IN THE SUPREME COURT

OF THE STATE OF NEVADA

NUVEDA, LLC, A NEVADA LIMITED LIABILITY COMPANY; SHANE M. TERRY, A NEVADA RESIDENT; AND JENNIFER GOLDSTEIN, A NEVADA RESIDENT, Appellants, vs. PEJMAN BADY; AND POUYA MOHAJER, Respondents.	Electronically Filed Apr 05 2017 02:23 p.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court Case No. 69648 District Court Case No. A-15-728510-B

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Respondents Pejman Bady, DO and Pouya Mohajer, MD are individuals and therefore there is no parent corporation or publicly held company to disclose. Respondents' answer to Appellants' complaint was filed in their individual capacities.

Respondent Pouya Mohajer, MD's only law firm of record in this matter has been Naylor & Braster (formerly Maupin • Naylor • Braster). Respondent Pejman Bady, DO was previously represented by Kolesar & Leatham and is now represented by Naylor & Braster.

Dated this 5th day of April 2017.

NAYLOR & BRASTER

By: /s/ John M. Naylor
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JURISDICTIONAL STATEMENT

Respondents Pejman Bady, DO ("Bady") and Pouya Mohajer, MD ("Mohajer") agree with the Jurisdictional Statements of Appellants Shane Terry ("Terry") and Jennifer Goldstein, Esq. ("Goldstein"), however, wish to add additional information. NuVeda, LLC ("NuVeda"), Terry and Goldstein jointly filed the Amended Notice of Appeal on January 28, 2016, and they jointly filed the Second Notice of Appeal on January 29, 2016 (JA001792 – JA001796; JA001797 – JA001808).

ROUTING STATEMENT

Bady and Mohajer agree with the Routing Statements of Terry and Goldstein.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Did the District Court correctly interpret a clear, unambiguous contract clause in NuVeda's operating agreement when determining that Bady and Mohajer could not be considered together during a vote to expel them as members?

2. Did the District Court rule correctly when it denied Terry and Goldstein's motion to preliminarily enjoin NuVeda from consummating an agreement with another company called CWNevada, LLC?

STATEMENT OF THE CASE

Bady and Mohajer agree with Terry and Goldstein's Statements of the Case, however, wish to add several events that were omitted. Terry and Goldstein filed

Plaintiffs' Motion for Preliminary Injunction and Application on Order Shortening Time on December 7, 2015 ("Motion"). In the Motion, Terry and Goldstein only requested the following limited relief:

> (i) "[Bady and Mohajer] should be restricted from selling, transferring, pledging, hypothecating, or otherwise disposing of any Membership interest in NuVeda or any asset of NuVeda absent [Bady and Mohajer's] consent, pending further Court order; and
>
> (ii) [Bady and Mohajer] shall be required to produce NuVeda's books and records to Plaintiffs for inspection pursuant to the terms of NuVeda's operating agreement.
>
> (JA000042 – JA000043).

The District Court denied this Motion after an evidentiary hearing lasting approximately four full days, and this appeal followed.

Terry and Goldstein brought this action on behalf of themselves individually and derivatively on behalf of NuVeda. Terry, Goldstein, and NuVeda jointly filed the Notice of Appeal and the Second Notice of Appeal. Terry and Goldstein each filed an opening brief.

Bady and Mohajer's Answering Brief addresses both the opening briefs of Goldstein and Terry because they are largely duplicative.

STATEMENT OF FACTS

A. Bady, Mohajer, Terry and Goldstein form NuVeda and Its Subsidiaries

This case centers on the attempt by two minority members of NuVeda to oust the majority members and take over the company. Terry and Goldstein, along with Mohajer and Bady, formed NuVeda in July 2014. (JA001516). Goldstein, acting as NuVeda's general counsel, drafted the operating agreement for all of the members ("Operating Agreement"). (JA00557, ll. 12 – 13). None of the members were represented by separate counsel during the negotiations over the Operating Agreement. (JA00557, ll. 14 – 15).

Pursuant to the Operating Agreement, the parties had the following voting interests (JA001537):

Bady	46.5%
Mohajer	21%
Terry	21%
Goldstein	7%

The remaining 4.5% was allocated to non-parties Joseph Kennedy ("Kennedy"), John Penders ("Penders"), and Ryan Winmill ("Winmill"). (JA001537). Goldstein drafted the operating agreement to include a provision that her 7% share would never be diluted while the interests of all the other members could be upon the admission of new members. (JA001537). Bady and Mohajer

agree with Terry that at the time of the hearing there was a dispute over ownership of some membership interests, but that dispute is not material to this appeal. (Terry Opening Brief, p. 4, fn. 1). Bady loaned Terry $120,000 so that Terry could buy his 21% membership interest. (JA000217, ¶ 8; JA00845, ll. 22 – 25; JA00846, ll. 1 – 6).

