IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: D.O.T. LITIGATION TGIG, LLC; NEVADA HOLISITIC MEDICINE, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; THC NEVADA, LLC; HERBAL CHOICE, INC.; RED EARTH LLC; NEVCANN LLC, GREEN THERAPEUTICS LLC; AND GREAN LEAF FARMS HOLDINGS LLC, Appellants, vs. THE STATE OF NEVADA, ON RELATION OF ITS DEPARTMENT OF TAXATION, Respondent.	CASE NO. 82014 DISTRICT COURT CASE NO. A-19-787004-B CONSOLIDATED WITH: A-18-785818-W A-18-786357-W A-19-786962-B A-19-787035-C A-19-787540-W A-19-787726-C A-19-801416-B

Appellants' Opening Brief

Nicolas R. Donath, Esq.
N.R. Donath & Associates
871 Coronado Center Dr., Suite 200
Henderson, Nevada 89052
(702) 460-0718
(702) 446-8063 *Facsimile*
Nick@nrdarelaw.com

NRAP 26.1 Disclosure Statement

Pursuant to NRAP 26.1, Appellants' counsel of record certifies that (i) Appellants Green Therapeutics, LLC, Red Earth LLC, and NevCann LLC have no parent companies and no publicly traded company owns more than 10% of them; and (ii) Green Leaf Farms Holdings, LLC, is majority owned by Players Network Inc., a publicly traded company. Green Therapeutics, LLC, NevCann LLC, Red Earth LLC, and Green Leaf Farms Holdings, LLC, are hereinafter referred to as the "Appellants".

The Appellants were represented before the District Court by Nicolas R. Donath of N.R. Donath & Associates, PLLC and will be represented by Mr. Donath in their appeal. Prior to Mr. Donath's appearance, the Appellants were represented before the District Court by the law firm of Brownstein Hyatt Farber Shreck LLP.

NICOLAS R. DONATH, ESQ.
Nevada Bar No. 13106
871 Coronado Center Dr., Suite 200
Henderson, NV 89052

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I. Jurisdictional Statement

This Court has jurisdiction pursuant to NRAP 3A(b)(1) because the District Court's Findings of Fact and Conclusions of Law entered September 3, 2020 (Vol. 333 JPA 046848-046877) and notice of which was served on September 22, 2020 (Vol. 333 JPA 046845-046846), constitutes a final order entered in an action or proceeding commenced in the court in which the judgment is rendered. Subsequent motion practice occurred in which various parties attempted to modify the permanent injunction, including Appellants, which requests were denied in their entirety on October 27, 2020 (Vol. 340 JPA 047863-047870). Notice of this appeal was timely filed on November 10, 2020, pursuant to NRAP 4(a).

II. Routing Statement

This case involves a ballot initiative. Jurisdiction is presumptively retained by the Supreme Court under NRAP 17(a)(2).

III. Issues on Appeal

1. After having found that the Nevada Department of Taxation ("DoT") "provided unequal, advantageous and supplemental information to some applicants," and having levied an evidentiary sanction against the DoT, did the District Court apply the wrong standard to deny relief to Appellants on the

basis plaintiffs had not shown "that there is a substantial likelihood they would have been successful in the rankings process?"

2. Did the District Court err when it entered an adverse presumption against communications destroyed by Pupo/DoT, but then ruled that no matter what those missing communications contained, Appellants had not prevailed on their Equal Protection claim; or, should the adverse presumption have applied to prove the content of the missing communications would have allowed Appellants to succeed in the licensing process (and by extension succeed on their claim for equal protection)?
3. Did the District Court err when it assigned the burden of proof to the Appellants as to whether unequal and advantageous information resulted in a successful application?

Appellants understand that other plaintiffs/appellants in this case are submitting other issues/arguments on appeal, the disposition of which will affect all parties. So as not to duplicate briefing, Appellants join in all other relevant issues/arguments submitted by other plaintiffs/appellants.

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IV. Statement of the Case

Appellants, all Nevada limited liability companies, appeal from various decisions made by the Honorable Elizabeth Gonzalez, Eighth Judicial District Court, in case No. A-19-787004-B.

