**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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



v.

PEJMAN BADY; AND POUYA MOHAJER, Appellees.

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

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# APPELLANT'S REPLY BRIEF

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## NRAP 26.1 DISCLOSURE

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.

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

Terry's only law firm of record in this matter has been Garman Turner Gordon, LLP.

Dated this 5th day of May, 2017.

GARMAN TURNER GORDON

By /s/ Erika Pike Turner

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## I. SUMMARY OF THE ARGUMENT

In their Answering Brief, Respondents Pejman Bady ("Bady") and Pouya Mohajer ("Mohajer") double down on their argument that the District Court is required to find a conspiracy between them in order for them to both be "interested" in a vote of the members under Section 6.2 of NuVeda's Operating Agreement; however, there is a conspicuous absence of any authority in the District Court record, as well as Bady and Mohajer's Answering Brief, to support this conspiracy standard wrongfully adopted by the District Court.

The District Court abused its discretion in its determination that for more than one member of NuVeda to be "interested" in a vote under Section 6.2 of the Operating Agreement, and therefore excluded from the vote, there had to be evidence of a conspiracy. Consistent with a plain reading of the Operating Agreement and application of relevant case law, the District Court should have determined that:

1) any and all members who do not qualify as "Disinterested Voting Members" are properly excluded from a vote of the members under Section 6.2 of the Operating Agreement, and

2) Disinterested Voting Members are those members who are not "interested" in the vote, i.e., have a lack of independence and/or interest in the outcome of the vote.

This appellate court's *de novo*[1] construction of the Operating Agreement should result in a determination that the District Court abused its discretion when it read in a conspiracy requirement to a vote under Section 6.2 of the Operating Agreement involving the conduct of more than one member. Based on the plain language of Section 6.2, as well as Terry's presentation of uncontroverted and substantial evidence to the District Court to show Bady and Mohajer were both interested in the vote to expel them as a result of their conduct in conjunction with one another being the basis for the vote, the District Court's denial of the requested preliminary injunction was clearly erroneous. The District Court's Findings of Fact and Conclusions of Law and Order ("FFCL") denying Terry injunctive relief should therefore be reversed and the requested injunctive relief entered.

## II. LEGAL ARGUMENT

### A. The District Court abused its discretion when it misconstrued Section 6.2 of the Operating Agreement.

Section 6.2 of NuVeda's Operating Agreement provides, in pertinent part, that:

[1] While this court reviews a district court order denying injunctive relief for abuse of discretion, factual determinations will be set aside when clearly erroneous or not supported by substantial evidence, and questions of law are reviewed de novo. Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); see also Douglas Disposal, Inc. v. Wee Haul, LLC, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007). To the extent that the review involves the construction of a contract, the standard of review is *de novo*. Id.; Farmers Ins. Exchange v. Neal, 119 Nev. 62, 64, P.3d 472, 473 (2003).

> 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."

(JA001195). A plain reading suggests any member can be expelled from NuVeda when they fail to act in the best interest of NuVeda and when greater than 60% of the **non-interested** voting interests vote for the exclusion of that member.

The District Court correctly concluded that the Operating Agreement, and specifically Section 6.2, was not ambiguous. (JA000894 ll. 1-20; JA001790 at ¶ 14). Further, the District Court correctly concluded that for purposes of voting on a member's interest under Section 6.2 of the Operating Agreement, more than one member could be considered interested and therefore ineligible to vote. (JA001789 at ¶¶7, 15).[2] To hold otherwise would render the term "Disinterested Voting Members" meaningless.

[2] Bady and Mohajer have not appealed the District Court's finding that members' interests could be aggregated under Section 6.2 of the Operating Agreement and therefore the issue is not on appeal and is not properly raised in the Answering Brief. (See Answering Brief at p. 20).

However, the District Court then erroneously determined that two members would have to be engaged in a civil conspiracy before they could both be considered "interested" for purposes of Section 6.2 of the Operating Agreement. (JA001790 at ¶¶15-17; JA001181). It is black letter law in Nevada that in interpreting an agreement, a court may not modify it or create a new or different one. Mohr Park Manor, Inc. v. Mohr, 83 Nev. 107, 111, 424 P.2d 101, 105 (1967). A court is not at liberty to revise an agreement while professing to construe it. Id. (citing Reno Club, Inc. v. Young Investment Co., 64 Nev. 312, 323-24, 182 P.2d 1011 (1947)).

