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6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
7 **IN AND FOR CARSON CITY**

8  
9 **INDEPENDENT ALCOHOL  
DISTRIBUTORS OF NEVADA**

**CASE NO.: 17 OC 00098 1B  
DEPT. NO.: 2**

10 **Plaintiff,**

**ORDER GRANTING PRELIMINARY  
INJUNCTION**

11 **v.**

12 **NEVADA DEPARTMENT OF TAXATION,**

13 **Defendant.**  
14 \_\_\_\_\_ /

15  
16 This matter comes before the Court on Independent Alcohol Distributors of  
17 Nevada (IADON)'s Application for Preliminary Injunction.

18 **I.**

19 **FINDINGS OF FACT**

20 On November 8, 2016, the voters of Nevada approved the "Initiative to Regulate  
21 and Tax Marijuana" (the "Initiative"). The Initiative imposed a 15% excise tax at the  
22 wholesale level.

23 The provisions of the Initiative became effective January 1, 2017, and are now  
24 codified at Nevada Revised Statutes ("NRS") Chapter 453D.

25 Under the Initiative, a "marijuana distributor" is an entity licensed to transport  
26 marijuana in amounts in excess of one ounce between marijuana establishments. NRS  
27 453D.030(10), 453D.110(1), 453D.120(4).

28 The Initiative mandates: "For 18 months after the Department [of Taxation (the

1 “Department”)] begins to receive applications for marijuana establishments, the  
2 Department shall issue licenses for marijuana distributors pursuant to this chapter only  
3 to persons holding a wholesale dealer license pursuant to Chapter 369 of NRS, unless  
4 the Department determines that an insufficient number of marijuana distributors will  
5 result from this limitation.” NRS 453D.201(3).

6 A wholesale dealer license under NRS Chapter 369 is required before any entity  
7 can operate as a liquor distributor in Nevada. There are 47 separate local licensing  
8 jurisdictions in Nevada which require a license to operate as an alcohol distributor. Each  
9 of these jurisdictions has unique and distinct methodologies for application, licensure  
10 and determination of suitability. These local licenses serve as the predicate for licensure  
11 under NRS Chapter 369.

12 Governor Sandoval implemented budgetary plans that relied on an estimated \$60  
13 to \$70 million from a proposed retail sales tax of 10% on adult marijuana use over the  
14 next fiscal biennium. The Legislature implemented the sales tax as part of SB 487.

15 Governor Sandoval set July 1, 2017 to begin the retail marijuana program.

16 The Department developed a proposed regulation, LCB File No. T002-17, dated  
17 March 16, 2017. Section 14(1) states in part: “Pursuant to NRS 453D.210(3), the  
18 Department has determined that there is an insufficient number of distributor licenses  
19 from persons holding a wholesale liquor dealer’s license ....” (Exhibit 4).

20 Department Director Contine explained the insufficiency finding was based on  
21 the fact the Department had sent a notice to all wholesale liquor licensees in November  
22 of 2016 requesting those licensees inform the Department if the licensee was interested  
23 in becoming a retail marijuana distributor, and she never heard from anyone except  
24 those that said they would not apply for a retail distributor license. The Director was  
25 trying to be prepared in case no wholesale liquor licensee applied.

26 The Department issued an Industry Notice Regarding Marijuana Distribution  
27 Licenses in March 2017. Exhibit 6. That notice stated the Department “will accept  
28 applications for marijuana distributor licenses beyond those who hold NRS Chapter 369

1 wholesaler liquor dealer licenses during the temporary retail marijuana program.” The  
2 Notice stated the basis for the finding of insufficiency:

3 To make [the insufficiency] determination, in November  
4 2016, the Department reached out to wholesale liquor license  
5 holders in writing to determine whether there would be  
6 enough interest to serve the marijuana establishment  
7 market. While some were “interested” none followed up to  
8 indicate that they had a plan going forward to be ready to  
9 serve the market or that they had sorted out issues with  
10 respect to their federal liquor license ....