NuVeda's business was medical marijuana, and it holds six licenses through three wholly owned subsidiaries called (i) Clark NMSD LLC ("Clark NMSD LLC"); (ii) Clark Natural Medical Solutions LLC ("Clark LLC"), and (iii) Nye Natural Medicinal Solutions LLC ("Nye LLC"). (JA000566, ll. 1 – 8). In April 2014, the Nevada Division of Public and Behavioral Health (the "Division") issued two medical marijuana licenses to Clark NMSD LLC: (i) a license for disbursal of medical marijuana in Las Vegas, Nevada, and (ii) a license to disburse medical marijuana in North Las Vegas, Nevada. (JA000176 – 179; JA000566, ll. 1 – 8). The Division also issued two medical marijuana licenses to Clark LLC: (i) a license for cultivation in North Las Vegas, Nevada, and (ii) a license for production in North Las Vegas, Nevada. (JA000566, ll. 1 – 8). At the same time, the Division issued two licenses to Nye LLC: (i) a license to cultivate medical marijuana in Pahrump, Nevada, and (ii) a license to produce marijuana products in Pahrump, Nevada. (JA000180 – 183; JA000566, ll. 1 – 8).

The governmental regulatory authorities (i.e., the Division, Clark County, and the municipalities) required NuVeda and its subsidiaries to have open, operating businesses by April/May 2016 (the "Deadline"). (JA000176; JA000179; JA000180; JA000182 – 183; JA000217, ¶¶ 14 – 15; JA000218, ¶¶ 16 – 17). Failure to open by the Deadline could have resulted in forfeiture of the licenses. (JA000176; JA000179; JA000180; JA000183).

B. NuVeda Needed to Raise Capital to Utilize Its Licenses

NuVeda fell behind schedule and was having problems meeting the Division's deadlines. (JA000218, ¶¶ 18 – 19). NuVeda had no tangible assets other than the licenses themselves, and it had significant debt. (JA000929, ll. 22 – 25; JA000930, ll. 1 – 3). NuVeda was strapped for cash, only raising about $200,000 in investments between January 1, 2015 and November 20, 2015. (JA000765, ll. 22 – 25; JA000766, ll. 1 – 8). In short, they needed a partner to develop the business.

NRS 453A.334, as it existed prior to October 1, 2015, created an obstacle to raising capital by barring outside investors from investing in medical marijuana companies such as NuVeda. That changed in 2015, when the Nevada Legislature amended NRS Chapter 453A to allow outside investors. 2015 Nev. Stat. 2986 (Chapt. 495). With this amendment, NuVeda attracted and considered a number of outside investors, two of which were CWNevada, LLC ("CWNevada") and 4Front Capital ("4Front"). Each made proposals to NuVeda.

Under the CWNevada proposal, NuVeda and CWNevada would form a new limited liability company called CWNV, LLC ("CWNV"). (JA001566 – JA001569; JA001615 – JA001634). NuVeda would own 35% of CWNV, and CWNevada would own 65%. (JA001616). In exchange for its interest in CWNV, NuVeda would transfer its interests in Clark NMSD and Nye LLC to CWNV. (JA001616). NuVeda would continue to separately own Clark and the licenses that it held. (JA001566 – JA001569; JA001615 – JA001634). Terry and Goldstein would have a continued role in the industry because they would be involved in the management of CWNV. (JA001094, ll. 11 – 16). Bady, Mohajer and Kennedy viewed this deal favorably because CWNevada, which had its own medical marijuana licenses, possessed the management and financial resources to help develop NuVeda's business. The District Court heard testimony from Kennedy, who analyzed the deals, stating that the CWNevada proposal better suited the needs of NuVeda:

> Q: Now, why would you favor one of these agreements [CWNevada vs. 4Front] over another?
>
> [Kennedy]: The biggest problem with these agreements are debt service. The 4Front agreement makes no capital contribution, but requires repayment of loans with substantial interest rates. And if the loans aren't repaid, then the forfeiture of the assets of the LLC take place. The CW deal requires no -- has no loans associated with it,

requires investment by CW, and ultimately results in an income stream to NuVeda that -- without the risk of putting the company up if it doesn't meet the requirements. Additionally, it has performance requirements on CW. And if CW doesn't meet those performance requirements, they have to fund the deficiency of the consequences of not meeting those performance requirements.

Q: Why does NuVeda need an agreement like this at this point?

[Kennedy]: At this point NuVeda only has -- has no tangible assets except the licenses. And it has significant debt, and there have not been any proposals that would fund the company moving forward, with the exception -- so that's why it would be a good idea for them to partner up with somebody like CW, who already has operating cultivation centers and operating dispensaries.