Appellants, licensed cannabis cultivators in Nevada, each applied to the DoT for retail recreational cannabis dispensary licenses, and each was denied licensure. The DoT was the agency tasked with implementing Nevada's recreational marijuana ballot initiative and regulations, and as such, collected and scored more than 450 applications between September 2018 and December 2018. Following denial of their applications, Appellants filed suit against the DoT, together with other applicants who did not receive a license ("Plaintiffs"). The Plaintiffs claimed, among other things, that the licensing procedure employed by the DoT violated provisions of the Nevada Revised Statutes, violated their Federal and State constitutional rights, and was implemented in an arbitrary and capricious manner. Later, numerous successful applicants who claimed that their interests would be affected by the litigation were granted the right to intervene as defendants along with the DoT. The various lawsuits were consolidated in the Eighth Judicial District Court under case number A-19-787004-B.

The District Court divided the trial into three phases. Phase 2, in particular, addressed the Plaintiffs' constitutional claims such as whether the Plaintiffs' rights

to Equal Protection and Due Process were violated, as well as claims for declaratory relief, a permanent injunction and claims of harm as a result of various business torts alleged to have been committed.

On September 3, 2020, deciding the issues in Phase 2, the District Court presented its Findings of Fact and Conclusions of Law and Permanent Injunction. In a lengthy order, the District Court identified numerous aspects of the licensing process that were constitutionally unfair. In particular, the Court stated: the "DoT's departure from its stated single point of contact and the degree of direct personal contact outside the single point of contact process provided unequal, advantageous and supplemental information to some applicants and is evidence of a lack of a fair process." (Vol. 333 JPA046868, at ¶ 63.)

Notably, the Court had also issued as a sanction a presumption that the texts of the Deputy Director of the DoT were adverse to the DoT, given that they had been destroyed or lost in violation of a preservation order.

Ultimately, the District Court refused to find a violation of equal protection with regard to "unequal, advantageous and supplemental information" given to some applicants by the DoT Deputy Director. The Court found that "Plaintiffs have not identified by a preponderance of the evidence, that if a single point of contact was followed by the DoT and information provided to all applicants, as was done for the medical marijuana application process, that there is a ***substantial likelihood*** they

would have been successful in the rankings process." (Vol. 333 JPA046870, at ¶ 75 (emphasis added).)

The District Court erred by (i) requiring the Plaintiffs to prove a heightened additional standard that there is a "substantial likelihood" they would have been successful in the rankings/licensing process; (ii) not concluding the adverse presumption regarding Pupo's text messages served to prove that plaintiffs would have been successful in the licensing process; and (iii) not shifting the burden of proof to the DoT in light of the presumption about Pupo's texts.

Appellants understand other Plaintiffs/appellants in this case are submitting other issues/arguments on appeal, the disposition of which will affect all parties. So as not to duplicate briefing, Appellants join in all other relevant issues/arguments submitted by other Plaintiffs/appellants.

V. Statement of Relevant Facts

The Parties

1. Appellants, at all relevant times, are and have been: (a) Nevada Limited Liability Companies operating within the State; (b) licensed cannabis cultivators in the State of Nevada; (c) applicants for a retail dispensary license that submitted completed applications within the rules set by the State and the Department of Taxation. (Vol. 333 JPA046853, ln. 2-6.).)

2. As Appellee, the DoT was the administrative agency responsible for issuing the retail dispensary licenses according to the will of the public after Ballot Question 2 was approved and the Legislature crafted laws establishing the rules for the licensing and sale of recreational cannabis. (Vol. 333 JPA046853, at ¶ 12.)

Spoliation and Evidentiary Presumptions

3. Jorge Pupo ("Pupo") was the Deputy Director of the DoT during the relevant periods of the recreational marijuana licensing process. (Vol. 333 JPA046853, ln. 15.)

4. Pupo had "pervasive communications" with and gave "preferential information" to certain applicants. (Vol. 333 JPA046868, at ¶ 63.)

5. After issuance of a preservation order, Pupo "deleted text messages from [his] phone" and "was unable to produce his phone for a forensic examination and extraction of discoverable materials." (Vol. 333 JPA046853, ln. 14-19.)

6. As a result of Pupo's spoliation, the District Court imposed as an evidentiary sanction a presumption that the evidence on Pupo's phone records, if produced, would have been adverse to the DoT. (Vol. 333 JPA046854, ln. 2-3.)