11 In considering the lack of evidence of serious interest or  
12 activity by the liquor wholesalers, the problems that liquor  
13 licensees could face with the federal government, and the  
14 lengthy process to get started in the marijuana business  
15 (state licensing requirements and local business license and  
16 zoning requirements), the Department determined that an  
17 insufficient number of marijuana distributors will result  
18 from limiting distributors to licensed NRS Chapter 369  
19 wholesalers.

20 The wholesale liquor licensees strongly objected to the Department’s finding of  
21 insufficiency.

22 The regulation was amended and the finding of insufficiency language was  
23 dropped.

24 The Department’s own documents show and the Court finds the Department  
25 received expressions of interest in applying for a retail marijuana distributor from 29  
26 wholesale liquor licensees during November of 2016. Exhibit 14. The Department told  
27 the licensees that had expressed an interest that they would be put on a Department  
28 email list for further communication.

The Court finds Kurt Brown’s testimony credible. Mr. Brown has operated Capital  
Beverages, a wholesale alcohol distribution business for 45 years. Capital Beverages  
currently has 55 vehicles and serves about 350 wholesale alcohol customers. Mr. Brown  
received the Department’s November 2016 notice and through Paladin LLC responded  
that he was interested in applying for a marijuana retail distributor license. The  
Department responded to his letter of interest by saying the Department would get back  
to him. The Department did not get back to him so he called the Department in

1 December. The Department did not request any additional information. Paladin LLC  
2 filed an application for a retail marijuana distributor before the May 31, 2017 deadline.  
3 Based upon 45 years of distribution experience Mr. Brown believes he could service all  
4 106 marijuana retail establishments allowed under NRS 453D.210(4)(d).

5 Mr. Brown also testified about the business reality. It will be expensive to become  
6 a retail marijuana distributor and all business enterprises are risky. Nevertheless, if  
7 licensed Paladin LLC can begin immediately distributing retail marijuana. He has  
8 researched the business of marijuana distribution, hired qualified people, acquired  
9 warehouse space, and made security modifications.

10 The Court finds Mr. Nassau's testimony credible. He had the essentially the same  
11 experience with the Department as Mr. Brown. Mr. Nassau has distributed alcohol for  
12 ten years in Clark County, Nevada through Redrock Wine. Redrock Wine serves more  
13 than 300 customers. Ms. Nassau opined Redrock Wine could service most of the 106  
14 marijuana retail distributors.

15 The Department has received applications for temporary marijuana distributor  
16 licenses from four liquor wholesalers.

17 The Court finds the Department never asked the 29 wholesale liquor licensees  
18 that expressed interest in 2016 in applying for a retail marijuana distributor license to  
19 provide additional information about whether they were "serious[ly] interest[ed]" in  
20 distributing retail marijuana, or about the licensee's "plan" or "activity" toward  
21 becoming a retail marijuana distributor, or about "problems [the] liquor licensee[] could  
22 face with the federal government," or about "the lengthy process to get started in the  
23 marijuana business (state licensing requirements and local business license and zoning  
24 requirements)."

25 The Nevada Tax Commission adopted the regulation on May 8, 2017, following a  
26 workshop on March 29, 2017, where the Department heard public comment. The  
27 regulation set May 31, 2017 as the deadline for applications. The regulation did not  
28 become effective until June 12, 2017 when it was filed with the Secretary of State.

1 The Department began accepting applications for marijuana establishments on  
2 May 15, 2017.

3 The regulation provides that after May 31, 2017, the Department may determine  
4 pursuant to NRS 453D.210(3) that an insufficient number of marijuana distributors  
5 would result from limiting licenses to persons holding a liquor wholesaler license based  
6 upon a review of the totality of applications received by the Department, and whether  
7 liquor wholesalers can demonstrate compliance with local zoning and safety  
8 requirements already in place for medical marijuana establishments under NRS 453A.  
9 LCB File No. T002-17, Sec. 14(2).

