondent maintained that it created and maintained documentation (other than Metrc) which demonstrated disposal of the test samples and that those records satisfied Nevada law. Petitioner agreed that Respondent maintained documentation outside Metrc showing disposal of the test samples – Petitioner relied on those records to determine that Respondent's Metrc records were incorrect. But Respondent admitted it failed to complete its entries in Metrc, thereby admitting to its failure to update its inventory in Metrc by recording the destruction of samples in Metrc. Respondent's failure to complete those entries in Metrc was a violation of Nevada law and Respondent's maintenance of other records does not excuse it failure to update its Metrc records.

Respondent proposed as a mitigating factor that its access to Metrc had been blocked by the Department during Respondent's summary suspension in January 2020, thereby preventing Respondent from updating its Metrc information. But Investigator Wayman considered this when counting the number of samples destroyed but not recorded in Metrc.[28] Because Respondent's SOP required the destruction of samples to be recorded in Metrc within 30 days of the destruction, Investigator Wayman did not count any samples which were destroyed within 30 days prior to Respondent's suspension but not recorded in Metrc because Respondent was potentially unable to update Metrc for those samples. Respondent failed to identify any other factors preventing it from updating its records prior to the summary suspension.

Petitioner established that Respondent failed to comply with NAC 453A.658(4), NAC 453D.426(5), NAC 453D.745(4), NAC 453D.788(4) and NAC 453D.905(3)(d)(4) & (15). Despite Respondent's failure to present mitigating evidence on this violation, it is recommended that the Board not treat each instance of the violation as separate violations but, instead, find a single . . . violation.

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[25] Petitioner's Exhibit 4, Hearing Transcript April 16, 2021 pp. 135-136, and Hearing Transcript April 26, 2021 pp. 117-118.

[26] Petitioner's Exhibits 52 and 53 and Hearing Transcript April 19, 2021 p. 73.

[27] Hearing Transcript May 25, 2021 pp. 109-110 (Testimony of Mr. Haun).

[28] Hearing Transcript April 26, 2021 pp. 120-121.

5. Also, to Paragraph 85 of the Complaint, the Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed a Category III violation under NAC 453D.905(3)(d)(4) & (15). This is a separate and distinct Category III violation and was Respondent's second Category III violation within 2 years of the Category III violation found under Paragraph 2, above. Therefore, pursuant to NAC 453D.905(4)(d)(2), the Board hereby imposes a civil penalty of $5,000, as Respondent's second Category III violation.

6. As to Paragraph 86 of the Complaint, the Board finds (by a 4 – 1 vote) there was no violation and imposes no discipline as to Paragraph 86 of the Complaint.

7. As to Paragraph 87 of the Complaint, the Board adopts (by a 4 – 1 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 87 that Respondent improperly issued 9 COAs without header and footer banners reading "RESEARCH AND DEVELOPMENT" or "R&D" in violation of NAC 453D.776(4) and NAC 453D.905(3)(d)(4), (8), & (13). The evidence of record established that Respondent issued 9 COAs without the required R&D banners.
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> On the date these COAs were issued, Nevada law required laboratories to: "report the results of the testing [for research and development purposes] to the marijuana establishment and to the Department by electronic mail. The marijuana testing facility shall clearly mark the test results with 'R&D TESTING ONLY-- NOT FOR RESALE' on the header and footer of the report in 20-point white font and a red background."[29]
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> On October 22, 2019, Respondent issued COAs to Silver Sage Wellness for the following products: Island Sweet Skunk, King Louis, GG#4, Deadhead OG, Gelato, Lemonade Dream, Bio Jesus, Bio Diesel, and Sour Diesel.[30] All 9 product names were preceded by the designation "R&D–."[31] However, none of the COAs bore the requisite R&D banners in the headers and footers. Additionally, the phrase "not for resale" did not appear on the COAs. This R&D testing was done with Department approval, but the COAs did not meet the labeling requirements for R&D

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[29] NAC 453A.655(4) and NAC 453D.776(4).
[30] Petitioner's Exhibit 10.
[31] *Id.*

testing.[32]

> Mr. Haun admitted that the failure to properly designate these 9 COAs as R&D was his error.[33] But Respondent argued that although it "is good practice" to include the R&D banners on R&D COAs, it was not necessary.[34] Respondent provided no support for this argument.
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> Petitioner established that Respondent failed to properly include the required banners on 9 R&D COAs in violation of NAC 453D.776(4) and NAC 453D.905(3)(d)(4), (8), & (13). Despite Respondent's admission to 9 improper COAs, it is recommended that the Board find a single . . . violation.

8. Also, as to Paragraph 87 of the Complaint, the Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed a Category III violation under NAC 453D.905(3)(d)(4),(8), & (13). This is a separate and distinct Category III violation and was Respondent's third Category III violation within 2 years of the Category III violations found under Paragraphs 2 and 5, above. Therefore, pursuant to NAC 453D.905(4)(d)(3), the Board hereby imposes a civil penalty of $10,000, as Respondent's third Category III violation.

9. As to Paragraph 89 of the Complaint, the Board finds (by a 4 – 1 vote) there was no violation. Therefore, the Board imposes no discipline for Paragraph 89.

10. As to Paragraph 94 of the Complaint, the Board adopts (by a 4 – 1 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 94 that Respondent failed to maintain records when it discarded laboratory testing information contained on post-it notes in violation of NAC 453A.652(1), (4), (6) & (7), NAC 453D.764(1), (4), (6) & (7), and NAC 453D.905(3)(d)(4). Specifically, the Complaint alleged that Respondent used post-it notes to direct staff to perform various retests but did not retain those post-it notes in its records.[35] The evidence of record established that the post-it notes contained important records of Respondent's testing procedures but

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[32] Petitioner's Exhibit 101 and Hearing Transcript April 26, 2021 p. 150 (Testimony of Investigator Wayman).
[33] Hearing Transcript May 25, 2021 pp. 119-120.
[34] *Id.*
[35] Complaint Paragraph 71.

Respondent discarded the post-it notes.

During the 2019 Inspection, Investigator Perez discovered a post-it note in Respondent's weigh station area bearing the words "Potency retest" and a list of product sample numbers.[36] Luling Wang and Director Yin told Investigator Perez that Director Yin's practice was to give Mr. Wang post-it notes like this to instruct him to weigh more product from the samples identified for potency retesting.[37] The post-it notes then moved with the samples for retesting through the testing process.[38] Because they were used to convey testing instructions to lab personnel, Investigator Perez determined the post-it notes were documentation related to testing that must be maintained in Respondent's records.[39] Respondent's staff confirmed that the post-it notes were not retained but were discarded following the retests.[40]

During the period in question, Nevada law required laboratories to be ISO/IEC certified, adopt good laboratory practices, maintain standard operating procedures as well as a quality control and quality assurance programs, and follow specific guidelines and standards set out in certain publications referenced in the regulations.[41] Laboratories were required to "maintain procedures for identification, collection, indexing, access, filing, storage, maintenance and disposal of quality and technical records."[42] Technical records include "records of original observations, derived data and sufficient information to establish an audit trail, calibration records, staff records and a copy of each test report or calibration certificate issued, for a defined period. The records for each test or calibration shall contain sufficient information to facilitate, if possible, identification of factors affecting the uncertainty and to enable the test or calibration to be repeated under conditions as close as possible to the original. The records shall include the identity of personnel responsible for the sampling, performance of each test and/or

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[36] Hearing Transcript April 29, 2021 p. 15 and Petitioner's Exhibit 67 p. 1467.

[37] Hearing Transcript April 29, 2021 pp. 16 and 129. These statements to Investigator Perez were hearsay (out of court statements offered for the truth of those statements). NRS 51.035. In disciplinary proceedings before the Board, "Any relevant evidence may be admitted and is sufficient in itself to support a finding if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a civil action." NRS 678A.540(1)(d). Investigator Perez's testimony regarding these conversations is credible and is supported by other evidence in the record. Further, the truth of those statements is confirmed by Respondent's admission during the hearing that it used post-it notes in the manner described to Investigator Perez during the 2019 Inspection.

[38] Hearing Transcript April 29, 2021 p. 129.

[39] Hearing Transcript April 29, 2021 pp. 15-16.

[40] Hearing Transcript April 29, 2021 p. 129.

[41] NAC 453A.652 and NAC 453D.764.

[42] Exhibit 92 p. 4485 (Section 4.13.1.1, Association of Official Agricultural Chemists ("AOAC") International's Guidelines for Laboratories Performing Microbiological and Chemical Analyses of Food, Dietary Supplements, and Pharmaceuticals – An Aid to Interpretation of ISO/IEC 17025:2005 which was adopted as a standard by NAC 453A.652(1)(d) and NAC 453D.764(1)(d)).

calibration and checking of results."[43] Laboratories were required to maintain and retain these records.[44] As part of Respondent's Process Requirements, technical records are to be "retained for each order and included in client records."[45] Technical records included "activity report, activity results, raw data, calculations, media, and handwritten notes and observations."[46] Further, this SOP required Respondent to document each activity performed.

Respondent did not dispute the contents or purpose of the post-it notes or that the post-it notes had been disposed rather than retained in Respondent's records. Respondent argued that the post-it notes were duplicative records because the results of the retests were in the instrument data on the potency testing instrument and Respondent recorded the retests in the lab notebooks for the instrument.[47] Further, Respondent argued that the post-it notes were just a form of communication like a text message or telephone call and not technical records subject to retention.[48] Respondent maintained that technical records were limited to actions which "affected measurement analysis" or affected the final results on the COAs and denied that the information on the post-it notes did so.[49]

Although an extensive review and comparison of the raw instrument data and lab notebooks could have revealed Respondent's practice of retesting, there is no evidence that Respondent's retesting instructions were explicitly recorded anywhere besides the post-it notes that it used to instruct its staff to retest certain samples. Respondent admitted Director Yin only entered results from retests into Confident Cannabis (specialized software for cannabis testing laboratories which was used by Respondent) when she accepted the results of a retest.[50] Consequently, not all retest results were entered into Confident Cannabis.[51] And because only the information from Confident Cannabis was reported in Metrc, that also meant the retest results were not recorded in Metrc. Thus, neither Confident Cannabis nor Metrc showed that Respondent was performing retests. And because Respondent kept evidence of its retesting practices out of Confident Cannabis and Metrc, that information was not readily available in places other than the post-it notes.

Further, the evidence of record established that the information on the post-it notes was information of the type required to be in Respondent's records because the retesting process determined the

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[43] *Id.* p. 4486 (Section 4.13.2.1).
[44] NAC 453D.905(3)(d)(4).
[45] Petitioner's Exhibit 75 p. 1629 (SOP titled Quality Manual, Section 7.5) and Hearing Transcript April 29, 2021 p. 130.
[46] *Id.*
[47] Hearing Transcript May 19, 2021 pp. 21-22 (Testimony of Ms. Romolino).
[48] Hearing Transcript May 25, 2021 pp. 75-76 (Testimony of Mr. Haun).
[49] *Id.*
[50] Hearing Transcript May 19, 2021 p. 22.
[51] *Id.*

> results ultimately reported to the Department and on the COAs. Though the employees charged with performing the measurement analysis for the retests may have accurately reported the results of each individual retest, the ultimate test results and the COAs were affected by retesting because Respondent selected between the results of the initial test and the retests for its preferred results to record in Confident Cannabis and Metrc and report on the COAs. Thus, a record of which samples were retested, who performed the various retests, and how Respondent chose which test results it would report were necessary for complete records of Respondent's testing.
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> Consequently, the information on the post-it notes falls within the scope of the technical records Respondent was required to maintain. That Respondent chose post-it notes to transmit testing instructions to its staff did not minimize the importance of the information on the post-it notes or remove it from the category of technical records which Respondent was required to maintain. Accordingly, Respondent was required to maintain these records, but failed to do so.
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> Petitioner established that Respondent failed to comply with NAC 453A.652(1), (4), (6) & (7), NAC 453D.764(1), (4), (6) & (7), and NAC 453D.905(3)(d)(4). Respondent's arguments do not resolve or mitigate its violations. Respondent failed to follow Nevada law and its own SOPs. It is recommended that the Board find one . . . violation.

11. Also, as to Paragraph 94 of the Complaint, the Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed a Category III violation under NAC 453D.905(3)(d)(4). This is a separate and distinct Category III violation and was Respondent's fourth Category III violation within 2 years of the Category III violations found under Paragraphs 2, 5, and 8, above. Therefore, pursuant to NAC 453D.905(4)(d)(4), the Board imposes the discipline of a 30-day suspension.

12. As to Paragraph 88 of the Complaint, the Board adopts (by a 4 – 1 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 88 that Respondent failed to report test results to the Department at the same time it provided test results to its clients in violation of NAC 453A.658(9) and NAC 453D.788(9). The Complaint further alleged that Respondent's actions in this regard amounted to intentional concealment of these results from the Department in violation of NAC 453D.905(3)(a)(4). The evidence of record established that Respondent provided test results to clients in advance of issuing COAs but did not provide those test results to the Department at the same time, if it provided the results to the

Department at all.

During the period in question, Nevada law required laboratories to: "file with the Department, in a manner prescribed by the Department, an electronic copy of the certificate of analysis for all tests performed by the independent testing laboratory, regardless of the outcome of the test . . . at the same time that it transmits those results to the facility which provided the sample. The independent testing laboratory shall transmit an electronic copy of the certificate of analysis for each test to the Department by electronic mail. . . ."[52] Respondent's SOP accurately reflected this requirement: "An independent testing laboratory shall file with the Division an electronic copy of each laboratory test result for any batch that does not pass the microbial, mycotoxin, heavy metal, pesticide chemical residue or residual solvents levels test at the same time that it transmits those results to the facility which provided the sample."[53]

Investigator Perez understood from Director Yin and Mr. Haun during the 2019 Inspection that Respondent contacted clients by telephone to provide them with preliminary potency testing results prior to completing all of the testing and issuing COAs.[54] Investigator Perez recalled that on the third day of the inspection, she had a second conversation with Director Yin to confirm her understanding of Respondent's practice of providing preliminary potency results to clients before the COAs for those tests were completed.[55] She also had a conversation with Mr. Haun who further explained that when there were multiple potency tests on the same samples, the calls to the clients also included discussions of which potency test result to report on the COAs.[56] Although Mr. Haun denied making these statements to Investigator Perez, he admitted Respondent engaged in the practice of providing what he characterized as "preliminary results" or "unofficial results" to clients in advance of issuing COAs as a customer service.[57]

Respondent argued NAC 453A.658(9) did not prohibit Respondent from releasing preliminary results to Respondent's clients without providing those preliminary results to the Department. By this, Respondent argued that the regulation did not prohibit it from informally disseminating test results to clients in forms other than COAs nor did it require Respondent to share with the Department the preliminary information that it informally shared with its clients. Respondent's interpretation calls into question the meaning of the phrase "an electronic copy of the certificate of analysis for all tests

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[52] NAC 453A.658(9) and NAC 453D.788(9) (emphasis added).
[53] Petitioner's Exhibit 11 p. 687 (Section 7.3). The SOP did not include the client notification process used by Respondent. Hearing Transcript April 29, 2021 pp. 48-49.
[54] Hearing Transcript April 29, 2021 pp. 46-47 and 49, Hearing Transcript May 11, 2021 p. 30, and Petitioner's Exhibits 12 and 130.
[55] Hearing Transcript April 29, 2021 pp. 46-47 and Petitioner's Exhibit 130 p. 7721.
[56] Hearing Transcript April 29, 2021 p. 49.
[57] Hearing Transcript May 25, 2021 pp. 122-123 and Hearing Transcript June 2, 2021 p. 49.

performed by the independent testing laboratory."[58] Specifically, the question is whether the regulation 1) required a laboratory to communicate test results only through COAs "for all tests performed" or 2) merely required that that the laboratory file with the Department all COAs issued by a laboratory. The language of the regulation does not support Respondent's proposed interpretation.