**1. There is no authority to support reading in a conspiracy requirement to Section 6.2 of the Operating Agreement.**

The failure to show a civil conspiracy was the only cited basis for denying the injunctive relief requested by Terry. (JA001787). Accordingly, this appellate court is narrowly tasked with determining whether the District Court incorrectly determined that for more than one member of NuVeda to be "interested" in a vote under Section 6.2 of the Operating Agreement, they had to be engaged in a conspiracy.

The District Court failed to identify or explain any support at law for the conclusion that to exclude more than one member from the vote to expulse a member's interest, Section 6.2 of the Operating Agreement required the demonstration of a conspiracy between those members, as opposed to

interestedness of more than one member. Further, the record on appeal is void of any authority for the conspiracy standard imposed by the District Court.

During their closing arguments, Bady and Mohajer urged that Terry could not demonstrate a likelihood of success on the merits unless they demonstrated a conspiracy between Bady and Mohajer by clear and convincing evidence. (JA001164, ll. 14-JA001165, ll. 7; JA001169, ll. 21-JA001169, ll.10; JA001175, ll. 19-JA001176, ll. 10). In their pleadings before the District Court, Bady and Mohajer had not previously taken such a position. (JA000151-JA000312; JA000455-JA000464). Furthermore, Bady and Mohajer did not provide any authority for the proposition that a finding of interestedness required evidence of a conspiracy. Similarly, the Answering Brief is void of any analysis of the applicability of a conspiracy standard.

Whether a person should be excluded from a vote based on his or her interestedness is not a concept unique to Section 6.2 of the Operating Agreement. Interestedness is frequently considered when evaluating members and directors' actions and is found throughout NRS Chapters 78 and 86's provisions dealing with voting rights. See e.g. NRS 78.3787; NRS 78.3791; NRS 78.140; NRS 86.451. The gravamen of interestedness is whether the voting member can "exercise its independent and disinterested business judgment." In re Amerco Derivative Litig., 127 Nev. 196, 219, 252 P.3d 681, 698 (2011); see also Shoen v. SAC Holding

Corp., 122 Nev. 621, 642, 137 P.3d 1171, 1185 (2006). A member cannot be impartial when beholden to another member or when his or her interest would be materially impacted by the board's decision. In re Amerco Derivative Litig., 127 Nev. at 219, 252 P.3d at 698.

Interestedness also factors into the business judgment rule, as the business judgment rule applies to the exercise of "business judgment by disinterested directors in light of their fiduciary duties." NRS 78.138; Shoen, 122 Nev. at 635–36, 137 P.3d at 1181; see also Nutraceutical Dev. Corp. v. Summers, 127 Nev. 1163, 373 P.3d 946 (2011); In re Trados Inc. S'holder Litig., 73 A.3d 17, 35–36 (Del. Ch. 2013) (analyzing interestedness in the context of the duty of loyalty and care).

Undeniably, being interested does not require[3] the existence of a conspiracy, as a conspiracy requires more than impartiality or an inability to exercise business judgment. Conspiracy requires clear and convincing evidence of "a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." Compare Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) with In re Amerco Derivative Litig., 127 Nev. at 219, 252 P.3d at 698. Given that one standard is

[3] Although members who conspire could certainly be interested.

much higher than the other, there is no basis to equivocate the two concepts of conspiracy and interestedness.

In their Answering Brief, Bady and Mohajer argue that a "futility" demand analysis under NRCP 23.1 is irrelevant to this court's analysis because the policy behind the demand requirement is notice and the promotion of settlement. (Answering Brief at pp. 24-25). Bady and Mohajer's argument is misplaced. The analysis underlying a shareholder demand that is relevant here is the determination of whether the voting members of the board are capable of exercising independent business judgment in furtherance of their duties to the entity, i.e., whether a member is interested in the outcome of a dispute. Succinctly, "[a] decision whether or not a corporation will sue an alleged wrongdoer is no different from any other corporate decision to be made in the collective discretion of the **disinterested** directors." Burks v. Lasker, 99 S. Ct. 1831, 1842 (1979) (Blackmun, J., concurring) (emphasis added).