(JA000929, ll. 5 – 25; JA000930, ll. 1 – 3).

CWNevada is a large, well-financed medical marijuana licensee in Nevada. (JA001566 – JA001567). Partnered together, CWNevada and NuVeda would potentially be the largest presence in the market. (JA000933, ll. 1-5).

The substantial evidence presented at the hearing proved that allying itself with CWNevada made sense for NuVeda. CWNevada already had its own licenses

and facilities, including a greenhouse, and would provide NuVeda with the much needed capital. (JA001566 – 1567; JA000929, ll. 5 – 25; JA000930, ll. 1 – 3). CWNevada would also pay up to $1,500,000 of NuVeda's existing debt. (JA001566; JA000940, ll. 2 – 25; JA000941, ll. 1 – 7; JA001030, ll. 8 – 13). Most importantly, CWNevada could provide NuVeda what it needed to meet its regulatory deadlines. Licensing would not be a problem because the deal between CWNevada and NuVeda was similar to other types of agreements that had already been approved. (JA001021, ll. 19 – 25; JA001022, ll. 1 – 10). Without the CWNevada deal, NuVeda would fail. (JA000934, ll. 9 – 23).

Terry favored the 4Front proposal, which provided investment directly in NuVeda's subsidiaries. (JA000648, ll. 13 – 25; JA000649, ll. 1 – 4). Knowing that Bady and Mohajer opposed the 4Front proposal, Terry explored with 4Front ways of overcoming their objections. This included entertaining a proposal to simply cash Bady and Mohajer out of the company so that Terry and Goldstein were left in control. (JA000717; 14 – 25; JA000718, ll. 1 – 25; JA000719, ll. 1 – 12; SJA001).

Bady, Mohajer, and Kennedy, representing 65% of the membership interests, wanted the CWNevada deal. Terry, Goldstein, Penders, and Winmill, representing only 31% of the membership interests, wanted the 4Front deal. Bady executed a non-binding letter of intent with CWNevada on November 17, 2015. (JA001566 – JA001569). The parties addressed the 4Front proposal and the CWNevada proposal

at a meeting on November 18, 2015. (JA000682, ll. 24 – 25; JA000683, ll. 1 – 25; JA000684, ll. 1 – 3; JA001260, ¶ 10). After that meeting, Terry moved forward with the plan to expel Bady and Mohajer. (JA000684; ll. 7 – 9).

C. The Minority Members Attempted to Expel the Majority Members

Even before Bady signed the non-binding letter of intent with CWNevada, minority members Terry and Goldstein planned to expel majority members Bady and Mohajer. (JA000744, ll. 14 – 16). To achieve their goal, Terry, without the knowledge of Bady and Mohajer, had retained an attorney name Martina Jaccarino, Esq. ("Jaccarino"), to represent the company and investigate allegations of alleged wrongdoing by Bady and Mohajer. (JA000701, ll. 24 – 25; JA000702, ll. 1 – 4; JA000744, ll. 14 – 16; JA001561 – JA001564). At the same time, another lawyer for NuVeda named Pantea Stevenson, Esq. ("Stevenson") was looking onto the alleged bad actions of Bady. (JA000473, ll. 22 – 24; JA000478, ll. 11 – 25; JA000479, ll. 1 – 14). Stevenson was the company's outside corporate counsel. (JA000473, ll. 22 – 24). She was not licensed in Nevada and worked under the direct supervision of Goldstein to meet the requirements to NRPR 5.5. (JA000474, ll. 8 – 25; JA000475, ll. 4 – 9). Stevenson believed it was important for Goldstein to review all of her work. (JA000475, ll. 10 – 14). Based on her review, Stevenson believed that Bady and Mohajer were co-conspirators with respect to Bady's alleged wrongdoing. (JA000547, ll. 10 – 17).

When Jaccarino concluded her investigation of Bady, she sent him a letter dated November 18, 2015, describing his alleged misdeeds. (JA001561 – JA001564). Jaccarino specifically pointed out in her letter that she did not have sufficient evidence of wrongdoing against Mohajer and was still investigating him. (JA001563).

Terry and Goldstein then proceeded with their attempt to expel Bady and Mohajer. Terry called a meeting on November 20, 2015, and purposefully did not tell either Bady or Mohajer about it. (JA000702, ll. 5 – 13; JA001238 – JA001241). Terry and Goldstein voted for expulsion. (JA000858, ll. 8 – 25; JA000859, ll. 1 – 5; JA001241).