Read as a whole, the clear intent of the regulation was that laboratories would issue COAs for all tests performed, communicate the results of testing only through COAs, and provide COAs to the Department and the client at the same time.[59] The regulations did not contemplate that laboratories would informally release test results to clients through email or telephone calls prior to, or in lieu of, issuing COAs. Nor did it contemplate that laboratories could communicate results to clients without also informing the Department of those results.

Respondent's proposed interpretation would leave a gaping loophole in this otherwise strict regulation scheme whereby laboratories could selectively choose whether and when to share testing results with the Department by simply issuing or not issuing a COA. This absurd result is inconsistent with the voter's intent for strict regulation of this industry and undermines the intent of the reporting requirements.[60] Further, Respondent's proposed construction would serve to obstruct, rather than promote, the evident purpose of the regulation.[61] The evident purpose of the regulation was to provide rules for submitting testing results to the Department and to clients, not to carve out a means for laboratories to avoid reporting testing results to the Department.

Petitioner established that Respondent failed to comply with NAC 453A.658(9) and NAC 453D.788(9). Respondent admitted it provided test results to clients before its issued COAs and that it did not provide those test results to the Department at the time it provided those results to its clients. Respondent intended its clients to have possession of test results that it did not provide to the Department, a violation of NAC 453D.905(3)(a)(4). It is recommended that the Board find one . . . violation.

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[58] NAC 453A.658(9) and NAC 453D.788(9).

[59] "If a statute's language is clear and unambiguous, this court will apply its plain language. Plain meaning may be ascertained by examining the context and language of the statutes as a whole." *Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 25 Nev. 111,113, 204 P.3d 1262, 1263 (2009) (citations omitted). Rules of statutory construction apply to administrative regulations. *Meridian Gold Co. v. State ex rel. Department of Taxation*, 119 Nev. 630, 633, 81 P.3d 516, 518 (2003).

[60] A court must "construe statutory language to avoid absurd or unreasonable results." *Meridian Gold Co.*, 119 Nev. at 633, 81 P.3d at 518 (*quoting Pellegrini v. State,* 117 Nev. 860, 874, 34 P.3d 519, 528 (2001)).

[61] "It is the duty of this court to give effect to the clear intention of the Legislature and to construe the language of a statute so as to give it force and not nullify its manifest purpose." *Hughes Properties, Inc. v. State*, 100 Nev. 295, 297, 680 P.2d 970, 971 (1984) (*citing State v. Pioneer Citizen's Bank of Nevada*, 85 Nev. 395, 398, 456 P.2d 4223, 423 (1969)).

13. Also, as to Paragraph 88, the Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed a Category I violation under NAC 453D.905(3)(a)(4). Under NAC 453D.905(4)(a)(1), the Board hereby imposes a civil penalty of $20,000, as Respondent's first Category I violation.

14. The Board next considers Paragraphs 90, 91, and 92 of the Complaint, which the Hearing Officer treated together and found one violation. The Board finds no violation as to Paragraph 90 of the Complaint (by a 5 – 0 vote). As to Paragraph 91 of the Complaint the Board adopts (by a 5 – 0 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence. As to Paragraph 92 of the Complaint the Board adopts (by a 5 – 0 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence. Therefore, the FFCL of the Hearing Officer are adopted as to Paragraphs 91 and 92 as follows:

> The Complaint alleged in Paragraph 91 that Respondent failed to adequately train and supervise employees Osvaldo Ruiz, Luling Wang (referred to as Lu Ling in the Complaint), and Gail Wang in violation of NAC 453A.650(1)(a) & (b), NAC 453A.652(1), (4), (6), & (7), NAC 453D.764(1), (4), (6), & (7), NAC 453D.755(1)(a) & (b), and NAC 453D.905(3)(d)(7) & (8).
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> And the Complaint alleged in Paragraph 92 that Respondent failed to ensure the competency of the staff who performed testing of cannabis products in violation of NAC 453A.652(1), (4), (6) & (7), NAC 453D.764(1), (4), (6) & (7), NAC 453D.352(1) & (3), and NAC 453D.905(3)(d)(7) & (8). Specifically, the Complaint alleged that Respondent failed to ensure the competency of Mr. Ruiz by failing to have Mr. Ruiz complete competency assessments before independently performing cannabinoid potency testing.
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> Petitioner failed to show that these Paragraphs alleged three different violations. Although the Paragraphs were worded slightly differently from each other, Petitioner ultimately relied on the same law and facts for both Paragraphs 90 and 91.[62] And Paragraph 92, which

[62] The allegations in Paragraph 68 (which were referenced by Paragraph 91) are clearly based on, and inseparable from, the allegations in Paragraphs 14-30 (which were referenced by Paragraph 90). Additionally, while Paragraph 90 alleged a failure to maintain standards of practice, only Paragraph 91 cited to NAC 453A.652 and NAC 453D.764, the provisions which adopted publications setting standards of practice for laboratories.

referenced Paragraph 69, then expounded on the ways in which Mr. Ruiz's training and supervision fell short of Respondent's SOPs and Nevada law.

During the period in question, Nevada law required "Each independent testing laboratory must employ a scientific director who must be responsible for: (a) Ensuring that the laboratory achieves and maintains quality standards of practice; and (b) Supervising all staff of the laboratory."[63] The Department enacted regulations concerning general laboratory standards and practices requiring laboratories to be ISO/IEC certified, adopt good laboratory practices, maintain standard operating procedures as well as a quality control and quality assurance program, and follow the guidelines and standards set out in certain publications referenced in the regulations.[64]

During the 2019 Inspection, Petitioner identified several of Respondent's practices as falling below the standard for good laboratory practices (identified in Complaint Paragraphs 88 and 93 through 102). Some of these practices were identified as deficiencies following the 2017 Inspection and 2018 Inspection.[65] Respondent continued those practices in 2019 despite the Department's findings and directions following the previous inspections. The Complaint also alleged that each of these practices were individual violations which warranted discipline. As discussed, except for the practices addressed in Complaint Paragraphs 95 and 102, Respondent's practices were not in compliance with its own SOPs (where SOPs existed) and were in violation of Nevada law. Consequently, Petitioner demonstrated that Respondent's practices fell below the standard for good laboratory practices.

Additionally, during the 2019 Inspection, the Department attempted to verify Respondent's employee training. During the period in question, Nevada law required laboratories to "ensure that instruction is provided to a marijuana establishment agent before that person begins to work or volunteer at or provide labor as a marijuana establishment agent to the marijuana testing facility. Such instruction must include, without limitation: (a) The good laboratory practices adopted by the marijuana testing facility; and (b) The standard operating procedures and the quality control and quality assurance programs of the marijuana testing facility."[66]

Respondent's SOP titled Laboratory Training Procedure was created to "establish a guideline for lab training procedure for all employee[s]."[67] This SOP contemplated that Respondent would craft a training program based on the employee's work experience and background.[68] With regard to instrument training, the SOP specified

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[63] NAC 453A.650(1)(a) and (b) and NAC 453D.755(1)(a) and (b).
[64] NAC 453A.652 and NAC 453D.764.
[65] *See* Petitioner's Exhibits 46, 50, and 52.
[66] NAC 453D.352(3). *See also* NAC 453A.652 and NAC 453D.764.
[67] Petitioner's Exhibit 62 p. 1433.
[68] *Id.* p. 1434.

that "lab director will assign a trainer for instrument training. The trainer will go through the instrument in detail with the trainee and make sure the trainee completely understands the operation and maintenance of the instrument."[69] The SOP required a new employee to complete an analysis check by preparing a known sample in triplicate in order to evaluate the employee's operation of the instrument. And the SOP required employee training records to be created and archived.

Investigator Perez examined Mr. Ruiz's training for using HPLC to test for potency and ICP-MS to test for heavy metals. Investigator Perez concluded that based on Mr. Ruiz's limited experience working in laboratories and his inexperience with HPLC and ICP-MS, Mr. Ruiz should have been treated like an analyst in training and received more training and supervision than provided by Respondent.[70] The evidence of record supported Investigator Perez's conclusion.

Mr. Ruiz's resume showed he was employed previously at a laboratory but had no experience using HPLC or ICP-MS prior to his employment with Respondent.[71] Mr. Ruiz described to Investigator Perez that he read Respondent's SOP on potency testing and operated the HPLC under supervision for a few days before operating that instrument without observation. Respondent's training records for Mr. Ruiz show he was trained on many, but not all, of Respondent's SOPs in February 2019.[72] He was also trained in 7 laboratory skills in February 2019 and he demonstrated competency in those skills on the date he was trained.[73] Mr. Ruiz's training records did not establish that Respondent customized a training program for Mr. Ruiz based on his experience and background. The records also failed to show the extent of Mr. Ruiz's training on the HPLC and ICP-MS, or completion of the analysis check described in the SOP.[74] The records show only limited training in February 2019 which did not prepare Mr. Ruiz to operate the HPLC or ICP-MS.

Once an employee was initially trained, Respondent's SOP on Ensuring Competent Personnel required ongoing supervision of

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[69] *Id.*

[70] Hearing Transcript April 29, 2021 pp. 105-106.

[71] Petitioner's Exhibit 54. Mr. Ruiz's recent completion of school and limited professional experience prior to his employment with Respondent do not reflect poorly on Mr. Ruiz or Respondent. It simply required that Respondent's training and supervision of Mr. Ruiz be tailored to this early phase of his career.

[72] Petitioner's Exhibit 55.

[73] *Id.* The records on Mr. Ruiz's training in laboratory skills were incomplete because, although Mr. Haun initialed the form as trainer, Mr. Ruiz did not initial the form as the trainee. Despite this, Respondent's training record for Mr. Ruiz will be accepted as evidence that Mr. Ruiz received the training in laboratory skills as marked by Mr. Haun.

[74] Through testimony of Ms. Romolino and Mr. Haun, Respondent argued that Mr. Ruiz received additional training. Although their testimony is credible, Respondent did not produce records of that additional training. Consequently, Respondent failed to show with particularity what additional training Mr. Ruiz received or that Respondent documented and archived the documentation of that training.

employees to monitor their competence.[75] Among the requirements in this SOP were establishing competence requirements, evaluating employees against those requirements, and providing supervision and training to ensure that the competence requirements were met. A competency assessment or demonstration of competency is a process for an individual to show that they possess the requisite training, knowledge, and skills to operate a specific testing instrument and produce accurate and reliable data with that instrument.[76] Accordingly, an individual is required to demonstrate that knowledge prior to performing testing and on an ongoing basis.[77] And laboratories are required to maintain documentation of those competency assessments.[78]

Respondent's SOP on Ensuring Competent Personnel discussed the need for and use of competency assessments to monitor staff and determine the training required for members of the staff.[79] The SOP instructed that competency assessments would be documented in writing.[80] Additionally, Respondent's SOP on Laboratory Training Procedure touched on components of a competency assessment.[81] For example, Section 5.1.6 required a trainee as part of the initial training and evaluation process to prepare a sample in triplicate for analysis of that trainee's performance.[82] That SOP required training records to be archived.[83]

During the 2019 Inspection, Investigator Perez asked Lab Director Yin for documentation of a competency assessment for Mr. Ruiz.[84] Although Director Yin provided some training records for Mr. Ruiz, she did not provide a competency assessment for him.[85] Ms. Romolino remembered training Mr. Ruiz in 2018 and 2019 to operate the HPLC and creating documentation of that training.[86] Mr. Haun also remembered documentation of Mr. Ruiz's training.[87] However, Ms.

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[75] Petitioner's Exhibit 62.

[76] Hearing Transcript April 27, 2021 pp. 118-119 (Testimony of Investigator Perez concerning her experience with competency assessments), Hearing Transcript April 29, 2021 p. 52 (Testimony of Investigator Perez concerning Mr. Ruiz's lack of a competency assessment), Hearing Transcript May 20, 2021 pp. 157-158 (Testimony of Mr. Haun describing competency assessment). *See also* Petitioner's Exhibit 59 p. 1275 (Food and Drug Administration Office of Regulatory Affairs Laboratory Personnel Training and Competency Management Manual Volume 1, Section 6 and Volume II, Section 6).

[77] *See* Petitioner's Exhibit 92 p. 4490 (AOAC International's Guidelines for Laboratories Performing Microbiological and Chemical Analyses of Food, Dietary Supplements, and Pharmaceuticals – An Aid to Interpretation of ISO/IEC 17025:2005 which was adopted as a standard by NAC 453A.652(1)(d) and NAC 453D.764(1)(d)).

[78] *Id.*

[79] Petitioner's Exhibit 63.

[80] *Id.* p. 1440.

[81] Petitioner's Exhibit 62.

[82] *Id.* p. 1434. *See also* Hearing Transcript April 29, 2021 pp. 57-58.

[83] Petitioner's Exhibit 62.

[84] *Id.*

[85] *Id.* pp. 52-54 and 59-60 and Petitioner's Exhibit 55.

[86] Hearing Transcript May 18, 2021 pp. 12 and 17-18.

[87] Hearing Transcript May 25, 2021 p. 134.

Romolino did not know if Mr. Ruiz ever performed an actual competency assessment. [88] Respondent did not provide documentation of a competency assessment for Mr. Ruiz or the training documentation Ms. Romolino and Mr. Haun testified to at the hearing.

