IN THE SUPREME COURT OF THE STATE OF NEVADA

NUVEDA, LLC, A NEVADA LIMITED LIABILITY COMPANY; SHANE M. TERRY, A NEVADA RESIDENT; AND JENNIFER M. GOLDSTEIN, A NEVADA RESIDENT, Appellants,

v.

PEIMAN BADY; AND POUYA MOHAJER, Appellees.

Supreme Court Case No. 69648
District Court Case No. A-15-728510-B, Department XI (Elizabeth Gonzales)

APPELLANT'S REPLY BRIEF

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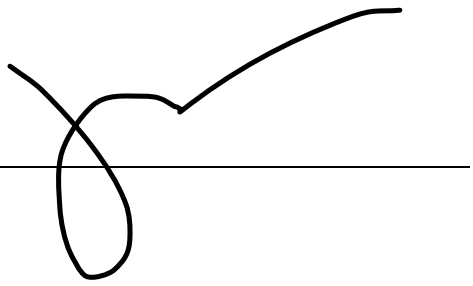
NRAP 26.1 DISCLOSURE

Appellant 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.

Appellant Jennifer Goldstein ("Goldstein") is an individual and therefore there is no parent corporation or publicly held company to disclose. Goldstein's complaint was filed in her individual capacity as well as derivatively on behalf of NuVeda, LLC, a Nevada limited liability company ("NuVeda").

Appellant was represented in District Court by Erika Pike Turner of Garman Turner Gordon, LLP and now is *pro se*.

Dated this 5th day of May, 2017.

By 

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I. SUMMARY OF THE ARGUMENT

The District Court abused its discretion when it ruled that the language of a written Operating Agreement regarding the vote of "disinterested members" was unambiguous, yet implied into the agreement the burden of proving an actual "civil conspiracy" to establish that a Member was "interested" in a transaction. Unable to articulate a legal basis for the erroneous imposition of the heightened burden, Respondents Pouya Mohajer and Pejman Bady's Opposition instead furthers the fiction of the "conspiracy" requirement.

Respondents fail to address the core of this Appeal: that the Court used the wrong standard of law. Instead, Respondents distract with flimsy—and irrelevant—arguments about conspiracy, leading with the head-scratching title "Terry and Goldstein Waived the Conspiracy Argument." Conspiracy was not at issue in the injunction hearing, nor here. Rather, the District Court was asked to interpretation of the term "Disinterested Members" as defined in the Operating Agreement.

Equally puzzling, the next entry in the Opposition's Table of Contents is the assertion that 'The Concept of "Interestedness" Has No Application Here.' Yet Respondents candidly, and repeatedly, reference the Operating Agreement's mandate that only "Disinterested Members" are eligible to vote on expulsions. Never does the Opposition address the actual matter at hand: the District Court abused its discretion in applying the wrong standard of law.

II. LEGAL ARGUMENT

The District Court was asked to determine if Pouya Mohajer and Pejman Bady were appropriately expelled as Members of NuVeda (the "Company") under the Company's Operating Agreement for their joint bad acts. Section 6.2 provides that a member may be expelled by a determination by 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." (JA001196). The provision defines "Disinterested Voting Members" as:

> "Disinterested Voting Members" shall be those Members who's membership in the Company is not then being voted upon… (JA001196).

Despite the clear language of Section 6.2, the District Court denied Appellants' injunction on the grounds that "in order for a civil conspiracy to be found, two or more persons act together to accomplish an unlawful objective" JA001790 (District Court's Findings of Fact and Conclusions of Law at p. 4:9-19), and that Appellants had failed to establish "a reasonable probability that [Bady and Mohajer] attempted to accomplish an unlawful objective." JA001790 (FFCL at p.4:9-19.) The FFCL states no other reason for denying the MPI. JA001787 (FFCL). In sum, the Court supplanted the OA's requirement of "disinterested" with the higher standard of "civil conspiracy." This constitutes reversible error.

A. "Civil Conspiracy" was Not at Issue in the Injunction Hearing; Defendants Raised it in their Closing Argument.

The elements of a "conspiracy" were not at issue in the injunction hearing. The Court was asked to rule whether Mohajer and Bady were properly expulsed under the terms of the Operating Agreement, which has no mention of "conspiracy." Not until Mohajer and Bady's closing argument in the injunction hearing was the concept of a conspiracy first brought up—by counsel for Defendants, who argued that the Plaintiffs would have to prove a conspiracy through the heightened "clear and convincing" standard in order for the District Court to uphold the vote under Section 6.2. (JA001164-1165). This is wrong.[1] Terry and Goldstein need not prove an unalleged civil conspiracy--the issue was whether the Members were properly dismissed under the terms of the Operating Agreement by a vote of the "disinterested" Members.

Respondents "Summary of the Argument" on page 13 perpetuates the fabricated "conspiracy" requirement.