Their problem, though, was they did not have the votes. To expel Bady, they needed to marshal at least 60% of the Disinterest Voting Interests, as that term is defined in the Operating Agreement:

> **6.2 Expulsion or Death of a Member.** A Member's interest in the Company may be terminated or expulsed only upon agreement of the Disinterested Voting Members by a vote of 60% or more of Disinterested Voting Interests. Expulsion may only be made by a majority vote of 60% or more of the Disinterested Voting Interests that the expulsed member was not acting in the best interest of the Company or was otherwise acting in a manner that was contrary to the purpose of the Company. ***For purposes of this provision, the "Disinterested Voting Members" shall be those Members who's membership in the Company is not then being voted upon***, and "Disinterested Voting Interests" shall be the total percentage of the Ownership Interests held by the Disinterested Voting Members. By means of example only, if the Members sought to expel Member A, who owned a 20% Voting Interest, the Disinterested Voting Members would be all Members other

> than Member A, and the vote would require 60% of the 80% Disinterested Voting Interests to carry . . . . (JA001196) (emphasis added).

Therefore, to expel Bady, the Goldstein Group needed to marshal 32.1% of the company's total membership interests, calculated as follows:

100% - 46.5% (owned by Bady) = 53.5% (the Disinterested Voting Interests)

53.5% x 0.6 (as required by Section 6.2 of the Operating Agreement) = 32.1%

They could not make it. Only 31.5% of the membership interests of the company voted for expelling Bady: (i) Terry (21%); (ii) Goldstein (7%); (iii) Ryan Winmill (1.75%); and (iv) John Penders (1.75%). Thus, the total vote was 0.6% shy of the required 60% majority. Nor could they make the vote for expelling Mohajer, which required 47.4% (100% – Mojaher's 21%) x 0.6 = 47.4%).

In order to muster the required votes, they had to lump Bady and Mohajer together into a single vote purportedly requiring only 19.5% of the company's membership interests, achieved as follows:

Bady and Mohajer together comprised 67.5% (46.5% + 21%)

(100% - 67.5%) x 0.6 = 19.5%

In order to lump them together, Terry and Goldstein came up with the idea that Bady and Mohajer had conspired together to harm the company. Nowhere in the resolution purportedly expelling Bady and Mohajer did it list the specific reasons

for the expulsion or state that the two were acting in concert or provide any other rationale for lumping them together. (JA001238 – 1241).

Four days after the vote, Stevenson sent Bady's attorney, Vincent J. Aiello, Jr., an email stating that the grounds for expelling both were almost entirely based on Bady's alleged misconduct: (i) Bady had engaged in self-dealing; (ii) Bady had usurped corporate opportunity; and (iii) Bady mislead potential investors and members. (JA001592 – 1593). The single bad act she attributed to Mohajer was agreeing with Bady to change the distributed losses on the company's IRS Form K-1 filings. (JA001593). The District Court heard extensive testimony from Kennedy, who in addition to being a member of the company and enrolled agent pursuant to 31 U.S.C. § 530 of the Internal Revenue Code, that there was nothing wrong with the K-1s. (JA000900, l. 25; JA000901, ll. 1 – 15; JA000901 – JA000906, ll. 1 – 14).

On November 24, 2015, Bady and Mohajer voted to expel Terry and Goldstein pursuant to Section 6.2 of the Operating Agreement. (JA001263 – JA001267). NuVeda then entered into an agreement with CWNevada dated December 6, 2015, reflecting the proposal. (JA001615 – JA001634). Terry and Goldstein subsequently filed their complaint seeking a preliminary injunction. Terry and Goldstein have told Kennedy that they would rather see the company fail than lose control to Bady and Mohajer. (JA000938, ll. 20 – 25, JA000939, ll. 1 – 10).

SUMMARY OF ARGUMENT

Substantial evidence supported the District Court's denial of the motion for preliminary injunction. The denial was not an abuse of discretion.

Section 6.2 of the Operating Agreement addresses any issues concerning the vote to expel Bady and Mohajer. The terms of Section 6.2 are clear and unambiguous. Terry and Goldstein, who held a minority interest in the company, simply did not have enough votes to oust Bady or Mohajer. To get around this problem, Terry and Goldstein aggregated Bady and Mohajer's interests and voted on them together, as if they were a single member.

To justify this, Terry and Goldstein improperly read into Section 6.2 a requirement that members that are the subject of an expulsion vote are required to undergo an "interestedness" analysis. The clear and unambiguous language of Section 6.2 does not mention an "interestedness" test anywhere, and it should not be read into the operating agreement.

Terry and Goldstein also improperly read into the Operating Agreement the concept that if Bady and Mohajer were acting together, but not to the extent justifying a conspiracy, they should be lumped together for purposes of an expulsion vote. Nothing in the plain language of Section 6.2 supports this notion.