Respondent argued that its annual proficiency testing for the laboratory generally satisfied the requirement that it perform initial and ongoing competency assessments on its staff.[89] Although annual proficiency testing is a requirement for laboratories, those proficiency tests were opportunities for Respondent to demonstrate its competency and were not a substitute for Respondent's requirement to monitor the competency of its staff.[90]

During the 2019 Inspection, the Department also attempted to verify the competency of Respondent's employees to perform their respective testing duties by observing them in the performance of their duties. Investigator Perez asked Respondent's staff to Re-prep (i.e., prepare and test again) 11 samples that had been recently tested by Respondent while she observed their sample preparation and testing techniques.[91]

While observing Mr. Ruiz's testing procedures during the Re-prep process, Investigator Perez concluded that "given his lack of experience, his training plan was inadequate."[92] She arrived at this conclusion based on her observations that Mr. Ruiz was not trained in certain parts of the HPLC test, was unfamiliar with settings of the HPLC, could not review and interpret the data from the HPLC, and did not properly perform manual integration of the chromatograms produced by the instrument.[93]

When Investigator Perez observed Mr. Ruiz operate the HPLC, he failed to follow the SOP for Cannabinoids Potency Testing because he failed to use a one milliliter volumetric flask for preparation of the working standards.[94] Respondent argued that the technique used by Mr. Ruiz both was described in Respondent's SOP and produced the same outcome as the technique using the flask.[95] This may have been the case. But Respondent failed to point to the SOP in which Respondent specified that a vial or a pipette could be used in place of a flask when preparing

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[88] Hearing Transcript May 18, 2021 p. 22.
[89] Hearing Transcript May 18, 2021 p. 137.
[90] *See* Petitioner's Exhibit 92 pp. 4506 and 4508 (AOAC International's Guidelines for Laboratories Performing Microbiological and Chemical Analyses of Food, Dietary Supplements, and Pharmaceuticals – An Aid to Interpretation of ISO/IEC 17025:2005 which was adopted as a standard by NAC 453A.652(1)(d) and NAC 453D.764(1)(d)).
[91] Hearing Transcript April 29, 2021 pp. 156-157 and Hearing Transcript May 10, 2021 pp. 141-144. The results of the Re-prep testing is included in the discussion of Complaint Paragraph 100 below.
[92] Hearing Transcript April 29, 2021 p. 61.
[93] *Id*. pp. 51-57 and 89-91.
[94] Hearing Transcript April 29, 2021 pp. 79-82 and Petitioner's Exhibit 66 p. 1446. A working standard is used to calibrate the instrument.
[95] Hearing Transcript May 25, 2021 pp. 80-81.

working standards. And, in the instrument log, Respondent's staff misrepresented the method used to prepare the working standards by recording that they were using a volumetric flask.[96] Respondent allowed these practices even though it was cited during the 2017 Inspection for its failure to follow its SOP which specifically called for the use of volumetric flasks.[97]

Petitioner established that Respondent failed to adequately train and supervise Mr. Ruiz. Respondent's SOPs required Respondent to tailor a training and supervision program for Mr. Ruiz based on his recent completion of school, limited experience, and inexperience with HPLC and ICP-MS. Although Respondent provided limited training to Mr. Ruiz, Respondent failed to provide a tailored training and supervision program and failed to require Mr. Ruiz to perform a competency assessment either before or during the time he operated the HPLC for Respondent. Finally, Mr. Ruiz failed to operate the HPLC in accord with Respondent's SOP on potency testing. Consequently, Respondent failed to train and supervise Mr. Ruiz in a manner which ensured that he could competently and accurately perform the testing with which he was entrusted.

During the 2019 Inspection, Investigator Perez also observed Luling Wang prepare samples for potency testing during the Re-prep process.[98] Inspector Perez identified several issues with Mr. Wang's sample preparation and homogenization technique.[99] However, Mr. Wang's sample preparation and homogenization technique was not the result of Respondent's failure to train and supervise Mr. Wang – Mr. Wang was using the method approved by Respondent.[100]

Finally, Investigator Perez observed Gail Wang perform the sample extraction portion of potency testing during the Re-prep process.[101] Investigator Perez concluded that Ms. Wang's pipetting technique was incorrect.[102] Specifically, Ms. Wang did not fully fill the pipette. As a result, Ms. Wang dispensed an inaccurate amount into the sample vial which in turn caused the calculation for the final concentration of the sample to be in error. Ms. Wang's training records indicate that she read Respondent's SOP on In-house Pipette

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[96] Petitioner's Exhibit 69.

[97] Petitioner's Exhibit 50.

[98] Hearing Transcript April 29, 2021 pp. 11-14 and 16-26, and Petitioner's Exhibits 67 and 133. Mr. Wang's training records may be found at Petitioner's Exhibit 127.

[99] The question of whether Mr. Wang's sample preparation techniques were improper will be addressed below in the discussion of Complaint Paragraph 95.

[100] Hearing Transcript April 29, 2021 p. 27 (Testimony of Investigator Perez), Hearing Transcript May 18, 2021 pp. 30-31 (Testimony of Ms. Romolino), and Hearing Transcript May 26, 2021 pp. 12-14 and 16-17 (Testimony of Mr. Haun).

[101] Ms. Wang's training records may be found at Petitioner's Exhibit 126.

[102] Hearing Transcript April 29, 2021 pp. 126-128. Petitioner did not offer the photographs of Ms. Wang's pipetting technique because it "was hard to see what was happening due to the color of the pipette tip and the color of the liquid." Hearing Transcript May 4, 2021 pp. 167-168.

Verification in November 2017.[103] But there were no other entries in Ms. Wang's training records to indicate that she had been trained in, or evaluated on, pipetting technique.[104] Through Ms. Romolino's testimony, Respondent asserted "there was nothing wrong with [Ms. Wang's] pipetting."[105] Mr. Haun testified that Ms. Wang "has always demonstrated excellent, excellent sets of detail in her work. And she's always been extremely thorough. She has some of the best work ethic I've seen out of some of the employees. And, honestly, we would go to her when it comes to some delicate tasks that she would do on a daily basis, such as pipetting, because she was very good at what she did."[106] Mr. Haun described Ms. Wang's pipetting technique as sufficient.[107] But Neither Ms. Romolino nor Mr. Haun addressed the specific insufficiencies in Ms. Wang's pipetting technique that were observed and described by Investigator Perez – specifically, not fully filling the pipette.

Petitioner established that Respondent violated NAC 453A.650(1)(a) & (b), NAC 453A.652(1), (4), (6), & (7), NAC 453D.352(1) & (3), NAC 453D.755(1)(a) & (b), NAC 453D.764(1), (4), (6), & (7), and NAC 453D.905(3)(d)(7) & (8). Respondent's arguments did not resolve or mitigate its failure to maintain quality standards of practice and to supervise testing staff.

15. As to Paragraph 90 of the Complaint, given the finding of no violation in Paragraph 14, above, the Board imposes no discipline as to Paragraph 90.

16. As to Paragraphs 91 and 92 of the Complaint, given the finding of violations in Paragraph 14, above, Board (by a 3 - 1 vote) finds that Respondent committed a single Category III violation under NAC 453D.905(3)(d)(7) & (8) as to both Paragraphs 91 and 92 together. This is a separate and distinct Category III violation and was Respondent's fifth Category III violation within 2 years of the Category III violations found under Paragraphs 2, 5, 8, and 11, above. The Board declines to adopt the Hearing Officer's recommendation of revocation and instead imposes the disciplinary action of a 30-day suspension, to run consecutively with the

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[103] That SOP is not in the record.
[104] Hearing Transcript April 29, 2021 p. 127.
[105] Hearing Transcript May 18, 2021 pp. 59-60.
[106] Hearing Transcript May 25, 2021 pp. 15-16.
[107] Hearing Transcript May 26, 2021 pp. 22-23.

30-day suspension imposed in Paragraph 11, above.[108]

17. As to Paragraph 93 of the Complaint, the Board adopts (by a 4 – 1 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 93 that Respondent failed to analyze THC potency in accord with its written procedures and in a way which would ensure accurate reporting of Delta-8 tetrahydrocannabinol ("Delta-8 THC"), Cannabidiol ("CBD"), Cannabidiolic acid ("CBD-A"), Cannabinol ("CBN") in violation of NRS 453A.368(2)(a)(1), NAC 453A.6544(1)(a), NAC 453D.782(1)(a), and NAC 453D.905(3)(d)(7) & (8).
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> First, Mr. Ruiz's operation of the HPLC prevented accurate reporting of Delta-8 THC. When Investigator Perez observed Mr. Ruiz operate the HPLC, she learned that he relied on the HPLC to automatically identify the peaks that indicate the presence of Delta-8 THC in a sample and did not manually review the data to verify that the Delta-8 information was correct unless the HPLC identified the presence of Delta-9 THC.[109] As a result of that practice, Mr. Ruiz missed a Delta-8 THC peak while Investigator Perez observed his review of the chromatograms produced by the HPLC. He also failed to identify and use manual integration to correct errors made by the HPLC. Specifically, on November 4, 2019 he failed to find a peak generated by the HPCL that was not properly on the baseline and failed to manually cancel that baseline and mark it correctly.[110] And when Investigator Perez pointed out a peak Mr. Ruiz missed, he performed manual integration of that peak improperly by angling the baseline up.[111]
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> Petitioner argued that Respondent's HPLC procedures should be evaluated against the methods described in the manual Determination of Inorganic Anions in Drinking Water by Ion Chromatography published by the National Exposure Research Laboratory but failed to show where the Department had notified cannabis testing laboratories that they were required to adopt the methods in this publication.[112] Additionally, Petitioner asserted Respondent was required to comply with ORA Laboratory Manual Volume I published by the Food and Drug Administration ("FDA") but failed to point to the legal authority for that

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[108] NAC 453D.905(4)(d)(5) presumes that, for the fifth, and any additional, Category III violations within 2 years, the penalty is revocation. This presumption is made "before consideration of the factors described in subsection 2." The Board has considered the factors set forth in NAC 453D.905(2) and, based on said factors, hereby imposes the penalty of a 30-day suspension for this violation.

[109] Hearing Transcript April 29, 2021 pp. 90-91.

[110] Petitioner's Exhibit 73 p. 1587 and Hearing Transcript April 29, 2021 pp. 87-91. Instead of performing an instrument calibration that day, Mr. Ruiz ran 5 system suitability tests to determine that the HPLC was working properly. Hearing Transcript April 29, 2021 p. 88.

[111] Hearing Transcript April 29, 2021 p. 90.

[112] Compare Petitioner's Exhibits 56, 57, and 58 with NAC 453A.652 and NAC 453D.764.

statement.[113] However, those publications along with Investigator Perez's 15 years of experience operating HPLC establish that for any laboratory operating an HPLC, consistent review of the instrument's automatic integration procedures accompanied by correct manual integration of HPLC data are good laboratory practices which ensure the accuracy of the HPLC's data.

Respondent did not dispute that manual integration is a good lab practice. Respondent argued that it did perform manual integration in 2019 but performing manual integration for every peak was a time-consuming process that would not yield useable information.[114] Respondent maintained that its HPLC was programmed to detect small peaks and if the HPLC did not automatically integrate the peak, that meant there was too little of the analyte to correctly quantify the amount (i.e., below the limit of quantification). Mr. Haun testified that Mr. Ruiz was aware of how the HPLC automatically identified analytes, but he was not asked to opine on whether Mr. Ruiz understood and was trained to perform manual integration.[115] The evidence of record established that Mr. Ruiz's practice, as allowed by Respondent, was to solely rely on the automatic results of the instrument.

Mr. Ruiz's single documented instance of failure to identify and correct the baseline in the November 4, 2019 system suitability tests alone was insufficient to warrant discipline. And his failure to correct the baseline while observed by Investigator Perez could be forgiven as the result of the pressure of observation.[116] However, the record established Mr. Ruiz's assumption that Delta-8 THC was not present, lack of familiarity with manual integration, reliance on the HPLC for automatic results, and failure to examine the results of the HPLC and perform manual integration as needed were not isolated incidents. Without accurate baseline markings, the HPLC could not perform accurate calculations of the cannabinoids represented by those peaks.[117] And if the HPLC missed a Delta-8 THC peak entirely, the HPLC did not record the presence of that missed cannabinoid. All of these errors precluded Respondent's accurate reporting of Delta-8 THC.

Second, Respondent used spreadsheets for communicating THC potency testing results to Director Yin which varied between potency analysts and failed to include all of the cannabinoids for which Respondent was required to test. These spreadsheets were used by Director Yin to create COAs.[118] Mr. Ruiz's spreadsheets were incomplete

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[113] Compare Petitioner's Exhibit 59 and Hearing Transcript April 29, 2021 p. 99 with NAC 453A.652 and NAC 453D.764. By its own terms, this publication is intended to apply to the FDA's laboratory.

[114] Hearing Transcript May 25, 2021 pp. 147-149 (Testimony of Mr. Haun) and Hearing Transcript May 18, 2021 pp. 36-38 (Testimony of Ms. Romolino).

[115] Hearing Transcript May 25, 2021 p. 150.

[116] Investigator Perez concluded that Mr. Ruiz was not intentionally manipulating the results of the HPLC, he was simply not sufficiently trained in manual integration. Hearing Transcript April 29, 2021 pp. 95-96.

[117] Hearing Transcript April 29, 2021 p. 91.

[118] Hearing Transcript April 29, 2021 pp.122-123.

because they did not include fields for Delta-8 THC and CBD results.[119] Ms. Romolino's spreadsheets failed to include Delta-8 THC, CBD, CBD-A, and CBN.[120] These differences showed that Respondent failed to create standard documentation for recording and communicating potency test results and failed to ensure that all analysts were recording and communicating all of the required test results.

Ms. Romolino described the spreadsheets as "used for in-lab organization."[121] Mr. Haun agreed that the spreadsheets were "in-house internal document[s] just used to move data."[122] When explaining her spreadsheet, Ms. Romolino claimed "I did not include Delta-8 THCA, CBN, CBDA or CBD. I only included those in samples that actually contained those analytes," thereby admitting that she did not use a standardized spreadsheet for all of the samples she tested.[123] As Ms. Romolino described it, she reported potency test results to Director Yin by giving the spreadsheets and a printout of the chromatograms to Director Yin who then manually entered that information into Confident Cannabis to create the COAs.[124] Ms. Romolino believed that Director Yin relied on the chromatogram printouts rather than the spreadsheets when creating the COAs even though Ms. Romolino admitted that the spreadsheets were easier to read.[125] But Mr. Haun described the spreadsheets as "a tool to transfer information from the instrument to a computer that housed the LIMS software."[126] LIMS stands for Laboratory Information Management System and Respondent used this system to store information used to generate COAs.[127]

Mr. Haun further testified that the spreadsheets "in no way affected measurement analysis or how we recorded the information on the report."[128] However, the evidence of record established that the spreadsheets were used to communicate and transmit testing information from the instrument to Director Yin and LIMS. Ultimately, the information from the spreadsheets was used to create Respondent's COAs. Accordingly, to ensure accurate recording and reporting of all cannabinoids, those spreadsheets should have been standardized for all potency analysts and included information for all the required cannabinoids.

Respondent's SOP on Cannabinoid Potency Testing properly listed Delta-8 THC, CBD, CBD-A, and CBN as cannabinoids for which

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[119] Hearing Transcript April 29, 2021 pp. 116-117 and Petitioner's Exhibit 64.
[120] Hearing Transcript April 29, 2021 pp. 117-123 and Petitioner's Exhibit 65.
[121] Hearing Transcript May 18, 2021 pp. 28 and 41-42.
[122] Hearing Transcript May 25, 2021 pp. 72-74 and 153.
[123] Hearing Transcript May 18, 2021 pp. 42 and 161.
[124] Hearing Transcript May 18, 2021 pp. 156-157.
[125] Hearing Transcript May 18, 2021 p.158.
[126] *Id.*
[127] *Id.*
[128] Hearing Transcript May 25, 2021 p. 74.

> Respondent must test.[129] Additionally, its validated method included analysis of Delta-8 THC.[130] However, Respondent's practices of failing to manually integrate the HPLC and using incomplete spreadsheets to communicate testing information fell short of both Respondent's validated method and its SOP for potency testing.[131] Further, its practices failed to satisfy Nevada law which requires laboratories to test for and report Delta-8 THC, CBD, CBD-A, CBN.[132]
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> Petitioner established that Respondent failed to comply with NRS 453A.368(2)(a)(1), NAC 453A.6544(1)(a), NAC 453D.782(1)(a), and NAC 453D.905(3)(d)(7) & (8). Respondent's arguments did not mitigate or resolve this violation. It is recommended that the Board find one . . . violation.