10 The Department has not determined what the likely demand for retail marijuana  
11 will be.

12 There is no evidence that the Department has determined how much demand  
13 any particular alcohol distributor licensee can service.

14 The Department has not determined whether exclusively licensing liquor  
15 wholesalers as temporary marijuana distributors will result in an insufficient number of  
16 licensees.

17 There is no evidence that anyone at the Department of Taxation contacted the  
18 Clark County Business Licensing Division to interfere with any applications for liquor  
19 wholesaler licenses. This is true even considering the hearsay statements offered by  
20 IADON.

## 22 II.

### 23 ANALYSIS

24 A court may issue a preliminary injunction “where the moving party can  
25 demonstrate that it has a reasonable likelihood of success on the merits and that, absent  
26 a preliminary injunction, it will suffer irreparable harm for which compensatory  
27 damages would not suffice.” *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. Adv. Op. 38,  
28 351 P.3d 720, 722 (2015); NRS 33.010.

1 **A. Ad hoc rulemaking**

2 NRS 453D.210(3) states that the Department shall issue licenses only to alcohol  
3 distributors for the first 18 months after accepting applications, unless the Department  
4 determines that this would result in an insufficient number of marijuana distributors. A  
5 determination of whether the number of alcohol distributors will be insufficient or  
6 sufficient to serve the market necessarily requires the Department make a determination  
7 regarding what number of distributors the market needs to function.

8 The Department adopted Temporary Regulation T002-17 on May 8, 2017, which  
9 sets forth the various criteria for an alcohol distributor to apply for a marijuana  
10 distribution license, and set a deadline of May 31, 2017 to apply. The Regulation also  
11 requests certain information from alcohol distributor applicants related to whether they  
12 have made security modifications to their facilities, complied with local zoning, etc.  
13 However, the Regulation does not define what “sufficient” is or how it is determined.  
14 The Regulation does not request any information from retail marijuana stores (or  
15 anyone else) to determine their need for distributors. In short, the Regulation is silent as  
16 to what constitutes sufficiency to serve the market.

17 A “regulation” includes an “agency rule, standard, directive or statement of  
18 general applicability which effectuates or interprets law or policy, or describes the  
19 organization, procedure or practice requirements of any agency.” NRS 233B.038(1)(a).  
20 “An agency makes a rule when it does nothing more than state its official position on  
21 how it interprets a requirement already provided for and how it proposes to administer  
22 its statutory function.” *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 305,  
23 721 P.2d 375, 377 (1986) (internal quotations omitted).

24 In this case, a determination of whether there are sufficient alcohol distributors is  
25 a statement of general applicability that effectuates law and policy because it directly  
26 impacts the substantive rights of all applicants by changing who is eligible to obtain a  
27 distributor license. *See State, Dep't of Taxation v. Chrysler Grp. LLC*, 300 P.3d 713, 717  
28 (2013) (defining a “statement of general applicability” as “a policy or rule that applies to

1 multiple parties in a similar manner”); *see also Coury*, 102 Nev. at 305, 721 P.2d at 376-  
2 77 (granting a license for a “stretch” limousine constituted ad hoc rulemaking because  
3 the statute and regulations did not recognize any subclass or different license for  
4 “stretch” limousines, as distinguished from a normal limousine license). It also affects  
5 the public, because it will determine whether marijuana transportation is performed by  
6 an independent third-party, similar to the three-tiered system for alcohol distribution,  
7 or whether the new industry will be allowed to vertically integrate from the very  
8 beginning.