Terry and Goldstein also claim that the District Court improperly used the standard for a conspiracy when analyzing the expulsion votes. Terry and Goldstein never raised this issue before the District Court and therefore waived it.

With respect to the relief specifically sought in Terry and Goldstein's Motion, enjoining the deal with CWNevada, the District Court heard substantial evidence about the benefits of the CWNevada deal and why it was needed to save the company and why the company would fail without it. The District Court also heard substantial evidence showing that neither Terry nor Goldstein would be irreparably harmed. Therefore, the District Court's decision was supported by substantial evidence and was not an abuse of discretion. Affirming the District Court is appropriate.

ARGUMENT

A. Terry and Goldstein Waived the Conspiracy Argument

Terry and Goldstein waived their argument that the District Court incorrectly applied a conspiracy requirement. Terry and Goldstein never raised this issue before the District Court. "A party may not raise a new theory for the first time on appeal which is inconsistent with or different from the one raised below." *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (citation omitted). "A point not urged in the trial court unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (citation omitted).

Throughout the proceedings before the District Court, Terry and Goldstein lumped Bady and Mohajer together as co-conspirators. At the beginning of the first day of the evidentiary hearing, the District Court believed that Terry and Goldstein were trying to prove Bady and Mohajer were co-conspirators:

> THE COURT: Well, there's an issue . . .
>
> THE COURT: -- as to interested parties. And part 1 of what they've argued, whether they're right or not, and I eventually may agree with them, is whether they can when they allege there is a conspiratorial act between two parties, whether those two parties are both disqualified in voting on that expulsion. That's really the allegation they've made. They haven't said it quite like that, but that's what they mean.

(JA000479, ll. 22 – 25; JA000450, ll. 1 – 7). Neither Terry nor Goldstein corrected the District Court regarding what they were trying to prove.

Terry and Goldstein alleged their Complaint that they had a conspiracy claim against Bady and Mohajer. (JA000008, ¶ 37). Stevenson, the company's outside general counsel, testified that Bady and Mohajer had co-conspired. (JA000547, ll. 10 – 17). During their closing argument, Bady and Mohajer devoted significant time to explaining why Terry and Goldstein failed to establish that Bady and Mohajer were co-conspirators and therefore could not be lumped together for purposes of classifying them as interested parties. (JA001169, ll. 21 – 25; JA001170, ll. 1 – 23;

JA001175; ll. 19 – 25; JA001176, ll. 1 – 23). Not once during Terry and Goldstein's rebuttal argument (nor at any other time) did Terry and Goldstein argue or point out to the District Court that they need not prove the existence of a conspiracy. (JA001178, ll. 13 – 25; JA00179 ll. 1 – 25; JA001181, l. 21). During their rebuttal argument, the District Court specifically asked Terry and Goldstein what documentary evidence they had establishing a conspiracy. Rather than tell the court that a conspiracy requirement was an incorrect reading of the Operating Agreement, Terry and Goldstein pointed to two exhibits that they claimed established a conspiracy:

> THE COURT: . . . Is there anything else in the evidence that's been presented to me that you can point to to [sic] show me that they were acting together on activities that would fall within the definition of a civil conspiracy?
>
> [COUNSEL]: Exhibit 6 and Exhibit 8. Exhibit 6 is the email from Pej Bady where he apologizes to the team –
>
> THE COURT: I've got them both. And 8 is the K-1s.
>
> [COUNSEL]: The K-1s.
>
> THE COURT: Okay.
>
> [COUNSEL]: And is anything else in writing? No. You heard the testimony of Mr. Terry that he was communicating -- and Ms.

Jaccarino was clearly communicating with Mr. Bady and that there were no communications with Pouya Mohajer.

THE COURT: Okay. Anything else?

[COUNSEL]: No, Your Honor.

(JA001181, ll. 2 – 21).

Terry and Goldstein were on notice that the District Court was considering the existence of a conspiracy as a key issue. Terry and Goldstein never challenged that, and they cannot do so now. *Old Aztec Mine, Inc., supra,* 97 Nev. at 52, 623 P.2d at 983.

B. Denying the Preliminary Injunction Was Not an Abuse of Discretion

Whether to grant or, as in this case, deny a motion for preliminary injunction is in the District Court's sound discretion:

> Determining whether to grant or deny a preliminary injunction is within the district court's sound discretion. Review on appeal is limited to the record, and the district court's decision will not be disturbed absent an abuse of discretion or unless it is based on an erroneous legal standard. Factual determinations will be set aside only when clearly erroneous or not supported by substantial evidence, but questions of law are reviewed de novo. *University and Community College System of Nevada*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004) (citations omitted).

"Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Tighe v. Las Vegas Metropolitan Police Department,* 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994), *citing State Emp.*

Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (internal quotation marks omitted).

1. Terry and Goldstein Could Not Establish the Existence of a Conspiracy

Terry and Goldstein set out to prove a conspiracy, however, they failed to do so. Terry and Goldstein do not dispute the District Court's finding that:

> 16. In order for a civil conspiracy to be found, two or more persons act together to accomplish an unlawful objective.
>
> 17. While the Defendants acted together at certain times, Plaintiffs have not demonstrated a reasonable probability that Defendants attempted to accomplish an unlawful objective.

(JA001782, ¶¶ 16 – 17).

Rather, they only complain that the District Court applied the incorrect standard. As shown, they attempted to prove a conspiracy, and they failed to do so. As a result, the District Court's conclusion that no conspiracy existed was more than adequately supported by the record.

2. The Concept of "Interestedness" Has No Application Here

Terry and Goldstein alleged that rather than proving a conspiracy, they must prove "interestedness." The issue, however, is not whether Bady or Mohajer are interested parties. When drafting Section 6.2, Goldstein chose not to use the term "interested." Indeed, the term "interested" does not appear anywhere in the Operating Agreement. (JA001186 – JA001212). Goldstein drafted Section 6.2 of

the Operating Agreement which specifically defines who were the "Disinterested Parties" and wrote it such that they were the only members entitled to vote on expulsion. The person who is being voted upon was therefore not a party who is entitled to vote.

Terry and Goldstein are trying to incorporate a new term into Section 6.2. They do not dispute that the Operating Agreement is a contract subject to the rules of contract interpretation. (Terry Opening Brief, pp. 9 – 10). Terry and Goldstein do not dispute that Section 6.2 of the Operating Agreement is clear and unambiguous. (Terry Opening Brief, pp. 9 – 11; Goldstein Opening Brief, p. 12). Therefore, as the District Court found, Section 6.2 is to be interpreted in accordance with its plain language. (JA001782, ¶ 14 ("The terms of an Operating Agreement should be given their plain meaning")). "[C]ontract interpretation is subject to independent appellate review. As a general rule, we construe unambiguous contracts and contractual covenants not to compete according to their plain language." *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 487-8, 117 P.3d 219, 223-4 (2005). A clear and unambiguous contract, such as the Operating Agreement, is to be interpreted from the language in the document. *Id*. No basis for Terry and Goldstein's interpretation exists in Section 6.2. They want to add a definition of and a test for "interestedness." Terry and Goldstein simply cannot read a new term into the Operating Agreement.

The real issue, and one that Terry and Goldstein never really address head-on, is whether Section 6.2 permits Bady and Mohajer to be lumped together as part of a single expulsion vote. As with the concept of "interestedness," Terry and Goldstein try to read aggregation into Section 6.2. Nowhere does the Operating Agreement, in particular Section 6.2, discuss aggregating members for the purposes of trying to expel members. On the contrary, Section 6.2 speaks in the singular when discussing a member who is subject to an expulsion vote. Section 6.2 clearly and unambiguously states that only the "Disinterested Members" may participate in a vote to expel a member. Section 6.2 clearly and unambiguously defined "Disinterested Members" as "***those Members who's membership in the Company is not then being voted upon."*** (JA001196) (emphasis added). Section 6.2 uses the singular noun "member" over 10 separate times when referring to the person subject to an expulsion vote. (JA001196) If it was the intent of Goldstein or the parties, they would have included that language.

Section 6.2 helpfully includes an example of how this formula works:

> By means of example only, if the Members sought to expel Member A, who owned a 20% Voting Interest, the Disinterested Voting Members would be all Members other than Member A, and the vote would require 60% of the 80% Disinterested Voting Interests to carry. In order to terminate a Member's interest a meeting of the Voting Members must be held in accordance with the provisions of Section 4.3. (JA001196).

The example Goldstein wrote into the Operating Agreement speaks only of expelling a single member. It says nothing about testing for "interestedness" or aggregation. Those concepts are simply not in Section 6.2 and cannot be added.