18. Also, as to Paragraph 93 of the Complaint, Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed a Category III violation under NAC 453D.905(3)(d)(7) & (8). This is a separate and distinct Category III violation and was Respondent's sixth Category III violation within 2 years of the Category III violations found under Paragraphs 2, 5, 8, 11, and 16, above. The Board declines to adopt the Hearing Officer's recommendation of revocation and instead imposes the disciplinary action of a 30-day suspension, to run consecutively with the 30-day suspensions imposed in Paragraphs 11 and 16, above.[133]

19. The Board next considered Paragraphs 95 and 101 of the Complaint, which the Hearing Officer treated together and found one violation. The Board finds no violation as to Paragraph 95 of the Complaint (by a 4 – 1 vote). As to Paragraph 101 of the Complaint the Board adopts (by a 4 – 1 vote) the FFCL of the Hearing

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[129] Petitioner's Exhibit 66.
[130] Petitioner's Exhibits 72 and 73, Hearing Transcript April 29, 2021 pp. 83-84 (Testimony of Investigator Perez), and Hearing Transcript May 18, 2021 p. 28 (Testimony of Ms. Romolino).
[131] Hearing Transcript April 29, 2021 pp. 83-84 (Testimony of Investigator Perez) and Petitioner's Exhibit 66.
[132] Hearing Transcript April 29, 2021 pp. 116-117. NAC 453D.151 by reference to NRS 453.139 included Delta-8 THC in the definition of THC and NAC 453D.782 required laboratories to test for THC, CBD, CBD-A, and CBN. These regulations went into effect February 27, 2018.
[133] NAC 453D.905(4)(d)(5) presumes that, for the fifth, and any additional, Category III violations within 2 years, the penalty is revocation. This presumption is made "before consideration of the factors described in subsection 2." The Board has considered the factors set forth in NAC 453D.905(2) and, based on said factors, hereby imposes the penalty of a 30-day suspension for this violation.

Officer and finds a violation, by a preponderance of the evidence, as forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 101 that Respondent utilized the chemistry samples ("chem sample") to retest products which initially failed microbiological testing in violation of NAC 453D.764(1), (4), (6), & (7) and NAC 453D.905(3)(d)(7) & (8).
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> During the 2019 Inspection, Investigator Perez observed Luling Wang prepare more than 20 samples for potency testing.[134] These chem samples came from lidded containers and were intended to be used for all tests besides those for microbials, i.e. potency, moisture, heavy metals, pesticides, solvents, terpenes, and foreign matter. [135] Investigator Perez observed Mr. Wang homogenize the samples by: pouring a portion of the sample from a lidded container into his gloved hand or reaching a gloved finger into the container to draw out a portion of the sample, rubbing and grinding the sample between his gloved hands to break up the larger pieces in the sample, spreading the broken-up sample on a piece of glass atop a clipboard, and finally using a razor blade to push some of the broken-up sample into a vial. Once the vial contained a sufficient amount of product for testing, Mr. Wang returned any remining sample on the clipboard back to the original lidded container. Between samples, Mr. Wang cleaned his disposable gloves by spraying them with isopropyl alcohol and wiping them with a chem wipe.[136] He changed the disposable gloves between every 3 to 5 samples. Between each sample he used methanol to clean the razor blade and then placed the razor blade on the open logbook while he cleaned the clip board with methanol.
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> Investigator Perez determined that this homogenization method was not sanitary and could lead to cross-contamination of the samples from microbials and pesticides.[137] She also expressed several concerns about ways in which the outcome of testing could be changed by Respondent's homogenization method. Potency testing could be affected if trichomes which contain THC were adhering to the gloves from one sample and then depositing into another sample.[138] Because the gloves were disposable, single-use gloves, the isopropyl alcohol and methanol could break down the integrity of the gloves which could cause chemicals from the gloves to transfer into the samples. Isopropyl alcohol could be transferred from the gloves to the samples, which could affect the accuracy of microbial testing. The non-laboratory grade clipboard could break down from the application of methanol. Respondent's practice of

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[134] Hearing Transcript April 29, 2021 pp. 11-28, Petitioner's Exhibit 67 pp. 1468-1492, and Petitioner's Exhibit 133.

[135] Hearing Transcript April 29, 2021 p. 26 (Testimony of Investigator Perez) and Hearing Transcript May 18, 2021 p. 30 (Testimony of Ms. Romolino).

[136] Chem wipe is short for chemical wipe, generally a low-lint surface wipe for cleaning.

[137] *See* Hearing Transcript May 4, 2021 pp. 182-184.

[138] *Id.* From the deposit of green stains on the gloves, Investigator Perez concluded the samples were leaving deposits on the gloves which could be transferred into other samples.

putting gloved fingers into the original sample container to extract a portion of the sample for testing was a possible point of contamination. And returning unused portions of the sample from the clipboard back to the original sample container which would be used for other tests was another point at which the chem sample could have been contaminated. Finally, Respondent's practice of placing the razorblade after it was cleaned on the logbook, a surface that was not cleaned, was another potential source of contamination.

Investigator Perez used the term cross-contamination in a way which differed from the publications adopted by the Department which generally call for laboratories to ensure sanitary conditions and take action to prevent of contamination both of the laboratory and the samples with which the laboratory worked.[139] The publications in the record use the term cross-contamination in reference to microbiological testing and preventing microbes from contaminating samples.[140]

Respondent did not provide a SOP to the Department for the sample preparation and homogenization process used by Mr. Wang.[141] But Respondent did not dispute that Mr. Wang used Respondent's method to prepare and homogenize the chem samples.[142] Respondent argued this process was sanitary because Mr. Wang cleaned his gloves and tools with W35 IPA in between samples, changed his gloves as necessary (though Ms. Romolino did not know how frequently he changed them), and didn't touch the ground or his phone while preparing samples.[143] Additionally, Respondent argued that Investigator Perez's contamination concerns were unwarranted for the preparation of the chemistry samples because the chemistry tests would not be affected by the presence of microbials because those portions of the samples were not used for testing for microbials. Finally, as Mr. Haun summarized it, to contaminate a sample "you would have to have the target analyte of interest on hand to then add it to said sample."[144] Petitioner failed to show that Respondent's method to prepare and homogenize the chemistry portion of the sample to test for potency, moisture, heavy metals, pesticides, solvents, terpenes, and foreign matter posed a contamination risk for those tests.

However, Respondent admitted that when it depleted the microbiology portion of a sample, it used the chemistry portion of the sample to complete microbiological testing.[145] Respondent admitted it

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[139] NAC 453A.652 and NAC 453D.764.

[140] Petitioner's Exhibit 59 pp. 1278-1279 (ORA Laboratory Manual Volume I published by the FDA).

[141] Hearing Transcript May 4, 2021 p. 177.

[142] Hearing Transcript May 18, 2021 pp. 30-31 (Testimony of Ms. Romolino).

[143] Hearing Transcript May 18, 2021 p. 50 (Testimony of Ms. Romolino) and Hearing Transcript May 26, 2021 p. 15 (Testimony of Mr. Haun).

[144] Hearing Transcript May 26, 2021 pp. 12-14 and 16-17 and Hearing Transcript June 2, 2021 pp. 20-26.

[145] Petitioner's Exhibit 98 p. 6536, Hearing Transcript April 23, 2021 pp. 25-26 (Testimony of Ms. Zhu) and Hearing Transcript May 26, 2021 pp. 58-60 (Testimony of Mr. Haun). Respondent claimed this happened infrequently. The Department found 19 chem samples used for 37 microbial tests between

used chem samples for microbial testing even though it knew that the chem samples were treated in a less aseptic manner than the microbiology portions of the samples and, consequently, could be contaminated with microbials.[146] Respondent also admitted that the use of harsh solvents like isopropyl alcohol and methanol could destroy microbials and lead to false negative results.[147] Respondent's admissions concerning its use of chemistry samples both for chemistry testing and microbiology testing established that Respondent failed to use the sanitary practices necessary to prepare the chemistry samples that would lead to accurate results when used in microbial testing.

Petitioner established that Respondent failed to comply with NAC 453A.652(1), (4), (6) & (7), NAC 453D.764(1), (4), (6) & (7), and NAC 453D.905(3)(d)(7) & (8). The evidence of record showed that Respondent's homogenization practices negatively affected only the chemistry samples which were ultimately used in microbial testing. For these samples, Respondent failed to follow Nevada law. Consequently, it is recommended that the Board find one . . . violation.

20. As to Paragraph 95 of the Complaint, given the finding of no violation in Paragraph 20, above, the Board imposes no discipline as to Paragraph 95.

21. As to Paragraph 101 of the Complaint, given the finding of a violation in Paragraph 19, above, Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed a Category III violation under NAC 453D.905(3)(d)(7) & (8). This is a separate and distinct Category III violation and was Respondent's seventh Category III violation within 2 years of the Category III violations found under Paragraphs 2, 5, 8, 11, 16, and 18, above. The Board declines to adopt the Hearing Officer's recommendation of revocation and instead imposes the disciplinary action of a 15-day suspension, to run consecutively with the 30-day suspensions imposed in Paragraphs 11, 16, and 18, above.[148]

22. As to Paragraph 97 of the Complaint, the Board adopts (by a 4 - 1 vote) the

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September 4, 2019 and November 26, 2019. Petitioner's Exhibit 105. But because neither party provided the total number of microbial tests performed by Respondent during that period, there is no way to evaluate the frequency of Respondent's use of chem samples for microbial testing.

[146] Hearing Transcript May 26, 2021 pp. 58-60 (Testimony of Mr. Haun).

[147] Hearing Transcript June 2, 2021 p. 29 (Testimony of Mr. Haun).

[148] NAC 453D.905(4)(d)(5) presumes that, for the fifth, and any additional, Category III violations within 2 years, the penalty is revocation. This presumption is made "before consideration of the factors described in subsection 2." The Board has considered the factors set forth in NAC 453D.905(2) and, based on said factors, hereby imposes the penalty of a 30-day suspension for this violation.

FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 97 that Respondent's pesticide and mycotoxin testing procedures precluded accurate reporting and endangered the public in violation of NRS 453A.368(2)(a)(2) & (4), and NAC 453D.905(3)(d)(7) & (8). Specifically, the Complaint alleged that Respondent continued to report testing results following quality control ("QC") failures and before taking corrective action to identify and resolve the issues which led to those failures.[149] Further, Petitioner alleged that even where corrective action was taken, Respondent failed to maintain adequate documentation of the failures and corrective actions. The evidence of record established that Respondent's pesticide and mycotoxin testing procedures were as described by Petitioner.
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> As part of the December 2019 Inspection, the Department examined Respondent's records concerning its pesticide and mycotoxin testing practices.[150] In their review of these records, Investigators Wayman and Perez found that Respondent regularly continued to issue test results for pesticides and mycotoxins after Respondent's instruments exceeded quality control tolerance limits.[151] Respondent engaged in this practice even though tolerance limits are intended to help a laboratory ensure confidence in the accuracy of its test results.[152] And Respondent continued this practice in 2019 even though the Department identified this as a deficiency following both the 2017 Inspection and 2018 Inspection.[153]
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> Investigator Perez summarized the pesticide and mycotoxin QC failures for the month of December 2019 in a spreadsheet.[154] The spread sheet shows the 116 continuing calibration verifications ("CCVs") that Respondent used for QC to demonstrate that the instrument was performing correctly during the testing in December 2019 of 28 pesticide and mycotoxin analytes.[155] For each analyte, Investigator Perez identified the total number of times the CCVs failed high, the total number of times the CCV's failed low, and the total number of CCV

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[149] Complaint Paragraph 74.
[150] Hearing Transcript May 4, 2021 p. 19.
[151] This problem was not isolated to December 2019. Petitioner's Exhibit 68 and Hearing Transcript May 4, 2021 pp. 45-46.
[152] Hearing Transcript April 19, 2021 pp. 75-76 and April 20, 2021 p. 88 (Testimony of Investigator Wayman).
[153] Petitioner's Exhibits 46 and 52, Hearing Transcript April 19, 2021 pp. 68-69 and 75-76, Hearing Transcript April 20, 2021 pp. 87-88, and Hearing Transcript May 4, 2021 pp. 43.
[154] Petitioner's Exhibits 77 and 78 and Hearing Transcript May 4, 2021 p. 19. The chart is labeled pesticides but also included mycotoxins.
[155] Petitioner's Exhibit 77 and Hearing Transcript May 4, 2021 pp. 23-24. Respondent performed a CCV every 10 samples to ensure that the instrument was operating properly. Hearing Transcript May 18, 2021 p. 80 (Testimony of Ms. Romolino) and Hearing Transcript May 25, 2021 p. 89 (Testimony of Mr. Haun).

failures, both high and low.[156]

As part of its quality control and quality assurance processes, Respondent was responsible to establish tolerance limits and ensure its instruments were properly calibrated.[157] Respondent's SOP titled Pesticide Residue/Mycotoxin Screening demonstrated that Respondent established the tolerance limits for these tests and Respondent's SOP titled Quality Assurance Program stated Respondent's intent that results will stay within those limits.[158] When Respondent's results fell outside those tolerance limits, it was required to stop testing with that particular instrument, determine why the results fell outside the tolerance limits, resolve the issue before placing the instrument back into service, and document this process.[159] After placing the instrument back into service, Respondent was required to reanalyze the tests impacted by the quality control failure.[160] Respondent's SOP titled Quality Manual recognized these responsibilities and included provisions for "Ensuring the Validity of Results" and instructions for a "Nonconforming Work Procedure."[161] Additionally, the SOP on corrective action preventative action reports ("CAPAs") instructed that when there is a QC failure, the issues with the instrument must be resolved and the samples tested before the failed CCV and after the last successful CCV must be reanalyzed.[162] But Respondent failed to follow those procedures.[163] Despite these SOPs, Respondent's pesticide and mycotoxin data showed that Respondent did not follow these procedures for the QC failures for pesticide and mycotoxin testing at issue here.[164]

Respondent's SOPs on Corrective Action Logs and CAPAs both indicated that QC failures due to exceeded tolerance limits were nonconformances which would be included in its records.[165] To examine what actions Respondent had taken in response to the 116 QC failures in December 2019, Investigator Perez asked Respondent for all CAPAs and corrective action logs from 2019.[166] Respondent provided CAPAs and Corrective Action Logs for some periods between October 9, 2019 and June 4, 2020.[167] When Investigator Perez emailed Mr. Haun to ask: "were there any CAPA's between 11/1/19 and 2/7/20?", Mr. Haun responded: "We do not have any CAPA reports between 11/1/19 to

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[156] Investigator Perez explained how she read Respondent's instrument data, determined which CCVs fell outside the tolerance range established by Respondent through its validated method, and assembled the information for the analyte Daminozide. Hearing Transcript May 4, 2021 pp. 27-30.
[157] Hearing Transcript May 4, 2021 pp. 70-72 (Testimony of Investigator Perez).
[158] Petitioner's Exhibit 86 pp. 2246-2247, Petitioner's Exhibit 76 p. 1651, and Hearing Transcript May 4, 2021 pp. 52-54.
[159] Hearing Transcript May 4, 2021 pp. 31-32.
[160] Hearing Transcript May 4, 2021 pp. 26-27.
[161] Petitioner's Exhibit 75 (Sections 7.7 and 7.10) and Hearing Transcript May 4, 2021 p. 32.
[162] Petitioner's Exhibit 85.
[163] Hearing Transcript April 19, 2021 pp. 79-81.
[164] Hearing Transcript May 4, 2021 p. 45.
[165] Petitioner's Exhibit 84 p. 2230 and Petitioner's Exhibit 85 p. 2234.
[166] Petitioner's Exhibit 79 and Hearing Transcript May 4, 2021 pp. 32-33.
[167] Petitioner's Exhibits 79 and 83.