9       The determination of sufficiency is not merely an “interpretative ruling” because  
10 its effect reaches well beyond any individual applicant, and instead sets forth a new  
11 policy of the Department and effectuates law, *i.e.*, whether it will issue licenses to an  
12 expanded class of applicants. *See State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 114  
13 Nev. 535, 537, 958 P.2d 733, 734 (1998) (where no statute or regulation defined the  
14 term “at fault,” agency determination that “at fault” meant driver was at least 51%, not  
15 just 50%, responsible for the accident constituted rulemaking that must comply with  
16 NRS Chapter 233B because this “interpretation” declared a new policy affecting all  
17 insurers and insured).

18       The Department argues the Regulation does contain specific criteria for  
19 determining whether alcohol distributors are sufficient, because it asks the alcohol  
20 distributors to provide information such as their plan to serve different geographic  
21 areas, whether they have already complied with local zoning and security requirements,  
22 etc., and the Department will use those responses in determining sufficiency. *See*  
23 Section 14(2). This argument is unavailing because these criteria probe the applicants’  
24 readiness and ability to begin distributing marijuana, but they do not help answer the  
25 threshold question of what is sufficient for the market to function. Without any standard  
26 regarding what is “sufficient,” the Department is free to simply determine that the  
27 applicants are not good enough, regardless of how they responded to those questions.  
28 Similar to the term “at fault” in *State Farm*, “sufficiency” is open to multiple reasonable

1 interpretations, but has never been defined. If the Department is going to decide  
2 whether alcohol distributors are “sufficient” (and decide who is eligible for a license  
3 based on that decision), it must first define the meaning of sufficiency. Otherwise, it is  
4 necessarily measuring alcohol distributors against an unknown, arbitrary standard. This  
5 is the same problem that arose in *State Farm*: there was no defined standard of when a  
6 driver was “at fault” for an accident. The Insurance Commissioner determined that State  
7 Farm’s 50% rule was invalid, because it was less than 51% responsibility. The Nevada  
8 Supreme Court held that this decision constituted improper ad hoc rulemaking because  
9 it effectively defined and set the standard for “at fault” as 51% or greater responsibility,  
10 but the Commissioner did not go through the proper rulemaking process. 114 Nev. at  
11 544, 958 P.2d at 738-39.

12 Section 14(2) of the Regulation states that the Department may make a  
13 determination after accepting applications as to whether the alcohol distributors are  
14 sufficient to serve the market. The Department’s failure to define sufficiency through the  
15 rulemaking process cannot be cured by adopting a rule stating that it can define the  
16 term later, without going through the rulemaking process. Accordingly, Section 14(2) is  
17 invalid because it purports to authorize the Department to engage in ad hoc rulemaking.

18  
19 **B. May 31, 2017 deadline for filing**

20 IADON has demonstrated a strong likelihood of success on its claim that the May  
21 31, 2017 application deadline in Section 15 of the Regulation is invalid. The Regulation  
22 was adopted on May 8, 2017, but did not become effective until June 12, 2017. *See* NRS  
23 233B.070(2) (agency may not file a temporary regulation with the Secretary of State  
24 until 35 days after it was adopted. Regulation becomes effective upon filing with the  
25 Secretary of State).

26 Accordingly, the May 31, 2017 deadline set forth in Section 15 of the Regulation  
27 passed before the Regulation had any force or effect of law. In other words, on May 31,  
28 2017, there was no legal duty or opportunity for anyone to submit an application to the



1 Department. The legal duty only arose later, on June 12, 2017, at which time it would  
2 obviously be impossible for someone to comply with the May 31, 2017 deadline. The  
3 Regulation is retroactive.

4 “Retroactivity is not favored in the law.” *Bowen v. Georgetown Univ. Hosp.*, 488  
5 U.S. 204, 208 (1988). Retroactive application of an administrative rule that creates new  
6 legal rights or duties is impermissible. *Cnty. of Clark v. LB Props., Inc.*, 315 P.3d 294,  
7 296–97 (2013). Since the May 31, 2017 deadline preceded the June 12, 2017 effective  
8 date of the Regulation, it is invalid.