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The District Court Found Unequal Communications Between the State and Certain Applicants relating to the Application Documents and Application Process

7. The DoT posted the 2018 Retail Marijuana Application on its website and released the application for recreational marijuana establishment licenses on July 6, 2018. (Vol. 333 JPA046861, at ¶ 21.)

8. However, the DoT published various versions of the 2018 Retail Marijuana Application. The original version published on the DoT's website on July 6, 2018, required the applicant to provide an actual physical address for the proposed marijuana establishment, and not a P.O. Box. A subsequent/alternative version of the DoT's application required only a proposed (not actual) physical address. The alternative version was distributed to some, but not all, of the potential applicants, while the original version was left published on the DoT website. (Vol. 333 JPA046868, at ¶ 60; Vol. 333 JPA046873, at ¶ 98.) Applications were accepted from September 7, 2018, through September 20, 2018. (Vol. 333 JPA046861, at ¶ 24.)

9. As applicants were preparing applications for submission, the "DoT utilized a question and answer process through a generic email account at marijuana@tax.state.nv.us to allow applicants to ask question and receive answers directly from the DoT." (Vol. 333 JPA046862, at ¶ 26.). However, the information

provided to applicants through this email account was not disseminated by the DoT to certain other applicants. (*Id.*)

10. The cover letter with the application advised potential applicants to direct questions to an email account:

> "Do not call the division seeking application clarification or guidance. Email questions to marijuana@tax.state.nv.us"

(Vol. 333 JPA046862, at ¶ 27.)

11. No statutory or regulatory requirement for a single point of contact process required the DoT to adopt this procedure. (Vol. 333 JPA046862, at ¶ 28.). However, despite having established the single point of contact process, the DoT departed from its own procedure. By allowing certain applicants and their representatives to personally contact the top DoT employee (i.e. Pupo) about the application process, the DoT violated its own established procedures for the application process. (Vol. 333 JPA046863, at ¶ 36.)

12. The District Court found that the "DoT's departure from its stated single point of contact and the degree of direct personal contact outside the single point of contact process provided unequal, advantageous and supplemental information to some applicants and is evidence of a lack of a fair process." (Vol. 333 JPA046868, at ¶ 63.)

13. At trial, Mr. Greg Smith, a prior Administrator of the Purchasing Division for the State of Nevada, provided expert testimony regarding the interfacing between applicants and the DoT, based on his experience overseeing numerous requests for proposals, among other things. (Vol. 311-13 JPA044394 (testimony begins); *id. at* JPA044397.) Mr. Smith stated:

> In the flow of communications, there's usually, in any solicitation document that I've ever been familiar with -- and again, this just isn't the State of Nevada, this is any state in the nation. This is a critical process.
>
> This is so that after vendors receive the original solicitation document, generally, two or three weeks goes by, and there's a question and answer period named in there. Gives them an opportunity to digest the document, formulate any questions.
>
> The general process -- the generally accepted process is that questions are then submitted back to the single point of contact; in our case, would be a purchasing individual, but it doesn't have to be. If the Agency is facilitating their own process, and as does happen in some cases, they have that individual.
>
> That's not an individual who needs to know everything, all-knowing, but it's a coordinating individual who accepts -- say ten vendors submit ten questions each. That's 100 questions.
>
> They then take a week or two and work with the using Agency and other people, possibly the AG's office if it's a legal question, formulate the State's answers to each of those questions in a generic form so that nobody knows who asked what question, and then release that amendment back to the vendor community for their, you know, digestion.
>
> I just can't overstate the importance of this. In my report, that's where I talk about ***the fatal flaw*** [in the marijuana licensing

> process]. In my opinion, not being able to adhere to that principle, that guideline, is just -- it tilts -- it causes the playing field to become unlevel in a manner that, in my opinion, in a public, transparent setting, is unacceptable.

(Vol. 311-313 JPA044442-43 (emphasis added).)

14. In the order appealed from, the District Court declined to provide relief for the unequal and advantageous communications, despite (i) the presumption that Pupo's spoliated communications would have favored the plaintiffs (Vol. 333 JPA046854, ln. 2-3) and (ii) the specific finding that certain applicants had received "unequal" and "advantageous" information (Vol. 333 JPA046868, at ¶ 61).