02/07/20."[168]

The only document addressing pesticide testing failures provided by Respondent during the 2019 Inspection was a single Corrective Action Log from December 2019 which described 11 non-conformances for analyte fludioxonil on December 2 and December 9, 2019 due to "random insufficient ionization."[169] Respondent's corrective action was described as "Results were accepted. Will continue to monitor." [170] Investigator Perez concluded that this corrective action was inadequate because insufficient ionization indicated a problem with the mass spectrometry detector in the UPLC which would prevent the instrument from identifying the pesticides.[171] Because a problem with ionization indicated a problem with the instrument, Investigator Perez also asked Respondent to provide the maintenance logs for the TQ-S Micro Mass Spectrometer and UPLC.[172] These logs showed the instruments were not serviced or maintained in December 2019 despite the numerous QC failures and Respondent's determination (as recorded in its Corrective Action Log) that the UPLC was not performing ionization properly.

In Ms. Romolino's experience, "If any quality controls failed, we would look into the failure and determine if we needed to rerun the samples."[173] Test results which fell above the range and below the range all warranted corrective action.[174] When she saw a CCV that was out of range, she would note the failure in the corrective action log, inform Director Yin, and follow Director Yin's instructions.[175] Ms. Romolino believed Respondent documented every corrective action taken for CCVs which fell outside of tolerance limits.[176]

Ms. Romolino remembered that results for fludioxonil were falling below the QC range in December 2019.[177] When Ms. Romolino reported this to Director Yin, she was told that random insufficient ionization was the cause of the errors concerning pesticide analyte fludioxonil and Ms. Romolino recorded that cause on the corrective action log in December 2019.[178] Presumably Ms. Romolino agreed with Director Yin's approach to continue to monitor following the CCV failures for fludioxonil because Ms. Romolino did not believe that the non-conforming test results were low enough to make a difference or indicate that there was enough pesticide in the sample to be dangerous

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[168] Petitioner's Exhibit 82 and Hearing Transcript May 4, 2021 pp. 38-40.
[169] Petitioner's Exhibit 79 and Hearing Transcript May 4, 2021 pp. 39-40. Respondent did not provide any additional CAPAs or Corrective Action Logs for pesticide testing in December 2019 at the hearing.
[170] Petitioner's Exhibit 79.
[171] Hearing Transcript May 4, 2021 pp. 34-35.
[172] Petitioner's Exhibits 80 and 81.
[173] Hearing Transcript May 18, 2021 p. 89.
[174] Hearing Transcript May 18, 2021 p. 95.
[175] Hearing Transcript May 18, 2021 pp. 92-93.
[176] Hearing Transcript May 18, 2021 p. 81.
[177] Hearing Transcript May 18, 2021 pp. 104-105 (Testimony of Ms. Romolino).
[178] Petitioner's Exhibit 79 and Hearing Transcript May 18, 2021 p. 94.

to consumers.[179] She came to this conclusion even though she explained that test results which fall below the QC range could be lower than the true amount of the analyte in the sample.[180]

In contrast with Ms. Romolino's testimony, according to Mr. Haun, when anomalies were observed with the CCVs, Respondent would monitor those over time to determine when to trouble shoot or perform maintenance on the instrument.[181] Respondent documented "every time we perform maintenance on the equipment and whenever we would see certain issues."[182] Mr. Haun maintained that despite the CCV failures, "we had a method that was validated, that proved that we were able to see what we were looking for as far as the pesticides and mycotoxins, and which we had QCs that backed up or that showed that we would have been able to see any pesticides or mycotoxins if they were in the sample. That meaning that if we would have been able to see it, then we would have seen it. And since we didn't see any, then there wouldn't be a potential for endangering consumers."[183]

Mr. Haun was unconcerned about results which fell above the tolerance range because that meant the instrument was reading more sensitively than Respondent expected and, therefore, Respondent could be confident that a negative result meant there were no pesticides present.[184] He maintained that random insufficient ionization did not warrant instrument maintenance because the instrument would continue to show whether the pesticide was present in the sample, it would just be unreliable in reporting the quantity of the pesticide present.[185] However, he did not explain how Respondent could be confident in results that fell below the tolerance range or, for the test results which detected pesticides, how Respondent could be confident that the amounts in the samples fell within the limits of the amounts of pesticides allowed by Nevada law.[186]

Petitioner established that Respondent failed to comply with NRS 453A.368(2)(a)(2) & (4) and NAC 453D.905(3)(d)(7) & (8). Respondent's arguments did not resolve or mitigate its violations. The testimonies offered by Respondent's employees regarding CCV failures and corrective actions were not satisfactory substitutes for actual documentation. Further, Respondent failed to adequately explain why numerous CCV failures in December 2019 were merely monitored and corrective action was not taken to ensure that Respondent's pesticide test results fell within the tolerance range Respondent established. Respondent failed to follow Nevada law and its own SOPs.

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[179] Hearing Transcript May 18, 2021 p. 106 and Hearing Transcript May 19, 2021 pp. 43-44.
[180] Hearing Transcript May 18, 2021 p. 106.
[181] Hearing Transcript May 25, 2021 p. 90.
[182] *Id. See also* Hearing Transcript May 26, 2021 pp. 42-43.
[183] Hearing Transcript May 26, 2021 pp. 38 and 42.
[184] Hearing Transcript May 26, 2021 pp. 44-45.
[185] Hearing Transcript May 26, 2021 pp. 117-123.
[186] NAC 453A.6548 and NAC 453D.786 adopt NRS 586.550 to set pesticide testing requirements including limits on allowed levels of some pesticides.

Consequently, it is recommended that the Board find one . . . violation.

23. Also, as to Paragraph 97 of the Complaint, the Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed a Category III violation under NAC 453D.905(3)(d)(7) & (8). This is a separate and distinct Category III violation and was Respondent's eighth Category III violation within 2 years of the Category III violations found under Paragraphs 2, 5, 8, 11, 16, 18, and 21, above. The Board declines to adopt the Hearing Officer's recommendation of revocation and instead imposes the disciplinary action of a 30-day suspension, to run consecutively with the 30-day suspensions imposed in Paragraphs 11, 16, and 18, and the 15-day suspension imposed in paragraph 21, above.[187]

24. As to Paragraphs 98 and 102 of the Complaint, the Board adopts (by a 5 - 0 vote) the FFCL of the Hearing Officer and finds a single violation as to both paragraphs, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 98 that Respondent performed unauthorized retesting of samples for microbials in violation of NAC 453A.658(11), NAC 453A.672(3), (4), (5) & (6), NAC 453D.788(11), NAC 453D.790(3), (4), (5) & (6), and NAC 453D.905(3)(a)(3). The Complaint further alleged that when Respondent reported passing microbial results to the Department following the retesting, it falsely reported passing results because the initial test results showed that the samples failed microbial testing.[188]

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[187] NAC 453D.905(4)(d)(5) presumes that, for the fifth, and any additional, Category III violations within 2 years, the penalty is revocation. This presumption is made "before consideration of the factors described in subsection 2." The Board has considered the factors set forth in NAC 453D.905(2) and, based on said factors, hereby imposes the penalty of a 30-day suspension for this violation.

[188] Because of Respondent's retesting practices, the Department was concerned that product which was reported as passing and released into the market had actually failed microbial testing. The Department had other laboratories retest those products and when some of those tests failed microbial testing, the Department suspended Respondent's testing and issued public advisories. Petitioner's Exhibits 95 and 96. Petitioner has been clear that these positive test results are not the basis for the Complaint at issue here. Hearing Transcript April 19, 2021 pp. 126-127. Because the testing done by other labs did not form the basis for the Petitioner's allegations, they are not at issue here.

The Complaint alleged in Paragraph 102 that Respondent falsely reported 43 Aspergillus testing results as passing when the samples in question failed initial microbials testing for that analyte in violation of NAC 453D.905(3)(a)(3). The Complaint further alleged that Respondent intentionally misled Investigator Wayman about the retesting process.

During the 2019 Inspection, Investigator Wayman examined Respondent's microbial testing practices and records. In those records she saw instances where Respondent did not report failed test results to the Department but retested the samples without obtaining permission from the Department for those retests. Investigator Wayman also discovered email messages from Director Yin and Mr. Haun instructing Ms. Zhu to perform retests following failed microbiology tests.[189] Investigator Wayman understood from Director Yin that Respondent's practice was that if a sample failed, it would be retested twice and the majority result of the three tests would be reported to the Department.[190]

Based on this information, Investigator Wayman performed an extensive examination of Respondent's microbial testing records for three clients for September, October, and November 2019.[191] Investigator Wayman created spreadsheets to organize the data contained in Respondent's records.[192] The spreadsheets identified in orange 1) failed tests which were followed by retests and 2) failed retests that were followed by additional retests. The spreadsheets identified in yellow the retests that yielded passing results.[193] Through this records inspection, Investigator Wayman identified 232 samples which initially failed microbial testing and were retested at least once during this period.[194]

Further, the records showed that Respondent did not follow the practice described by Director Yin of retesting fails twice and reporting the majority result.[195] For example, Respondent reported as passing samples which failed microbial testing twice and passed only once. And Respondent performed retests even when it had reason to know that the facility from which the samples had been obtained was struggling with

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[189] Hearing Transcript April 19, 2021 pp. 108 and 115-116, Petitioner's Exhibit 89 p. 2940, Exhibit 90 p. 3940, Exhibit 97, and Exhibit 98.

[190] Hearing Transcript April 19, 2021 pp. 159-160. Investigator Wayman's testimony that this was the explanation she received from Director Yin is bolstered by Mr. Haun's testimony that the same practice was used for failures with heavy metals testing. Hearing Transcript June 2, 2021 p. 65.

[191] Hearing Transcript April 16, 2021 p. 108 and Petitioner's Exhibits 88 (client THC Nevada), 89 (client Integral Cultivation), and 90 (client Nevada Group Wellness).

[192] Petitioner's Exhibit 88 pp. 2275-2286, Exhibit 89 pp. 2739-2762, and Exhibit 90 pp. 3880-3884.

[193] Hearing Transcript April 19, 2021 pp. 100-101. Additionally, the letter R appeared in the notes column where Respondent's records designated the tests as retests. Hearing Transcript April 19, 2021 p. 88.

[194] Hearing Transcript April 19, 2021 pp. 97-98 and Complaint Paragraph 75(f).

[195] Hearing Transcript April 19, 2021 pp. 159-165 and Petitioner's Exhibits 107 and 108.

contamination of the very microbial for which the sample had failed.[196]

At the hearing, Ms. Zhu confirmed the statements she made to Investigator Wayman during the 2019 Inspection. Ms. Zhu received emails from Mr. Haun and Director Yin instructing her to retest failed microbial samples.[197] And she was asked to retest every sample which failed microbial testing.[198] Mr. Haun also confirmed that Respondent engaged in retesting.[199] Despite his email instructing Ms. Zhu to perform retesting, Mr. Haun alleged that retesting was performed at Ms. Zhu's discretion.

As discussed above concerning Complaint Paragraph 88, during the period in question, Nevada law required laboratories to file a COA with the Department for all test results. Thus, Respondent was required to report to the Department the results of microbial testing, even when the sample failed microbial testing. When a sample failed microbial testing, cultivators and producers were allowed to ask the Department for permission to retest that sample.[200] If the request was granted, the Department assigned a laboratory other than the one that performed the initial test to collect a new sample from the cultivator or producer and test that new sample.[201]

At the hearing, Investigator Wayman clarified that a laboratory can test a sample again without seeking approval from the Department if the test yields an invalid result.[202] When a test result was invalid, the laboratory was required to document the invalid result, identify the issue that led to the invalid result, document the correct action to resolve the issue, and test the sample again once the issue is resolved. Accordingly, where Investigator Wayman saw test samples associated with documented corrective action, she did not include those tests as retests on the spreadsheets. Thus, none of the retests at issue here followed results which were identified as invalid in Respondent's records.

Respondent admitted that it engaged in the practice of retesting samples which failed microbial testing. But Respondent argued this was a good lab practice which prevented false positives and confirmed questionable results or the amount of the microbial contaminant in the sample.[203] Respondent did not point to records in which it had documented false positives or questionable results prior to the retests in

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[196] Hearing Transcript April 19, 2021 pp. 110-112 discussing Petitioner's Exhibit 89 p. 2941 and Exhibit 120 p. 7601 and Hearing Transcript April 19, 2021 pp. 112-118 discussing Petitioner's Exhibit 90 p. 3380 and Exhibit 118 p. 7414.

[197] Hearing Transcript April 23, 2021 pp. 19-20.

[198] Hearing Transcript April 23, 2021 pp. 22-23.

[199] Hearing Transcript June 2, 2019 pp. 58-64.

[200] NAC 453A.672, NAC 453D.790, and Hearing Transcript April 19, 2021 p. 83 (Testimony of Investigator Wayman).

[201] *Id*. and Hearing Transcript April 20, 2021 pp. 164-165 (Testimony of Investigator Wayman).

[202] Hearing Transcript April 19, 2021 pp. 122-125.

[203] Hearing Transcript May 20, 2021 p. 51 (Testimony of Mr. Rushton) and June 2, 2021 pp. 59-61, 64, 99-100 (Testimony of Mr. Haun).

question. And Respondent admitted that its retesting practice was not reflected in its SOPs.[204] Respondent failed to point to statutes, regulations, or published guidelines and standards for laboratories which were adopted by the Department that approved of Respondent's retesting procedures.[205]

Even if Respondent had pointed to authority or SOPs, Respondent's justifications for the practice did not explain the patterns in Respondent's retesting: Respondent only performed retests following initial failed results and not after initial passing results; Respondent performed a second retest even when both the initial test and the first retest both showed failed results; and Respondent only performed a second retest when the first retest resulted in a second fail but not when the first retest resulted in a passing result.

When a sample failed microbial testing, Respondent engaged in the practice of retesting the failed sample. Respondent did not report the initial failed test to the Department and did seek permission to perform a retest. Respondent did not perform the retests following documented invalid results, to prevent false positives, to confirm the failed tests, or to confirm the amount of microbial contaminant in the sample. Respondent performed the retests with the goal of obtaining passing test results to report to the Department and its clients.