9  
10 **C. Equitable estoppel**

11 IADON did not offer any evidence to show a likelihood of success on the merits of  
12 its equitable estoppel claim to warrant preliminary injunctive relief. This is true even if  
13 the Court considers the hearsay statements offered by IADON.

14  
15 **D. Irreparable harm**

16 IADON has also demonstrated that it will suffer irreparable harm if a preliminary  
17 injunction does not issue. “[A]cts that unreasonably interfere with a business or destroy  
18 its credit or profits, may do an irreparable injury.” *Finkel v. Cashman Profl, Inc.*, 270  
19 P.3d 1259, 1263 (Nev. 2012) (quoting *Sobol v. Capital Management*, 102 Nev. 444, 446,  
20 726 P.2d 335, 337 (1986)). Even though the harm is economic in nature, such acts still  
21 support the issuance of an injunction. *Guion v. Terra Mktg. of Nevada, Inc.*, 90 Nev.  
22 237, 239–40, 523 P.2d 847, 848 (1974).

23 The evidence presented and the briefs of amici indicate that much of the medical  
24 marijuana industry is already vertically integrated, meaning that no third-party  
25 distributors are used. Only medical marijuana licenses are permitted to apply for  
26 recreational marijuana for the first 18 months (NRS 453D.210(2)). Many of these  
27 licensees have also applied for distributor licenses, and intend to distribute to  
28 themselves if the Department determines alcohol distributors to be insufficient. *See*

1 Brief of Amicus Curiae Nevada Dispensary Association, p. 3. In other words, these  
2 entities will use the existing vertically integrated model for medical marijuana and apply  
3 it to recreational marijuana. *Id.*

4 Amici's arguments corroborate Plaintiff's evidence and arguments that Plaintiff's  
5 members will very likely be shut out of the marijuana distribution business entirely if  
6 the Department issues distribution licenses to non-alcohol distributors. Once licenses  
7 are issued to others, it will be difficult if not impossible to revoke those licenses, or at  
8 least not within the 18-month period during which NRS 453D.210(3) grants alcohol  
9 distributors exclusive licenses. Thus Plaintiff has demonstrated that, absent injunctive  
10 relief, it is likely to suffer irreparable harm. *Finkel*, 270 P.3d at 1263.

11  
12 **III.**

13 **CONCLUSIONS OF LAW**

14 The regulation allows ad hoc rulemaking.

15 The May 31, 2017 deadline for filing applications is retroactive and therefore  
16 invalid.

17 IADON has not produced evidence to support its equitable estoppel claim.

18 IADON has demonstrated it will suffer irreparable harm if the Department is not  
19 enjoined.

20 **III.**

21 **ORDER**

22 GOOD CAUSE APPEARING, IT IS HEREBY ORDERED THAT:

23 IADON's Application for Preliminary Injunction is granted.

24 The Department is enjoined from:

25 Issuing a retail marijuana distributor license to any person or entity other  
26 than wholesale alcohol distributors;

27 Making any determination of the sufficiency or insufficiency of the number  
28 of alcohol distributors under NRS 453D.210(3) until it has adopted valid

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definitions or rules for determining what number of distributors is  
required to serve the market, through the regulation-making process in  
NRS Chapter 233B;  
Enforcing the May 31, 2017 application deadline in Section 15 of the  
Regulation.

June 20, 2017.

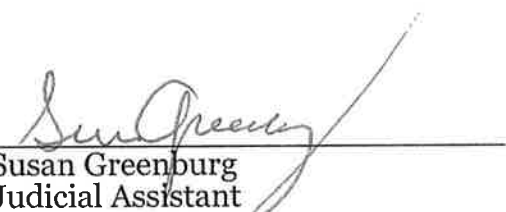
  
DISTRICT COURT JUDGE

1 **CERTIFICATE OF MAILING**

2 I hereby further certify that on the 20 day of June 2017, I placed a copy  
3 of the foregoing in the United States Mail postage prepaid, addressed as follows:

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