15. The Court refused to grant relief from the unequal process, finding that "Plaintiffs have not identified by a preponderance of the evidence, that if a single point of contact was followed by the DoT and information provided to all applicants, as was done for the medical marijuana application process, that there is a ***substantial likelihood*** they would have been successful in the rankings process." (Vol. 333 JPA046870, at ¶ 75 (emphasis added).)

Following trial, the District Court provided no actual remedies despite acknowledging the DoT's licensing process was unfair.

16. Following trial, the Court found multiple aspects of the licensing process were unfair:

a. "[T]he Court finds the lack of training for the graders affected the [application] graders' ability to evaluate the applications objectively and impartially." (Vol. 333 JPA046866, ¶ 53.)

b. "The DoT's late decision to delete the physical address requirement on some application forms while not modifying those portions of the application that were dependent on a physical location (i.e. floor plan, community impact, security plan, and the sink locations) after the repeated communications by an applicant's agent, not effectively communicating the revision, and leaving the original version of the application on the website ***is evidence of a lack of a fair process***." (Vol. 333 JD046868, at ¶60 (emphasis added).)

c. "The DoT's departure from its stated single point of contact and the degree of direct personal contact outside the single point of contact process provided unequal, advantageous and supplemental information to some applicants and ***is evidence of a lack of a fair process***." (Vol. 333 JD046868, at ¶61 (emphasis added).)

d. "The DoT's lack of compliance with the established single point of contact and the pervasive communications, meetings with Pupo, and preferential information provided to certain applicants creates an uneven playing field because of the unequal information available to

potential applicants. ***This conduct created an unfair process for which injunctive relief may be appropriate***." (Vol. 333 JD046868, at ¶ 63 (emphasis added).)

e. "With respect to the decision by the DoT to ***arbitrarily and capriciously*** replace the mandatory requirement of BQ2, for the background check of each prospective owner, officer and board member with the 5 percent or greater standard in NAC 453D.255(1), ***the DoT created an unfair process***." (Vol. 333 JPA046876, ln. 11-13 (emphasis added).)

17. In spite of finding that the entire licensing process was substantially flawed and unfair, the Court chose only to conclude (as it previously held in an order for preliminary injunction) "that the 5 percent rule found in NAC 453D.255(1) was an impermissible deviation from the background check requirement of NRS 453D.200(6) as applied to that statute," (Vol. 333 JPA046914, at ¶ 78), and that the "DoT's deviations constituted arbitrary and capricious conduct without any rational basis for the deviation" (Vol. 333 JPA 046918, at ¶ 104).

18. The Court denied all other bases for relief, including the DoT's "unequal" and "advantageous" communications with certain applicants, despite the adverse presumption against the DoT. (Vol. 333 JPA046912, at ¶ 61; Vol. 333 JPA046920.)

19. Following its Findings of Fact and Conclusions of Law, the Court issued an order that mirrored the order in the prior illusory preliminary injunction, which had no impact because it ultimately applied to nobody. (Vol. 333 JPA046920.)

VI. Summary of the Argument

The District Court erred by (i) requiring the Appellants to prove a heightened standard that there is a "substantial likelihood" they would have been successful in the rankings/licensing process; (ii) not concluding the adverse presumption regarding Pupo's text messages served as proof that Appellants would have been successful in the licensing process; and (iii) not shifting the burden of proof to the DoT regarding the likelihood of Appellants' success in the rankings, in light of the presumption about Pupo's texts.

VII. Argument

As found by the District Court, the DoT clearly treated applicants unequally when its top representative provided "unequal, advantageous and supplemental information to some applicants." (Vol. 333 JPA046868, at ¶ 63.) Yet, the District Court ultimately refused to find a violation of equal protection, stating "Plaintiffs have not identified by a preponderance of the evidence, that if a single point of contact was followed by the DoT and information provided to all applicants, as was done for the medical marijuana application process, that there is a ***substantial***

likelihood they would have been successful in the rankings process." (Vol. 333 JPA046870, at ¶ 75 (emphasis added).).