Allowing laboratories to perform retesting without limitations such as SOP guidelines, documentation of valid reasons for questioning initial test results, and first obtaining Department authorization would allow the laboratories to select the test results to report to the Department. Essentially, this would create a means for the laboratories to control the information reported to the Department rather than requiring them to report accurate test results. As demonstrated here, this practice undermines the trust placed in laboratories to ensure that the product released to the public meets the standards for safe products and are correctly described to consumers.

The record also showed that Respondent misrepresented to Investigator Wayman its practice of retesting for microbials. As Respondent described its practice to Investigator Wayman, a sample which initially failed would be retested twice and the majority result of the three tests would be reported to the Department. But Investigator Wayman's examination of Respondent's records of Aspergillus testing for two of Respondent's clients demonstrated that this representation was false: Respondent did not report the majority outcome of those test results.[206] Instead, Respondent reported the passing Aspergillus result even when the passing result was the minority outcome of the multiple

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[204] Hearing Transcript June 2, 2021 p. 48 (Testimony of Mr. Haun). Following the 2019 Inspection, Respondent created an SOP concerning its retesting practice. Respondent's Exhibit 8.

[205] Respondent admitted that it did not know if the practice of retesting was addressed in the ISO. Hearing Transcript June 2, 2021 p. 96 (Testimony of Mr. Haun).

[206] Petitioner's Exhibits 107 and 108 and Hearing Transcript April 19, 2021 pp. 160-167.

tests.

> Petitioner established that Respondent failed to comply with NAC 453A.658(11), NAC 453A.672(3), (4), (5) & (6), NAC 453D.788(11), NAC 453D.790(3), (4), (5) & (6), and NAC 453D.905(3)(a)(3). Respondent failed to present evidence which mitigated its actions in extensively using retesting to control its test results and avoid reporting failing microbial test results to the Department. Further, Respondent misrepresented to Investigator Wayman its practice of retesting for microbials. Despite the numerous incidents of this violation, it is recommended that the Board find one . . . violation.[207]

25. Also, as to Paragraphs 98 and 102 of the Complaint, the Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed one Category II violation under NAC 453D.905(3)(a)(3)[208]. Under NAC 453D.905(4)(b)(1), the Board hereby imposes a civil penalty of $10,000, as Respondent's first Category II violation.

26. As to Paragraph 99 of the Complaint, the Board adopts (by a 5 - 0 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 99 that Respondent performed unauthorized retesting of samples for heavy metals in violation of NAC 453D.788(11), NAC 453D.790(3), (4), (5) & (6), and NAC 453D.905(3)(a)(3). The Complaint specifically alleged that when Respondent reported passing Cadmium results for tests performed for Silver Sage Wellness Cultivation to the Department following the retesting, it falsely reported passing results because the other test results for the samples showed that the samples failed heavy metals testing for Cadmium.
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> During the 2019 Inspection, Investigator Wayman examined Respondent's heavy metals testing practices and records. In those records she saw instances where Respondent retested samples from

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[207] The 43 retested samples listed in Paragraph 79 were also included in the 232 samples listed in Paragraph 75. Consequently, there were a total of 232 samples identified by Petitioner in support of its allegations regarding Petitioner's microbial retesting activities.

[208] NAC 453D.905(3)(a)(3) states that it is a Category I violation for "making an intentionally false statement to the Department." However, the Hearing Officer recommended a Category II violation, instead, and the Board adopts that recommendation.

Silver Sage Wellness Cultivation for heavy metals, but Respondent did not obtain permission from the Department for the retests.[209] Based on this information, Investigator Wayman examined Respondent's heavy metals testing records for September, October, and November 2019 for client Silver Sage Wellness Cultivation and created a spreadsheet to organize the data contained in Respondent's records.[210] The spreadsheet identified in orange tests and retests with failed Cadmium results and identified in yellow retests that yielded passing Cadmium results.[211]

Through this records inspection, Investigator Wayman identified 22 samples which were retested and reported as passing Cadmium testing despite failed test results.[212] In one instance, Respondent tested a sample 5 times, received 2 passing and 3 failing results, and reported the initial passing result to the Department.[213] In another instance, the initial test and three subsequent retests all resulted in failures for Cadmium.[214] Respondent then conducted two additional retests which both yielded passing results and reported the sample as passing Cadmium testing.[215] Respondent continued in this practice for Silver Sage Wellness Cultivation even though Respondent knew the facility was struggling with Cadmium contamination.[216]

As discussed previously concerning microbial testing, a laboratory can test a sample again without seeking approval from the Department if the test yields an invalid result.[217] But Respondent's records did not identify these Cadmium tests for Silver Sage Wellness Cultivation which were followed by retesting as having produced invalid results. And, as discussed above concerning Complaint Paragraph 88, during the period in question, Nevada law required laboratories to report all test results to the Department. Thus, Respondent was required to report the results of the heavy metals testing, even when the sample failed for Cadmium.

Respondent admitted that it engaged in the practice of retesting samples for heavy metals.[218] Respondent argued this was a good lab practice which confirmed failed results.[219] Mr. Haun testified that when he ran multiple heavy metals tests of the same sample, he would run three tests (the initial test plus two retests), use the majority of the results to decide what result to report (i.e. passing if 2 of the three were passing results and failing if 2 of the 3 results were failing), and he

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[209] Hearing Transcript April 19, 2021 p. 131.
[210] Petitioner's Exhibit 99 and Hearing Transcript April 19, 2021 pp. 131-132.
[211] Hearing Transcript April 19, 2021 pp. 137-138.
[212] Hearing Transcript April 19, 2021 pp. 142-143 and Complaint Paragraph 76.
[213] Hearing Transcript April 19, 2021 pp. 136-139.
[214] Hearing Transcript April 19, 2021 pp. 140-143.
[215] *Id*.
[216] Hearing Transcript April 19, 2021 pp. 134-135 and Petitioner's Exhibit 101 pp. 6662-6663.
[217] Hearing Transcript April 19, 2021 pp. 122-123.
[218] Hearing Transcript May 26, 2021 p. 58 and Hearing Transcript June 2, 2021. p. 65.
[219] *Id*.

would report the higher number of the 2 passing or failing results.[220] Mr. Haun first claimed that he performed heavy metals testing as instructed in Respondent's SOP[221], but admitted on cross-examination that the retesting practice as he described it was not in the SOP.[222]

Respondent also argued that these retests were part of the R&D testing for heavy metals requested by Silver Sage Wellness Cultivation in March and October 2019.[223] But the COAs created by Respondent for the results at issue here indicated that Respondent did not consider these tests and retests part of the R&D testing.[224] Specifically, the COAs did not identify the tests in question as R&D and, unlike heavy metals R&D COAs which would only report heavy metals results, these COAs reported all required testing results.

Respondent did not point to SOPs, statutes, regulations, or published guidelines and standards for laboratories which were adopted by the Department that approved of Respondent's heavy metals retesting procedures. Additionally, Respondent's heavy metals testing records show that Respondent did not use the method Mr. Haun described for retesting: even when a majority of the multiple test results were failing, Respondent reported passing results.[225]

The evidence of record established that Respondent performed retesting but did not report all test results to the Department and did not ask for permission to perform retests. The evidence shows that Respondent did not perform the retests following documented invalid results or to confirm failed tests or for R&D. Respondent performed the retests with the goal of obtaining passing test results to report to the Department. Respondent engaged in this practice for Silver Sage Wellness Cultivation's Cadmium fails even though it knew Silver Sage Wellness Cultivation was struggling with Cadmium contamination at that time.

Petitioner established that Respondent failed to comply with NAC 453D.788(11), NAC 453D.790(3), (4), (5) & (6), and NAC 453D.905(3)(a)(3). Respondent failed to present evidence which mitigated its actions in using retesting in an attempt to control its test results and avoid reporting failing heavy metals test results to the

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[220] Hearing Transcript June 2, 2021 p. 65.

[221] Hearing Transcript May 20, 2021 p. 187, Hearing Transcript May 26, 2021 p. 51, and Petitioner's Exhibit 100.

[222] Hearing Transcript June 2, 2021 p. 65.

[223] Hearing Transcript April 27, 2021 pp. 44-49 and Petitioner's Exhibit 101 pp. 6662-6663.

[224] *See* Petitioner's Exhibit 102.

[225] Respondent also argued that Investigator Wayman failed to establish that heavy metals in cannabis products posed a danger if consumed. Hearing Transcript April 20, 2021 pp. 62-64. (Questioning of Investigator Wayman). Respondent made this argument even though Respondent described heavy metals testing as part of its safety testing for cannabis products. Hearing Transcript May 20, 2021 p. 146 (Testimony of Mr. Haun). Respondent's arguments in this regard are unpersuasive and better suited to a legislative hearing or regulatory workshop on the question of whether cannabis products should be tested for heavy metals.

> Department and the client. Despite the numerous instances of this violation, it is recommended that the Board find one … violation.

27. Also, as to Paragraph 99 of the Complaint, the Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed one Category II violation under NAC 453D.905(3)(a)(3)[226]. This is a separate and distinct Category II violation and was Respondent's second Category II violation within 2 years of the Category II violation found under Paragraph 25, above. Therefore, pursuant to NAC 453D.905(4)(b)(2), the Board hereby imposes a civil penalty of $10,000[227], as Respondent's second Category II violation.

28. As to Paragraph 100 of the Complaint, the Board adopts (by a 5 - 0 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 100 that Respondent performed unauthorized retesting of samples for cannabinoid potency in violation of NAC 453D.782, NAC 453D.790(3), (4), (5) & (6), and NAC 453D.905(3)(a)(3). The Complaint specifically alleged that when Respondent reported higher cannabinoid potency results to the Department following the retesting, it falsely inflated THC potency which was a deceptive trade practice.[228]
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> During the 2019 Inspection, Investigator Perez examined Respondent's cannabinoid potency testing practices and records. In those records, Investigator Perez noted many instances of Respondent retesting for potency results.[229] Respondent did not obtain permission from the Department to perform those retests. Investigator Perez was

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[226] NAC 453D.905(3)(a)(3) states that it is a Category I violation for "making an intentionally false statement to the Department." However, the Hearing Officer recommended a Category II violation, instead, and the Board adopts that recommendation.

[227] NAC 453D.905(4)(b)(2) presumes that, for the second Category II violations within 2 years, the penalty is up to $20,000. This presumption is made "before consideration of the factors described in subsection 2." The Board has considered the factors set forth in NAC 453D.905(2) and, based on said factors, hereby imposes the penalty of $10,000 this violation.

[228] Complaint Paragraph 80 also alleged that this practice posed a danger to consumers because providing inaccurate potency information to consumers "precludes their ability to accurately estimate their response to the product." But Petitioner did not rely on that allegation in Complaint Paragraph 100 to support its allegation of a violation and request for discipline.

[229] Petitioner's Exhibits 103 and 104 and Hearing Transcript April 29, 2021 pp. 197-199.

unable to determine from this data or Respondent's SOP how Respondent chose from the various retest results which result to report to the Department and on the COA.[230] At Investigator Perez's request, Director Yin explained that Respondent's potency retesting process relied on THC potency trend logs and established trend limits to determine when a sample would be retested for potency.[231]

Respondent provided its THC potency trend logs for various strains for three of its clients: Nevada Group Wellness (Prime Cannabis), THC Nevada, and Integral Associates (Essence or Desert Grown Farms).[232] Although Ms. Romolino was the primary potency chemist, Mr. Haun maintained the potency trend logs for Respondent.[233] Only the test results that were reported to the Department appeared on the trend logs.[234]

After examining the trend logs, Petitioner charted the data from those trend logs to demonstrate the potency trends.[235] These charts show visually how Respondent's potency results for these clients increased over time. Director Yin and Mr. Haun explained to Investigator Perez during the 2019 Inspection that the logs were used to manage potency testing results with the goal of achieving results which fell within certain parameters as defined by those logs.[236] The use of trend logs, for this purpose or any other, was not included in Respondent's SOPs.[237]

Even with the information from the trend logs and knowing which samples fell within and without the trend limits, Investigator Perez was unable to determine a pattern for which testing results Respondent chose to report to the Department.[238] Based on Respondent's lack of clear standards for retesting, practice of contacting its clients with test results in advance of reporting results to the Department, and testing trends showing gradually increasing THC levels, Investigator Perez concluded Respondent was testing and selecting test results with the

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[230] Hearing Transcript April 29, 2021 pp. 199-201.

[231] Hearing Transcript April 29, 2021 p. 133. Trend logs are not prohibited by Nevada law. Hearing Transcript May 11, 2021 pp. 155-157 (Testimony of Investigator Perez). But Respondent failed to use its trend logs as an aid in accurate reporting of potency results.

[232] Complaint Paragraph 77, Petitioner's Exhibits 116, 117, and 119, and Hearing Transcript April 29, 2021 pp. 133-134. Investigator Perez understood that Respondent kept trend logs for all of its clients and the trend logs for these two clients were exemplary of the documents Respondent maintained for all its clients. Hearing Transcript May 4, 2021 p. 7.

[233] Hearing Transcript May 19, 2021 p. 23 (Testimony of Ms. Romolino).

[234] Hearing Transcript May 10, 2021 p. 189 (Testimony of Investigator Perez) and Hearing Transcript May 25, 2021 p. 77 (Testimony of Mr. Haun).

[235] Hearing Transcript April 29, 2021 pp. 137-139 discussing Petitioner's Exhibit 116 p. 7294, Hearing Transcript April 29, 2021 pp. 143-144 discussing Petitioner's Exhibit 117 p. 7342, and Hearing Transcript April 29, 2021 pp.153-155 discussing Petitioner's Exhibit 119 p. 7450.

[236] Hearing Transcript April 29, 2021 pp. 133, 140-142, and 155.

[237] Hearing Transcript May 10, 2021 pp. 27-28 (Testimony of Investigator Perez).

[238] Petitioner's Exhibits 103 and 104, Hearing Transcript April 29, 2021 pp. 199-202, and Hearing Transcript May 10, 2021 p. 189.

goal of satisfying its clients rather than accurately reporting test results.[239]

Petitioner also argued that Respondent knew it was inflating its potency results because its potency results were higher than the results reported by other testing facilities between May 2019 and December 2019.[240] Although Petitioner accessed the information from other laboratories through the Metrc records system to make this comparison, Petitioner failed to show that Respondent had similar access to this information or was otherwise aware of the potency results of other laboratories.[241]

To see if Respondent could replicate the potency results it reported on its COAs, Investigator Perez asked Respondent's staff to Re-prep (i.e., prepare and test again) 11 samples that had been recently tested by Respondent while she observed their sample preparation and testing techniques.[242] The Re-preps were done in duplicate, "Re-prep A" and "Re-prep B."[243] Investigator Perez then created a chart and graph compiling the test results to facilitate a comparison of the THCA potency results from Respondent's COAs ("Originals") for those 11 samples to the THCA results of Re-preps A and B.[244] Investigator Perez expected to see variations between the test results of no more than 5 to 10 percent based on Respondent's method validations.[245] But most of the Re-prep results differed by more than 10% from the Originals.[246] Additionally, the majority of the THCA results from the Re-preps were lower than the THCA results from the Originals.[247] Based on these results, the gradually increasing THC levels in Respondent's testing results (as demonstrated by the trend logs), and Respondent's practices of retesting for potency and contacting its clients with test results prior to reporting those results to the Department, Petitioner concluded that Respondent intentionally engaged in these practices with the goal of inflating potency results.