3. Terry and Goldstein Failed to Prove that Bady and Mohajer Acted in Concert

Terry and Goldstein never exactly state what justified the aggregation of Bady and Mohajer's interests, other than to say such aggregation need not rise to the level of a conspiracy. Terry and Goldstein assert that Bady and Mohajer should be lumped together because they somehow acted together. (Terry Opening Brief, pp. 14-15; Goldstein Opening Brief, pp. 7 – 10). The District Court determined that the examples of Bady and Mohajer acting together did not rise to the level of aggregation: "The evidence at the evidentiary hearing shows that, while certain groups of members acted together in accomplishing activities related to the business of NuVeda, these activities did not rise to the level that would permit aggregation." (JA001782, ¶ 15). The District Court was presented with substantial evidence that these events neither caused the company harm nor created a situation where they should be considered to have acted together. Terry and Goldstein offered four events:

(a) Usurpation of Corporate Opportunity (Terry Opening Brief, pp. 14 – 15). Terry and Goldstein now claim that Bady and Mohajer acted together to usurp corporate opportunity to purchase real property related to 2113 Investors, LLC in

North Las Vegas, Nevada. (Terry Opening Brief, pp. 5 – 6; Goldstein Opening Brief, pp. 9 – 10). NuVeda needed the property to meet the requirements of its licenses, and was under a severe time constraint under which to acquire it. (JA000919, ll. 12 – 17). Kennedy testified that NuVeda could not close on the purchase because it could not obtain financing. (JA00913, ll. 4 – 25; JA00914, ll. 1 – 6). Simply put, the bank would not make a loan secured by a medical marijuana facility. (JA000915, ll. 19 – 25; JA000916, ll. 1 – 25; JA000917, ll. 1 – 10). Kennedy had to step in to use his personal lines of credit to complete the purchase. (JA000915, ll. 19 – 25; JA000916, ll. 1 – 25; JA000917, ll. 1 – 10). He did so through a corporate vehicle called 2113 Investors, LLC. (JA000915, ll. 19 – 25; JA000916, ll. 1 – 25; JA000917, ll. 1 – 10). Bady was initially a member, however, he was not a member of the entity as of August 2015, well before Terry and Goldstein attempted to expel him.[1] (JA00918, ll. 3 – 5).

Even though 2113 Investors, LLC has title to the property, NuVeda retained an option to purchase it for the same price that 2113 Investors, LLC paid for it. (JA000921, ll. 3 – 12). The District Court heard Kennedy's analysis that Bady certainly did not take over a corporate opportunity. (JA000921, ll. 3 – 12). There was no conspiracy here. If anything, the substantial evidence demonstrated that it

[1] Bady retained an option to become a member if he was required to personally guarantee any financing. (JA000918, ll. 11-15).

was an attempt to get the company what it needed to meet the conditions of one of its licenses.

(b) The Loan From Majid Golpa ("Golpa") (Terry Opening Brief, p. 6; Goldstein Opening Brief, pp. 8 – 9). Kennedy testified that the loan from Golpa to Bady was personal in nature, and was not an obligation of the company. (JA000940, ll. 9 – 25; JA000941, ll. 1 – 7). Mohajer had no involvement, and Golpa was never given any shares in the company. (JA000912, ll. 15 – 25; JA000913, ll. 1 – 3). The substantial evidence presented to the District Court demonstrated that there was simply no agreement between Bady and Mohajer for wrongdoing.

(c) Shifting Tax Losses (Terry Opening Brief, p. 7; Goldstein Brief, p. 10). Terry and Goldstein alleged that the losses between Bady and Mohajer were distributed in violation of the Operating Agreement, and this this was reflected on IRS Form K-1s for the company. The District Court heard extensive testimony from Kennedy on this topic. Kennedy is an enrolled agent admitted to practice before the IRS. (JA000972, ll. 11 – 13; JA000990, l. 25; JA000991, ll. 1 – 5). As an enrolled agent, he received specialized training and is able to defend audits before the Tax Court and the United States District Court. (JA000901, ll. 3 – 15). Kennedy prepared the K-1s at issue. (JA0000901, ll. 16 – 23). Kennedy testified that he allocated the losses in consultation with Bady, Mohajer, Terry, and the company's bookkeeper. (JA000902, ll. 8 – 25; JA000903, ll. 1 – 25; JA000904, l. 1). Mohajer

instructed Kennedy to prepare the K-1 such that no loss allocation were given to him. (JA000904, ll. 11 – 23). Kennedy testified that the request would not jeopardize the company. (JA000904, ll. 24 – 25, JA000905, ll. 1 – 24; JA000906, ll. 1- 14). Simply put, the substantial evidence demonstrated that if there was any agreement, it was among Terry, Bady, Mohajer, and Kennedy, and that agreement was to take a tax position that was appropriate and necessary.

(d) Close Relationship (Terry Opening Brief, p. 15). Terry and Goldstein claimed that Bady had unusual influence over Mohajer because he loaned Mohajer money to buy an interested in NuVeda. Bady also loaned Terry $120,000 so that Terry could purchase his interest in NuVeda. (JA000217, ¶ 8; JA00845, ll. 22 – 25; JA00846, ll. 1 – 6).