> Terry and Goldstein also improperly read into the Operating Agreement the concept that if Bady and Mohajer were acting together, ***but not to***

[11] Counsel for Appellants at the injunction hearing articulated the correct standard in her closing argument: "if the same conduct that is the basis for voting out a member is the conduct that's subject to both of them [being voted out], you can't be disinterested." (JA001157 ll. 21-23).for voting out a member is the conduct that's subject to both of them [being voted out], you can't be disinterested." (JA001157 ll. 21-23).

> ***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. (Emphasis added.)

(Opposition, page 13.)

Respondents provide no support, either from the Operating Agreement itself of caselaw, for their contention that the joint acts of Respondents must rise to the "extent of justifying a conspiracy." Respondents gamely try to capitalize on the error of the District Court by asserting that Appellants were required to prove that Mohajer and Bady's bad acts justified a conspiracy; Appellants only had to show that Mohajer was not disinterested in the outcome of in the vote to expel Bady's, and Bady was not disinterested in the outcome of the vote to expel Mohajer.

1. The Company's CFO Testified that the Test Is Whether the Members Acted Together.

Importantly, Joe Kennedy, NuVeda's Chief Financial Officer and co-founder of 2113 Investors with Bady, agrees with Appellants: if the members of NuVeda were seeking to expel two members based on actions that they took together, the members would not be disinterested under the Operating Agreement. JA00972 (D3 at p. 76: 2-10.) This is precisely the case at hand: Bady and Mohajer's intertwined actions harmed the Company, and thus each is precluded on voting on the expulsion of the other. The District Court erred in ignoring the express language of the Operating Agreement ("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") by

imposing the heightened and erroneous legal standard of "legal conspiracy." The Opposition is devoid of any rationale to explain this legal misstep.

B. Respondents Believe "Interestedness" is Irrelevant.

Two of the more salient aspects of Respondents' Opposition are: (1) the repeated assertions that the language of Section 6.2 defining "Disinterested Members" is "clear and unambiguous;" and (2) their utter unwillingness to acknowledge that very same clear and unambiguous language. In fact, Respondents posit that "interestedness" is not relevant.

1. Respondents' Opposition Asserts "The Concept of "Interestedness" Has No Application Here"

Respondents assert that interestedness is irrelevant to the expulsion of Members. Their clumsy attempt to parse "interested" from the word "disinterested" comes under the telling subheading: "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).

(Opposition, page 18.)

> 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.

(Opposition, page 13.)

The Operating Agreement uses, *and defines,* the term "Disinterested Members." To credit Respondent's Argument, this Court would have to agree that the words "interested" and "disinterested" are unrelated.

Any dictionary will suffice here. The linguistic contortions in Respondents' Opposition are astounding, but ultimately prove exactly Plaintiffs' point: the Operating Agreement delineates that disinterested members of the Company have the right to vote on the expulsion of the interested members.

There is no reference to a "civil conspiracy" anywhere in the Operating Agreement, and Respondents' grammatical contortions are meritless, and belied by the English language. Simply, the clear and unambiguous language of the Operating Agreement does not require a showing of a conspiracy. Nor does it require that only a single member be voted upon. It simply requires that those Disinterested Members, as that phrase is defined in the Operating Agreement, vote by a margin of 60% or more to expel the wrongdoers. That threshold was reached, and Mohajer and Bady were properly expelled.

The District Court improperly used the legal standard for "civil conspiracy" rather than the correct standard of "disinterested," and Respondents have proffered no argument that would allow that ruling to stand.

C. More than One Member may be Terminated Simultaneously, Otherwise "Disinterested Members," a Defined Term In the Operating Agreement, has No Meaning.

Respondents want this Court to believe that more than one Member of the Company could never, under any circumstance, be voted out together. (See, Opposition at p. 20.) The application of Respondent's "one member at a time" voting proposition is absurd.

Under Respondents' construction of the Operating Agreement, the Company could never vote out two or more Members for their joint bad acts. The logical fallacy is clear. First, such a construction would render the word "disinterested" meaningless—yet the Operating Agreement actually defines who is "disinterested." As explained in Respondents' Opposition:

> "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."

(Opposition, page 20.)

Respondents want this Court to ignore that entire provision, insisting that only one member at a time can be expelled. Respondents would have this Court believe that the references to "Disinterested Members"—a capitalized and defined term in the Operating Agreement—should be simply overlooked.

Second, Respondents' "one Member at a time" construction would actually encourage joint bad acts. If the Operating Agreement is construed as Respondents

allege, Members would actually be incentivized to engage other Members in their efforts to harm the Company, because the wrongdoers would have the vote of their partners in crime since no one could be "disinterested." Patently, this outcome is directly contrary to the intent in excluding interested parties from voting on memberships.