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[239] Hearing Transcript May 4, 2021 pp. 9-17. As Petitioner observed, this method potentially excluded the test results for naturally occurring outliers that would be expected in living plants. Hearing Transcript April 29, 2021 p. 141.

[240] Petitioner's Exhibits 110, 111, 112, 113, and 114.

[241] Petitioner's Exhibit 91 p. 4450. ISO/IEC 17025:2017 "General requirements for the competence of testing and calibration laboratories" recommends that laboratories compare their results to those of other laboratories where available. But Petitioner failed to show that the information was available to Respondent. Consequently, while the information on other laboratories' potency testing results may have provided grounds for Petitioner to examine Respondent's testing methodologies to determine the cause of these differences, it did not show that Respondent was aware that it was consistently reporting higher potency results than other testing facilities.

[242] Hearing Transcript April 29, 2021 pp. 156-157 and Hearing Transcript May 10, 2021 pp. 141-144.

[243] Hearing Transcript April 29, 2021 pp. 157-158.

[244] Hearing Transcript April 29, 2021 pp. 156-178 and 182-183 and Petitioner's Exhibit 109 pp. 7035-7036.

[245] Hearing Transcript April 29, 2021 pp. 178-179.

[246] Hearing Transcript April 29, 2021 pp. 181-182.

[247] Hearing Transcript April 29, 2021 p. 182.

Petitioner alleged that Respondent engaged in this practice of inflating potency results because retail stores charge more, and consumers pay more, for products with higher THC levels.[248] Petitioner alleged this was a deceptive trade practice because it was "designed to attribute higher monetary value to products than they are worth in the marketplace."[249] However, Petitioner failed to establish that products with higher THC levels are always worth more than those with lower THC levels.[250]

As with microbials and heavy metals, a laboratory can test a sample again without seeking approval from the Department only if the test yields an invalid result.[251] However, Respondent's records did not identify these cannabinoid potency tests which were followed by retesting as having produced invalid results. And, as discussed above concerning Complaint Paragraph 88, Nevada law required laboratories to report all test results to the Department. Thus, Respondent was required to report the results of cannabinoid potency testing, even when those results were lower than Respondent or the client hoped (i.e., fell below the range dictated by the trend logs).

Petitioner demonstrated that it previously cited and summarily suspended Respondent for inflation of potency results following the 2017 Inspection.[252] From that inspection the Department concluded that Respondent's potency results showed "an almost 20% increase in the laboratory's mean total potential THC for flower products as compared to industry average."[253] Although the 2017 Inspection, citation, and suspension put Respondent on notice that its potency testing results were consistently higher than other laboratories in the industry, this evidence does not establish that the potency inflation issue identified during the 2017 Inspection was a prior citation for the same potency inflation issues identified during the 2019 Inspection.[254]

Respondent did not dispute that it performed retesting for potency results.[255] Respondent also did not dispute that not all retest results were recorded in Confident Cannabis and reported to the

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[248] Complaint Paragraph 80, Petitioner's Exhibit 115, and Hearing Transcript April 29, 2021 p. 136.
[249] Complaint Paragraph 80.
[250] *See* Petitioner's Exhibit 115 and Hearing Transcript May 10, 2021 pp. 122-124 (Testimony of Investigator Perez). The price sheet submitted offered by Petitioner does not support this conclusion.
[251] Hearing Transcript April 19, 2021 pp. 122-123.
[252] Petitioner's Exhibits 46, 48, and 49. Respondent offered a letter dated March 3, 2017 from the Department of Health and Human Services (which regulated medical marijuana until July 1, 2017) stating that following its February 2017 inspection of Respondent, it found the allegation that THC results were falsely inflated for 2 products to be "Unsubstantiated." Respondent's Exhibit 10. Respondent failed to show how this letter was relevant to the issues here.
[253] Petitioner's Exhibit 46 pp. 1017 and 1020.
[254] Respondent was not previously cited for using retesting, communications with clients, and trend longs to inflate potency results. The 2017 Inspection concerned the use of a 10-ml pipette versus a 5ml pipette. Respondent's Exhibit 12.
[255] Hearing Transcript May 18, 2021 p. 159 (Testimony of Ms. Romolino).

Department.[256] Despite this, Respondent maintained that both the initial tests and all retests were fully documented by Respondent.[257]

Through its questioning of Investigator Perez, Respondent argued that it recorded results in its trend logs after the testing was completed and that the trend logs tracked – but did not guide – which test results were reported to the Department on the COAs.[258] Even if this is true, it did not resolve the problems with Respondent's potency retesting and reporting activities but further confirmed that Respondent lacked a method for determining which test results to report to the Department. This was an admission of inconsistency in its potency testing practices because laboratories are required to define and follow specific processes for performing tests and reporting test results.[259] Further, if it is the case that the trend logs merely recorded test results after the fact, then the trend logs established that Respondent documented, and therefore was aware of, its ever increasing potency results but failed to investigate whether those results were reliable.[260] But Respondent's argument that the trend logs merely recorded information after testing is unpersuasive. Investigator Perez had more than one conversation with Director Yin and Mr. Haun to ensure that she understood their explanation concerning the trend logs. Her contemporaneous notes coupled with her recollections of those conversations are more reliable than Respondent's belated and unsupported claims at hearing.[261]

The evidence of record established that Respondent performed retesting but did not report all test results to the Department and did not ask for permission to perform retests. The evidence showed that Respondent did not perform the retests following documented invalid results. Despite Respondent's failure to explain how it selected which test results to report to the Department, its trend logs showed that it selected test results which continuously increased the potency results. Despite Petitioner's failure to clearly establish that cannabis products with a higher THC potency always generated more revenue, Petitioner did show that Respondent was motivated to increase its potency results and established its practices of contacting clients, retesting, and using trend logs with that goal in mind. These actions show that Respondent was not merely reporting the results of the potency tests it performed

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[256] Hearing Transcript May 19, 2021 p. 22 (Testimony of Ms. Romolino).
[257] Hearing Transcript June 2, 2021 p. 53 (Testimony of Mr. Haun).
[258] Hearing Transcript May 10, 2021 p. 187 (Questions of Investigator Perez by Ms. Maxson-Rushton).
[259] Hearing Transcript May 10, 2021 p. 188, Petitioner's Exhibit 60 pp. 1367-1369 and pp. 1377-1379 (Guidance from Eurofins Calscience, Inc. based on the ISO/IEC 17025:2005), Petitioner's Exhibit 61 p. 1428 (ASTM Standard D8244 based on the ISO/IEC 17025:2017), and Petitioner's Exhibit 91 pp. 4455-4456 (ISO/IEC 17025:2017 "General requirements for the competence of testing and calibration laboratories").
[260] Petitioner's Exhibit 91 pp. 4449-4450 (ISO/IEC 17025:2017 "General requirements for the competence of testing and calibration laboratories.") Under Section 7.7 Ensuring the Validity of Results, laboratories are to record data from testing in a way that facilitates detection of trends and monitoring of results.
[261] Petitioner's Exhibits 12 and 130.

but was working with its clients to increase the potency reported. At the very least, the evidence also showed that Respondent's trend logs put it on notice of consistently increasing potency results but Respondent failed to take efforts to verify and monitor these results despite the warning from the Department following the 2017 Inspection. The evidence of record established that Respondent engaged in potency testing practices which violated Nevada law.

Petitioner established that Respondent failed to comply with NAC 453D.782, NAC 453D.790(3), (4), (5) & (6), and NAC 453D.905(3)(a)(3). Respondent failed to present evidence which mitigated its actions in extensively using retesting in an attempt to control its cannabinoid potency test results and avoid reporting lower test results to the Department. Respondent failed to follow Nevada law when it engaged in this practice. Despite the numerous instances of this violation, it is recommended that the Board find one … violation.

29. Also, as to Paragraph 100 of the Complaint, the Board (by a 3 - 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent committed one Category II violation under NAC 453D.905(3)(a)(3)[262]. This is a separate and distinct Category II violation and was Respondent's third Category II violation within 2 years of the Category II violations found under Paragraph 25 and 27, above. The Board declines to adopt the Hearing Officer's recommendation of revocation and instead imposes the disciplinary action of a 15-day suspension, to run consecutively with the 30-day suspensions imposed in Paragraphs 11, 16, 18, and 23 and the 15-day suspension imposed in paragraph 21, above.[263]

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[262] NAC 453D.905(3)(a)(3) states that it is a Category I violation for "making an intentionally false statement to the Department." However, the Hearing Officer recommended a Category II violation, instead, and the Board adopts that recommendation.

[263] NAC 453D.905(4)(b)(3) presumes that, for the third, and any additional, Category II violations within 2 years, the penalty is revocation. This presumption is made "before consideration of the factors described in subsection 2." The Board has considered the factors set forth in NAC 453D.905(2) and, based on said factors, hereby imposes the penalty of a 15-day suspension for this violation.

30. As to Paragraph 96 of the Complaint, the Board adopts (by a 3 – 2 vote) the FFCL of the Hearing Officer and finds a violation, by a preponderance of the evidence, as set forth by the Hearing Officer as follows:

> The Complaint alleged in Paragraph 96 that Respondent failed to maintain a quality assurance and quality control program in violation of NAC 453A.652(1), (4), (6), & (7), NAC 453D.405, NAC 453D.764(1), (4), (6), & (7), and NAC 453D.905(3)(d)(7) & (8). Petitioner specifically alleged that Respondent engaged in six practices which showed that it was not adhering to a quality assurance and quality control program. Petitioner alleged that Respondent was previously cited for some of those practices following the 2017 Inspection.
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> First, as discussed regarding Complaint Paragraph 97, Petitioner showed that Respondent failed to take corrective action when the HPLC exceeded tolerance limits in pesticide testing. Respondent's SOPs on Corrective Action Logs and CAPAs both indicated that quality control failures due to exceeded tolerance limits were nonconformances which would be included in these records.[264] Petitioner notified Respondent following the 2017 Inspection that its failure to maintain a quality assurance and quality control program by: "allowing instrument controls for Pesticides and Mycotoxins to exceed tolerance limits without performing and documenting corrective action or assessing impact on actual sample results for the months of June 2017 – October 2017" was a violation of Nevada law.[265]
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> Respondent's HPLC data for pesticide testing in December 2019 showed 116 CCVs where the results fell outside the tolerance limits for multiple analytes.[266] Respondent provided one Corrective Action Log to the Department during the 2019 Inspection dated December 8, 2019.[267] This Corrective Action Log documented only 11 non-conforming CCVs for the pesticide Fludioxonil which Respondent determined were caused by random insufficient ionization and were considered resolved with the corrective action: "Results were accepted. Will continue to monitor."[268] Respondent provided no record of its response to the other CCVs which fell outside tolerance limits in December 2019. Respondent did not provide any CAPAs or any additional Corrective Action Logs for December 2019 at the hearing. Although Ms. Romolino and Mr. Haun offered testimony that Respondent documented every corrective action taken for CCVs which fell outside of tolerance limits, Respondent

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[264] Petitioner's Exhibit 84 p. 2230 and Exhibit 85 p. 2234.
[265] Petitioner's Exhibit 46.
[266] Petitioner's Exhibits 77 and 78. Respondent established its QC standards in its SOP. Hearing Transcript May 4, 2021 p. 70 (Testimony of Investigator Perez).
[267] Petitioner's Exhibit 79. Respondent also provided CAPA reports for February 7 through June 17, 2020 but those did not demonstrate that Respondent acted on the December 2019 non-conformances.
[268] *Id*.

provided no documents to show that was the case. Despite being previously cited for this violation, Respondent failed to follow its SOPs on Corrective Action Logs and CAPAs, thereby failing to maintain and adhere to that part of its quality assurance and quality control program.

Second, as discussed regarding Complaint Paragraph 93, Petitioner showed that Respondent utilized spreadsheets for communicating THC potency testing results from analysts to Director Yin and from instruments to Respondent's database. But these spreadsheets failed to include all of the cannabinoids for which Respondent was required to test.[269] Additionally, they varied between potency analysts and a single analyst even used varying spreadsheets.[270] Ultimately, the information gathered and communicated by these spreadsheets was used to complete Respondent's COAs. But these spreadsheets fell short of meeting the requirements of both Respondent's validated method and its SOP for potency testing.[271] Further, these spreadsheets failed to ensure that the potency testing information was consistently gathered and communicated.[272] By using these spreadsheets, Respondent failed to maintain and adhere to its quality assurance and quality control program.[273]

Third, Petitioner alleged Respondent failed to use 1ml volumetric flasks to prepare calibration standards for potency testing as required by its SOP for Cannabinoids Potency Testing but continued to make entries in its logbook which indicated that volumetric flasks were used in these preparations.[274] During Investigator Perez's observation of the Re-runs (included in the discussion of Complaint Paragraphs 90-92), she observed Mr. Ruiz use a "sample vial that goes into the instrument" to prepare the calibration standards.[275] Additionally, the SOP required 9 flasks to prepare the standards but Respondent had only 6 flasks in inventory.[276]

The 2019 Inspection was not the first time Respondent was notified of this issue. In the Statement of Deficiencies issued by the Department following the 2017 Inspection, Respondent was notified that its failure to follow its SOP which required the use of volumetric flasks to prepare instrument standards was a violation.[277] In response to the Statement of Deficiencies, Respondent stated as of January 5, 2018 it had received and would use a set of 1ml volumetric flasks for its

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[269] Petitioner's Exhibits 64 and 65.
[270] *Id.* and Hearing Transcript May 18, 2021 p. 161 (Testimony of Ms. Romolino).
[271] Petitioner's Exhibits 66 and 72.
[272] Petitioner's Exhibit 74 (SOP on Document Control).
[273] *See e.g.*, Petitioner's Exhibit 75 p. 1638 (Quality Manual Section 7.11 Control of Data and Information Management) and Petitioner's Exhibit 9 (SOP Ensuring Validity of Results).
[274] Hearing Transcript April 29, 2021 p. 80, Hearing Transcript May 4, 2021 pp. 165-167, Hearing Transcript May 10, 2021 pp. 13-14, and Petitioner's Exhibits 66 and 69.
[275] Hearing Transcript April 29, 2021 p. 80.
[276] *Id.* at p. 81.
[277] Petitioner's Exhibit 50.

standard preparation.[278]

Respondent did not deny that it failed to prepare calibration standards in flasks but argued that it used pipettes not vials to prepare the standard and was allowed to do so.[279] Respondent also did not deny that its SOP required calibration standards to be prepared in a flask but argued that "If there is another, a tool that we can use to measure volume accurately, then we can use that."[280] Respondent maintained that using a pipette was as accurate as using a flask.[281] Despite admitting that it changed its process and claiming it had validated that change, Respondent failed to explain why it did not change the SOP for that process. Because Respondent failed to either comply with its SOP or change its SOP to reflect its new process, Respondent failed to maintain and adhere to this part of its quality assurance and quality control program.