4. Disinterested Directors in the Context of Demand Futility Is Not Applicable Here

The concept of "interestedness" in the context of a shareholder derivative action has no application here. Considerations of interestedness only arise when a court is determining whether demand on the directors of a corporation would have been futile prior to filing a shareholder derivative action. There, the duty to make a demand is imposed both by statute and by the Nevada Rules of Civil Procedure. NRS 41.520 and Nev. R. Civ. P. 23.1. The policy reason for this requirement is to place the directors on notice of a claim and to allow for the opportunity to settle it or otherwise resolve without resorting to a lawsuit. *Shoen v. SAC Holding Corp.*, 122

Nev. 621, 633, 137 P.3d 1171, 1179 (2006). If a shareholder claims demand would have been futile, a court will then embark on an analysis of whether the corporate directors at issue are interested. *In re: Americo Derivative Litigation*, 127 Nev. 196, 218-19, 252 P.3d 681, 697-98 (2011).

This analysis has no application here. First, there has been no demand, and therefore an analysis of "interestedness" has not been triggered. Second, Terry and Goldstein are trying to read into the clear and unambiguous Operating Agreement a new term, i.e., the analysis of "interestedness" as used in the situation of demand shareholder demand futility. Terry and Goldstein do not point to any provision in the Operating Agreement that claims to import those terms and considerations. The Operating Agreement provides a specific definition of who can and who cannot vote with respect to a particular expulsion. The parties need not look further than the contract itself.

5. Terry and Goldstein Failed to Prove Irreparable Harm

Terry claims irreparable harm because he will allegedly not be able to engage in his chosen profession, medical marijuana. (Terry Opening Brief, p. 18). Terry's preliminary injunction only requested that the court enjoin the consummation of the CWNevada deal. More than substantial evidence was presented to the District Court proving that the deal with CWNevada will not prevent Terry from pursuing his chosen profession, medical marijuana. NuVeda still retained full control over two

licenses and partnered with CWNevada on the remaining four. Terry and Goldstein would have a place in the new company. Ultimately, the substantial evidence showed that NuVeda would have failed without the CWNevada deal. That result might have prevented Terry and Goldstein from working in the industry, but the CWNevada deal would not have.

Arizona Dream Act Coal. v. Brewer, 757 F.3d 1053,1068 (9th Cir. 2014), cited by Terry, is inapplicable here. There, plaintiffs sought to preliminarily enjoin the enforcement of an Arizona statute that prohibited certain undocumented immigrants from obtaining a driver's license. *Id.* at 1060. The Ninth Circuit found irreparable harm because, at least in Arizona, a car was almost essential to maintaining a job, let alone one in a chosen field. *Id.* at 1068 (noting that 87% of Arizona workers commute by car). The Ninth Circuit also stressed the, "[Y]oung age and fragile socioeconomic position [of plaintiffs]. Setbacks early in their careers are likely to haunt Plaintiffs for the rest of their lives." *Id.* None of those factors exist here. This is Terry's second career, having been a fighter pilot with the United States Air Force, and he could have had a position with the new company. (JA000723, ll. 3 – 10; JA001094, ll. 11 – 16). These doors were not closed to him, and the CWNevada deal was not like depriving him of his automobile.

Terry and Goldstein finally claim that the threatened loss of the medical marijuana license can constitute irreparable harm. (Terry Opening Brief, pp. 18 –

19; Goldstein Opening Brief, pp. 17 – 19). The District Court was presented with substantial evidence that the transaction with CWNevada would not jeopardize the license. (JA001021, ll. 19 – 25; JA001022, ll. 1 – 10). Thus, the District Court's ruling is properly supported.

CONCLUSION

Bady and Mohajer respectfully request that this Court affirm the District Court's denial of Terry and Goldstein's motion for preliminary injunction.[2]

Dated this 5th day of April 2017.

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[2] To the extent that the District Court did not expressly consider matters in this Answering Brief, consideration of those matters is still appropriate and supports upholding the denial of the preliminary injunction. *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("Although the court below apparently denied appellant's motion on the sole ground that appellant had not demonstrated excusable neglect, this court will affirm the order of the district court if it reached the correct result, albeit for different reasons.").

ATTORNEY'S CERTIFICATE PURSUANT TO NRAP 28.2

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5,953 words.

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

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

Dated this 5th day of April 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Naylor & Braster and that on the 5th day of April 2017, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENTS' ANSWERING BRIEF and SUPPLEMENT TO JOINT APPENDIX** as follows:

[ ] by depositing same for mailing in the United States Mail, in a sealed envelope addressed to:

[X] by the Court's CM/ECF through eFlex:

Jennifer Goldstein
Vincent Aiello
Dylan Ciciliano
Erika Pike Turner
Matthew Dushoff

/s/ Amy Reams
An Employee of NAYLOR & BRASTER