1. Outside Counsel Determined Respondents Were Properly Expelled by a vote of the Disinterested Members.

Outside counsel for NuVeda, Pantea Stevenson, determined that pursuant to the terms of the Operating Agreement, Bady could not be disinterested in the vote to expel Mohajer, and vice versa. (See JA000064 – JA000131.) She did not testify that she had analyzed the expulsions under a standard for "civil conspiracy" because such an analysis would be irrelevant to, and inconsistent with, the express language of the Operating Agreement. All disinterested members, aside from Joe Kennedy, voted for the expulsion. *Id*. and see JA001237; JA000494; JA000074-JA000075 (Exh. 7 to Hearing; D1 at p.30:14-18; MPI Exh. 2, at ¶¶ 8-12.)

Simply, "disinterested" is not equivalent to "not co-conspirators." One may be interested in the outcome of an expulsion without having conspired with another person; the District Court erred in imposing this additional requirement into Section 6.2.

D. The District Court Abused Its Discretion In Not Entering A Preliminary Injunction.

Nevada courts grant injunctions when fiduciaries breach their duty of loyalty by taking self-interested actions that expose the company to a risk of significant harm. Controlling shareholders owe fiduciary duties to the corporation and its other shareholders. See Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 28, 62 P.3d 720, 738 (2003), see also Foster v. Arata, 74 Nev. 143, 155, 325 P.2d 759, 765 (1958) (noting that a dominant or controlling stockholder's dealings with the company are "subject to rigorous scrutiny"). At issue here is Appellants' (and NuVeda's) ability to operate a medical marijuana establishment in compliance with governmental requirements.

1. The Record Establishes Irreparable Harm to Appellants if the Injunction is not Issued.

The bad acts of Mohajer and Bady put at risk the licenses that allow the Company to operate in the highly regulated medical marijuana industry. In Nevada, it is well settled that "acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury." Sobol v. Capital Management, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986).

The Supreme Court extended that analysis to include licensure, finding that the loss or suspension of a license amounts to irreparable harm for purposes of granting a preliminary injunction. State, Dep't of Bus. & Indus. v. Check City, 130 Nev. Adv. Op. 90, 337 P.3d 755, 758 (2014); Com. v. Yameen, 401 Mass. 331, 516 N.E.2d 1149, 1151 (1987) ("A licensee whose license has been revoked or

suspended immediately suffers the irreparable penalty of loss of [license] for which there is no practical compensation.").

The District Court found that NuVeda's licenses were "unique and valuable." (JA000314.) Licenses to operate a medical marijuana establishment in the State of Nevada are scarce, valuable, geographically limited and irreplaceable, and thus the District Court erred in not granting Appellants' injunction. NRS 453A.324; NAC 453A.

E. Respondents Have Established No Basis Upon Which the Court's Order Can Be Upheld.

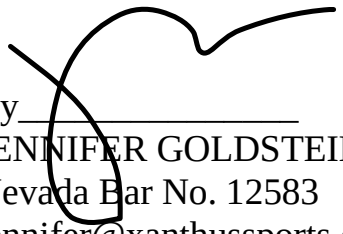
Respondents cannot articulate a credible argument in support of the District Court's Order. Instead, they hope the court will indulge their whimsical approach to the English language, where the definition of "interested" plays no role in "disinterested." Finally, despite repeatedly admitting that the language of 6.2 is "clear and unambiguous," Respondents want to read in a "civil conspiracy" into that very sentence.

The District Court erred in requiring proof of the elements of a "civil conspiracy" rather than determining whether Bady and Mohajer were "disinterested" versus "interested" in the outcome of the membership vote. Because both Bady and Mohajer's conduct provided the basis for their expulsion, and each would have therefore been materially affected by the outcome of the vote on the other's shares,

they were not "Disinterested" under the terms of the Operating Agreement. Thus, the District Court employed an erroneous standard of law in construing Section 6.2 of the Operating Agreement to require a "civil conspiracy" between Bady and Mohajer for them to be deemed "interested."

III. CONCLUSION

Appellant Jennifer Goldstein respectfully requests that this Court determine that the District Court abused its discretion by applying an erroneous standard of law when construing the Operating Agreement, resulting in the denial of Appellants' request for injunctive relief. The requested relief is necessary for Appellants to avoid irreparable harm, and Appellant requests that the requested injunction issue, and for such other and further relief as the Court deems just and appropriate.



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CERTIFICATE OF COMPLIANCE

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 2007 in 14-point Times New Roman font.

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 either:

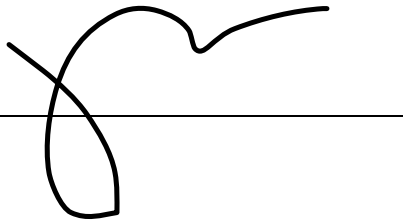
☒ proportionally spaced, has a typeface of 14 points or more and contains 2035 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 May, 2017.

By 

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF** was filed electronically with the Nevada Supreme Court on May 5, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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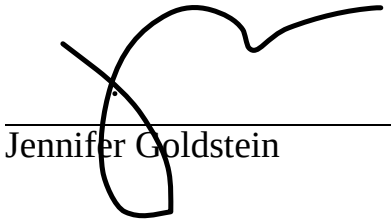

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