Fourth, as discussed regarding Complaint Paragraph 100, Respondent's potency trend logs, including their purpose, use, and the procedure for maintaining them, do not appear in Respondent's SOPs. Additionally, those trend logs put Respondent on notice that its potency test results consistently increased over time. Respondent failed to take efforts to verify and monitor these results even though the Department suspended Respondent's operations following the 2017 Inspection for potency inflation.[282] Respondent's use of trend logs (for which standards and procedures were not established by SOP) to maintain ever increasing potency test results, especially when Respondent was on notice to monitor such increases, was a failure to maintain its quality assurance and quality control program.

Fifth, Petitioner vaguely asserted that Respondent "failed to address non-conforming work with timely corrective action measures that were appropriate for the magnitude of the issue."[283] Pursuant to NRS 678A.520(1), a "complaint must be a written statement of charges and must set forth in ordinary and concise language the acts or omissions with which the respondent is charged." Although Nevada is a notice-pleading state in civil matters[284], a Complaint must "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of

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[278] Petitioner's Exhibit 51.

[279] Hearing Transcript May 18, 2021 pp. 43-45 (Testimony of Ms. Romolino) and Hearing Transcript May 25, 2021 pp. 80-81 (Testimony of Mr. Haun).

[280] Hearing Transcript May 18, 2021 p. 43 (Ms. Romolino reading from Petitioner's Exhibit 66 p. 1444, Respondent's SOP on Cannabinoids Potency Testing).

[281] Hearing Transcript May 18, 2021 p. 45 and Hearing Transcript May 25, 2021 p. 81.

[282] Petitioner's Exhibit 46 p. 1016.

[283] Complaint Paragraph 73(e).

[284] The Nevada Supreme Court has ruled "a complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought. . . . Nevada is a notice pleading jurisdiction and we liberally construe pleadings to place matters into issue which are fairly noticed to the adverse party." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996).

the claim and relief sought."[285]

In administrative licensing matters, the Court has held "Although proceedings before administrative agencies may be subject to more relaxed procedural and evidentiary rules, due process guarantees of fundamental fairness still apply. Administrative bodies must follow their established procedural guidelines and give notice to the defending party of the issues on which decision will turn and the factual material on which the agency relies for decision so that he may rebut it."[286] This portion of Paragraph 96 failed to put Respondent on notice of what the term "non-conforming work" refers or which of the many issues raised by the Complaint this subparagraph references. Petitioner has failed to sufficiently describe this allegation in a way which informs Respondent of the acts with which it is charged in this subparagraph.

Finally, Petitioner established that Respondent's required proficiency testing for years 2018 and 2019 is incomplete because it failed to perform proficiency testing for analytes Delta-8 THC and CBD-A.[287] Each laboratory is required to participate in and complete a proficiency testing program annually.[288] A laboratory successfully completes proficiency testing only if, along with the other requirements, it "Analyzes the proficiency testing sample for all analytes listed in NAC 453D.780 to 453D.786, inclusive."[289]

As of February 28, 2018, Nevada law required laboratories to test for Delta-8 THC and CBD-A.[290] Consequently, Respondent was required to complete proficiency testing for those analytes in 2018 and 2019.[291] That Respondent used a proficiency testing provider approved by the Department to administer its proficiency testing in those years does not negate the scientific director's responsibility to ensure that Respondent's participation in proficiency testing was successful.

Petitioner established that Respondent failed to comply with NAC 453A.652(1), (4), (6), & (7), … NAC 453D.764(1), (4), (6), & (7), and NAC 453D.905(3)(d)(7) & (8) by failing to maintain a quality assurance and quality control program. Respondent's arguments did not resolve or mitigate its violations. Consequently, it is recommended that the Board find one … violation.

31. Also, as to Paragraph 96 of the Complaint, the Board (by a 3 – 1 vote) adopts the recommendation in Hearing Officer's FFCL and finds that Respondent

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[285] *Western States Constr. v. Michoff,* 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992).
[286] *Dutchess Business Services, Inc. v. Nevada State Bd. of Pharmacy*, 124 Nev. 701, 711, 191 P.3d 1159, 1166 (2008) (internal citations omitted).
[287] Petitioner's Exhibits 70 and 71 and Hearing Transcript April 29, 2021 pp. 92-93.
[288] NAC 453A.660 and NAC 453D.772.
[289] NAC 453A.660(11)(b) and NAC 453D.772(11)(b) (emphasis added).
[290] NAC 453D.151 by reference to NRS 453.139 included Delta-8 THC in the definition of THC and NAC 453D.782 required laboratories to test for THC, CBD, CBD-A, and CBN.
[291] NAC 453A.660(4) and NAC 453D.772(4).

committed a Category III violation under NAC 453D.905(3)(d)(7) & (8). This is a separate and distinct Category III violation and was Respondent's ninth Category III violation within 2 years of the Category III violations found under Paragraphs 2, 5, 8, 11, 16, 18, 21 and 23, above. The Board declines to adopt the Hearing Officer's recommendation of revocation and instead imposes the disciplinary action of a 30-day suspension, to run consecutively with the 30-day suspensions imposed in Paragraphs 11, 16, 18, and 23 and the 15-day suspension imposed in Paragraphs 21 and 29 above.[292]

32. As to Paragraph 103 of the Complaint, the Board finds (by a 4 – 1 vote) there was no violation. Therefore, the Board imposes no discipline as to Paragraph 103 of the Complaint.

3. Conclusion.

In summary, the Board finds, by a preponderance of the evidence, that Respondent committed violations with respect to Paragraphs 83, 85, 87, 88, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, and 102 of the Complaint, for a total of 14 violations[293].

For the violations so set forth, the Board concludes that Respondent has committed 1 Category I violation, 3 Category II violations, and 9 Category III violations[294].

Attached hereto as Exhibit 1 is a chart[295] summarizing the violations and penalties associated therewith.

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[292] NAC 453D.905(4)(d)(5) presumes that, for the fifth, and any additional, Category III violations within 2 years, the penalty is revocation. This presumption is made "before consideration of the factors described in subsection 2." The Board has considered the factors set forth in NAC 453D.905(2) and, based on said factors, hereby imposes the penalty of a 15-day suspension for this violation.

[293] As set forth above, the Board found one violation with respect to Paragraphs 98 and 102 combined together.

[294] As set forth in Paragraph 16, although it found 2 violations for Paragraphs 91 and 92, the Board found this constituted 1 Category III violation for those paragraphs together.

[295] This chart lists, in order of the paragraphs of the Complaint, each violation, the authority for discipline, and the discipline imposed. The second column of the chart shows the numerical order in which the Board reviewed each violation in this Final Order.

Therefore, the Board imposes the disciplinary action of a 180-day suspension of license Nos. L006 and RL006, and a total civil penalty in the amount of $57,500.

The civil penalty in the amount of $57,500 shall be paid to the CCB no later than 5:00 p.m., Pacific Time, 30 days[296] from the date this Final Order is served on counsel for Respondent. Failure to pay by this deadline may result in additional discipline against Respondent.

Pursuant to NRS 678A.590(1), this Final Order is effective on service on the Parties.

RESPONDENT IS FURTHER NOTIFIED THAT IT SHALL IMMEDIATELY CEASE ALL CANNABIS OPERATIONS AND REMOVE ALL CANNABIS FROM ITS FACILITY UPON SERVICE OF THIS FINAL ORDER ON ITS COUNSEL AND SHALL NOT RESUME ANY CANNABIS OPERATIONS UNTIL ITS 180-DAY SUSPENSION HAS BEEN TERMINATED.

IT IS SO ORDERED.

SIGNED AND EFFECTIVE this 4th day of March, 2023.

STATE OF NEVADA,
CANNABIS COMPLIANCE BOARD

By: _____
Adriana Guzmán Fralick, Chair

[296] Should the 30th day fall on a weekend or holiday recognized by the State of Nevada, this deadline shall continue to 5:00 p.m., Pacific Time, on the following business day.

Exhibit 1

Para.	Violation	Discipline Authority	CCB's Imposition of Discipline
83	(1)One Category III NAC 453D.905(3)(d)(6)	NAC 453D.905(4)(d)(1)	First Category III Penalty: $2,500
84	The Board found no violation.		None
85	(2)One Category III NAC 453D.905(3)(d)(4) & (15)	NAC 453D.905(4)(d)(2)	Second Category III Penalty: $5,000
86	The Board found no violation.		None
87	(3)One Category III NAC 453D.905(3)(d)(4), (8), & (13)	NAC 453D.905(4)(d)(3)	Third Category III Penalty: $10,000
88	(5)One Category I NAC 453D.905(3)(a)(4)	NAC 453D.905(4)(a)(1)	First Category I Penalty: $20,000
89	The Board found no violation.		None
90	The Board found no violation.		None
91	(6)One Category III NAC 453D.905(3)(d)(7) & (8)	NAC 453D.905(4)(d)(4)	Fifth Category III Penalty: 30-Day Suspension
92	(7)One Category III NAC 453D.905(3)(d)(7) & (8)	NAC 453D.905(4)(d)(5)	Subsumed with Para. 91 as the Fifth Category III
93	(8)One Category III NAC 453D.905(3)(d)(7) & (8)	NAC 453D.905(4)(d)(5)	Sixth Category III Penalty: 30-Day Suspension
94	(4)One Category III NAC 453D.905(3)(d)(4)	NAC 453D.905(4)(d)(5)	Fourth Category III Penalty: 30-Day Suspension
95	The Board found no violation		None
96	(14)One Category III NAC 453D.905(3)(d)(7) & (8)	NAC 453D.905(4)(d)(5)	Ninth Category III Penalty: 30-Day Suspension
97	(10)One Category III NAC 453D.905(3)(d)(7) & (8)	NAC 453D.905(4)(d)(5)	Eighth Category III Penalty: 30-Day Suspension
98 & 102	(11)One Category II NAC 453D.905(3)(a)(3)	NAC 453D.905(4)(b)(1)	First Category II Penalty: $10,000
99	(12)One Category II NAC 453D.905(3)(a)(3)	NAC 453D.905(4)(b)(2)	Second Category II Penalty: $10,000
100	(13)One Category II NAC 453D.905(3)(a)(3)	NAC 453D.905(4)(b)(3)	Third Category II Penalty: 15-Day Suspension
101	(9)One Category III NAC 453D.905(3)(d)(7) & (8)	NAC 453D.905(4)(d)(5)	Seventh Category III Penalty: 15-Day Suspension
103	The Board found no violation.		None

		Total Civil Penalty and Discipline	**$57,500 and 180 days Suspension**

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I hereby certify that I am an employee of the Cannabis Compliance Board and I have this day served the foregoing Final Order of the Cannabis Compliance Board Including Findings of Fact, Conclusions of Law, and Imposing Discipline for Case No. 2020-27 as follows:

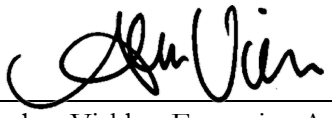
Respondent's Counsel:
Kimberly Maxson-Rushton, Esq.
Cooper Levenson
krushton@cooperlevenson.com

Petitioner's Counsel:
L. Kristopher Rath
lrath@ag.nv.gov

Anthony Garasi
agarasi@ag.nv.gov

CCB Hearings Division:
CCBhearings@ccb.nv.gov

Dated at Las Vegas, Nevada, this 4th day of March 2024.



Amber Virkler, Executive Assistant

CERTIFICATE OF SERVICE BY HAND DELIVERY

I hereby certify that I am an employee of the Cannabis Compliance Board and I have this day served the foregoing Final Order of the Cannabis Compliance Board Including Findings of Fact, Conclusions of Law, and Imposing Discipline for Case No. 2020-27 by hand delivering a copy thereof to:

Kimberly Maxson-Rushton, Esq.
Cooper Levenson
3016 W. Charleston Blvd., Suite 195
Las Vegas, NV 89102

Dated at Las Vegas, Nevada, this 4 day of MARCH 2024.

Shandon Snow, Compliance Enforcement Investigator

Confirm receipt on this day:

Agent of Cooper Levenson

03/04/2024
Date

Gabriela Mercado
Print Name

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I hereby certify that I am an employee of the Cannabis Compliance Board and I have this day served the foregoing Final Order of the Cannabis Compliance Board Including Findings of Fact, Conclusions of Law, and Imposing Discipline for Case No. 2020-27 as follows:

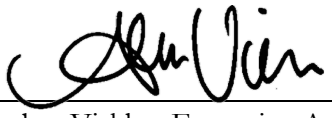
Respondent's Counsel:
Kimberly Maxson-Rushton, Esq.
Cooper Levenson
krushton@cooperlevenson.com

Petitioner's Counsel:
L. Kristopher Rath
lrath@ag.nv.gov

Anthony Garasi
agarasi@ag.nv.gov

CCB Hearings Division:
CCBhearings@ccb.nv.gov

Dated at Las Vegas, Nevada, this 4th day of March 2024.



Amber Virkler, Executive Assistant

BEFORE THE CANNABIS COMPLIANCE BOARD
STATE OF NEVADA

STATE OF NEVADA, CANNABIS COMPLIANCE BOARD, Petitioner, vs. CANNEX NEVADA, LLC, now known as LETTUCETEST, LLC, Respondent.	Case No. 2020-27

ERRATA TO FINAL ORDER OF THE CANNABIS COMPLIANCE BOARD INCLUDING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND IMPOSING DISCIPLINE

On March 4, 2024, the Final Order of the Cannabis Compliance Board Including Findings of Fact, Conclusions of Law, and Imposing Discipline was issued with an incorrect date of March 4, 2023 in the final signature block on page 53. This Errata maintains the entirety of that Order but corrects that specific typo on the signature block to reflect the correct date – March 4, 2024.

IT IS SO ORDERED.

SIGNED AND EFFECTIVE this 4th day of March, 2024.

STATE OF NEVADA,
CANNABIS COMPLIANCE BOARD

By: _____
Adriana Guzman Fralick, Chair

CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I hereby certify that I am an employee of the Cannabis Compliance Board and I have this day served the foregoing Errata to Final Order of the Cannabis Compliance Board Including Findings of Fact, Conclusions of Law, and Imposing Discipline for Case No. 2020-27 as follows:

Respondent's Counsel:
Kimberly Maxson-Rushton, Esq.
Cooper Levenson
krushton@cooperlevenson.com

Petitioner's Counsel:
L. Kristopher Rath
lrath@ag.nv.gov

Anthony Garasi
agarasi@ag.nv.gov

CCB Hearings Division:
CCBhearings@ccb.nv.gov

Dated at Las Vegas, Nevada, this 5th day of March 2024.

Amber Virkler, Executive Assistant

CERTIFICATE OF SERVICE BY HAND DELIVERY

I hereby certify that I am an employee of the Cannabis Compliance Board and I have this day served the foregoing Errata to Final Order of the Cannabis Compliance Board Including Findings of Fact, Conclusions of Law, and Imposing Discipline for Case No. 2020-27 by hand delivering a copy thereof to:

Kimberly Maxson-Rushton, Esq.
Cooper Levenson
3016 W. Charleston Blvd., Suite 195
Las Vegas, NV 89102

Dated at Las Vegas, Nevada, this 5 day of March 2024.

#301

Heather Withers, Supervisory Investigator

Confirm receipt on this day:

Agent of Cooper Levenson

3-5-24

Date

GAYLE AYALA

Print Name