Here, the question is whether Bady and Mohajer could have exercised their independent business judgments when evaluating whether the other "was **not acting in the best interest of the Company**." (JA001195 (emphasis added)). That does not require Bady and Mohajer to have "acted together . . . to accomplish an unlawful objective," as found by the District Court. (JA001790). Instead, it required the District Court to consider, *inter alia*, the impact of the decision on

Bady and Mohajer's individual interests, Bady and Mohajer's participation in the offending conduct, the financial implication to Bady and Mohajer, Bady and Mohajer's close personal relationship, Bady's control over Mohajer, and Bady's financial interest in Mohajer's membership interest. In re Amerco Derivative Litig., 127 Nev. at 220–21, 252 P.3d at 698–99.; Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 175 (Del. Ch. 2005), aff'd, 906 A.2d 114 (Del. 2006) ("Entrenchment, self-dealing, or financial interest can indicate that a director is interested or lacks independence.") Abrams v. Koether, 1991 WL 99375 (D.N.J. 1991); Aronson v. Lewis, 473 A.2d 805, 811 (Del.Supr.1984). The District Court's limitation of its analysis to whether Terry showed that "[Bady and Mohajer] attempted to accomplish an unlawful objective" was clearly in error. (JA001790).

**2. Terry's alleged claim for conspiracy is not relevant to whether Section 6.2 of the Operating Agreement required a conspiracy of members to exclude them from a vote**.

It appears from the Answering Brief that the primary basis for Bady and Mohajer' position that Terry must demonstrate a conspiracy is the fact that there is a conspiracy claim alleged against Bady and Mohajer. (Answering Brief at p. 15). Terry alleged numerous claims against Bady and Mohajer based on the facts adduced during the MPI hearing, including breach of the Operating Agreement, breach of the implied covenant of good faith and fair dealing, fraudulent misrepresentation, constructive fraud, negligent misrepresentation, fraudulent

concealment, conspiracy, negligence, unfair business practices, tortious interference with prospective economic advantage, tortious interference with contractual relations, breach of fiduciary duty, constructive trust, and accounting, refusal to cooperate with reasonable requests for inspection, misappropriation, usurpation, and derivative claims on behalf of NuVeda to include, inter alia, breach of fiduciary duty, gross mismanagement, waste of corporate assets, and unjust enrichment. (JA000008-JA000010, ¶37).[4] However, the MPI was narrowly tailored. Terry requested the District Court construe the Operating Agreement, declare Terry's rights thereunder and enter the remedy of narrowly tailored injunctive relief to avoid irreparable harm (i.e., that 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 Terry's further consent, pending further Court order). (JA000042-63).

In sum, Terry argued that if Bady and Mohajer were expulsed under Section 6.2 of the Operating Agreement, then they had no authority to transfer NuVeda assets to CWNevada. (JA000057-58). On this point, Terry only had to show a likelihood of success of showing that Bady and Mohajer were both interested in a vote under Section 6.2 under the circumstances, and were therefore properly excluded from the vote, which he did.

[4] As the Operating Agreement contains an arbitration clause, Appellants only requested injunctive relief from the District Court. (JA000008).

### B. The District Court should have entered a preliminary injunction.

#### 1. Terry demonstrated a likelihood of success.

There was uncontroverted and substantial evidence presented at the evidentiary hearing that Bady and Mohajer acted in conjunction with one another when Mohajer assigned NuVeda's interest to acquire property for a dispensary to 2113 Investors, LLC, an entity owned by Bady. (JA000582 l. 19 - JA00586 l. 24; JA000590 ll. 18-21; JA000591 ll. 16-22; JA000633 ll. 19-25; JA000634 ll. 14-19; JA000852 ll. 2-14; JA000966 ll. 4-12; JA000966 ll. 20-24; JA000535 ll. 7-14). Bady and Mohajer also both secretly pledged interests in NuVeda to third-parties. (JA000604 l. 1 - JA000609 l. 8; JA000629 ll. 22-25; JA000679 ll. 17- JA000680 ll. 8; JA001234-JA001236). Ultimately, both Bady and Mohajer negotiated and approved selling NuVeda's valuable licenses to NuVeda's competitor CW Nevada, LLC. (JA001306-JA001346). Furthermore, the evidence demonstrated Bady enjoyed significant control over Mohajer. Inclusive, Mohajer obtained his ownership interest in NuVeda through a loan from Bady and Bady and Mohajer had been friends for 15 years. (JA000561 ll. 19-23; JA000605 ll. 18-19). Mohajer then assigned Bady his tax losses in violation of Section 5.1 of the Operating Agreement. (JA001106 l. 15 - JA001107 l. 6; JA000901 l. 24 - JA000902 l. 4; JA000903 ll. 13-25).

Each of the aforementioned facts formed the foundation for the members' decision that Bady and Mohajer were "not acting in the best interest of the Company" and therefore should be expelled. (JA001195 (emphasis added)). Accordingly, in November 2015, the members voted to expel Bady and Mohajer. (JA001238-JA001241).

The interestedness of Bady and Mohajer was shown with the uncontroverted and substantial evidence that Bady and Mohajer both had interest and/or personal gain from the transactions that formed the basis for the expulsion. Thus, the District Court should have evaluated these facts regarding influence and personal interest when determining whether Bady and Mohajer were disinterested versus interested. Because both Bady and Mohajer's conduct provided the basis for the expulsion of Bady and Mohajer, and they would have both been materially affected, either to their benefit or detriment, they were not Disinterested Voting Members under Section 6.2.

**2. Terry presented evidence of irreparable harm.**

In Nevada's seminal case on preliminary injunctions in a business context, the Supreme Court held 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 has subsequently extended that analysis to

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, fn. 5 (2014); Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc., 128 Nev. Adv. Op. 34, 294 P.3d 1223, 1228 (2012) (citing Com. v. Yameen, 401 Mass. 331, 516 N.E.2d 1149, 1151 (1987).

Bady and Mohajer do not contend or dispute that the loss of a medical marijuana establishment license would constitute irreparable harm. Without the injunction, Terry demonstrated through uncontroverted and substantial evidence that there was a substantial threat of irreparable harm as a result of Bady and Mohajer's actions, if not enjoined. Sobol, 102 Nev. at 446, 726 P.2d at 337. Bady and Mohajer acted to dispose of NuVeda's assets, including the valuable medical marijuana establishment registration certificates to CWNevada, without Terry and Goldstein's vote, or even knowledgge. The loss or transfer of the license is irreparable harm. Furthermore, Bady and Mohajer's demonstrated pledge of interests in NuVeda to Mr. Golpa was "a clear violation [of the laws surrounding medical marijuana establishments]" and created "concern for the protection of [NuVeda's] licenses." (JA000684 ll. 10-24). Absent an injunction, Bady and Mohajer would be able to sell NuVeda's interests without member input or

approval in contravention of those members' rights under the Operating Agreement.

The Answering Brief's reliance on the testimony of Brian Padgett, CWNevada's Attorney and Chairman, who testified that he thought the transfer to CWNevada would be approved by the State's regulators, is misplaced. (Id. at p. 27; JA001002; JA001021, ll.19-JA001022, l. 10). While Mr. Padgett's testimony was transparently self-serving as the beneficiary of the CWNevada deal, it does not obviate the fact that transfer of NuVeda's assets, including its valuable medical marijuana licenses, without member participation and approval is in and of itself irreparable harm.

### C. Terry did not waive his right to appeal.

In their Answering Brief, Bady and Mohajer hatch the argument that "Terry and Goldstein waived their argument that the District Court incorrectly applied a conspiracy requirement." (Answering Brief at p. 14). To be considered on appeal, contentions need only have been raised or litigated in the District Court. Nevada Power Co. v. Haggerty, 115 Nev. 353, 370, 989 P.2d 870, 880 (1999); Fick v. Fick, 109 Nev. 458, 461–62, 851 P.2d 445, 448 (1993); Hill v. Summa Corp., 90 Nev. 79, 82, 518 P.2d 1094, 1096 (1974). Notably, Terry has maintained since the filing of the Complaint that Bady and Mohajer were interested in the vote to divest the other of membership interest and thus disqualified from the vote under Section 6.2

of the Operating Agreement. In fact, in closing argument to the District Court, Terry's counsel argued that "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). Accordingly, Terry is clearly not raising a new theory on appeal, but advocating the same position.

On the other hand, reading in a conspiracy standard to Section 6.2 of the Operating Agreement was not advocated by Bady and Mohajer in their briefs. It was not until closing arguments that Bady and Mohajer made the off-the-cuff argument, and it was not until the FFCL (entered after taking the matter under advisement) that the District Court adopted the argument and decided that two members would have to be engaged in a conspiracy before they would be considered "interested" for purposes of Section 6.2. (JA001790 at ¶¶15-17).

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## III. CONCLUSION

Based on the record before this appellate court, Terry respectfully requests a determination that the District Court abused its discretion when construing the Operating Agreement and, based thereon, denying the requested injunctive relief necessary for Terry to avoid irreparable harm, and for such other and further relief as the court deems just and appropriate.

Dated this 5th day of May 2017.

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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 3,261 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.

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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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Garman Turner Gordon

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