The District Court erred when it evaluated the facts of this case under an improper standard (substantial likelihood), when it did not account for the presumption against the DoT, and when it placed the burden of proof on Appellants. This Court reviews de novo whether the District Court applied the correct legal standard. *Cain v. Price*, 134 Nev. 193, 198, 415 P.3d 25, 30 (2018) ("[T]his court reviews whether a district court has applied the proper legal standard de novo.").

1. The District Court erred when it required Appellants to show a "substantial likelihood" they would have been successful in the rankings process.

A claim for equal protection in Nevada, or under the U.S. Constitution, requires plaintiffs to prove their claim by a preponderance of the evidence. *See Nassiri v. Chiropractic Physicians' Bd. of Nev.,* 130 Nev. 245, 252, 327 P.3d 487, 491-92 (2014) (noting that preponderance of the evidence is used for both equal protection claims and review by a medical review board); *Patraw v. Groth*, Nos. 53918, 54573, 2011 Nev. Unpub. LEXIS 1309, at *15 (Dec. 12, 2011) (noting that a Title VII equal protection claim must be proved by a preponderance of the evidence).

Instead of applying the proper "preponderance of the evidence" standard, the District Court found that:

> "Plaintiffs have not identified by a preponderance of the evidence, that if a single point of contact was followed by the DoT and information provided to all applicants, as was done for the medical marijuana application process, that there is a ***substantial likelihood*** they would have been successful in the rankings process."

(Vol. 333 JPA046870, at ¶ 75 (emphasis added).).

By requiring Appellants to show a "substantial likelihood" they would have been successful in the licensing process in order to succeed on their equal protection claim, the District Court erred. Therefore, the case should be remanded for a determination based on the proper standard.

2. The District Court erred when it failed to properly apply its own evidentiary sanction.

The District Court "impose[d] as an evidentiary sanction…that the evidence on Pupo's phone, if produced, would have been adverse to the DoT." (Vol. 333 JPA046854, ln. 2-3.) The improper communications between Pupo and various successful applicants were a primary factor in the lower Court's determination that the DoT's processes were "unequal" and unfair. (Vol. 333 JPA046868, at ¶ 63.) Without knowing the entirety of the information shared by Pupo with select applicants, the Appellants could not have known or shown whether such information would have changed their likelihood of success in the licensing process.

Due the spoliation, the total universe of unequal and advantageous information that Pupo gave to certain applicants was unknown, which is precisely the reason the District Court levied the sanction against the DoT. The presumption, therefore, must be relied upon to determine the effect and weight of the missing evidence.

In finding the Appellants had not shown a likelihood of succeeding in the rankings (Vol. 333 JPA046870, at ¶ 75), the District Court essentially found that *no matter what the missing communications said, Appellants would not have succeeded*. This approach was error as it was contrary to the presumption previously set by the Court.

It must be assumed (via the adverse presumption) that the evidence destroyed would have led to the Appellants' success in the licensing process. Because no proper effect was given to the evidentiary sanction, the District Court's decision regarding Appellants' likelihood of success in the rankings should be reversed or remanded for further proceedings.

3. The Burden of Proof should have been placed on the DoT as to whether unequal and advantageous information resulted in a successful application.

Because of the presumption against the DoT based on Pupo's texts messages, the DoT, not the Appellants, should have had the burden of proof to show the "unequal" or "advantageous" information received by certain applicants did not

affect who ultimately received a license. *See* NRS 47.180(1) ("A presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof.").

In *Bass-Davis v. Davis*, the Court stated as follows:

> When such evidence is produced, the presumption that the evidence was adverse applies, and the burden of proof shifts to the party who destroyed the evidence. To rebut the presumption, the destroying party must then prove, by a preponderance of the evidence, that the destroyed evidence was not unfavorable. If not rebutted, the fact-finder then presumes that the evidence was adverse to the destroying party.

122 Nev. 442, 448, 134 P.3d 103, 107 (2006).

The presumption against Pupo's text messages is inseparable from any demonstration that the unequal and advantageous information provided in those texts to certain applicants resulted in a likelihood of success in the licensing process. Not only does the presumption necessarily extend to the likelihood of success, but, as a result of the presumption, the burden of proof should have been placed on the DoT. The District Court erred when it placed this burden on the Appellants.

This case should be remanded for a determination under the proper standards set forth herein, and for the issuance of injunctive relief commensurate with the DoT's failures.

VIII. Conclusion

The District Court erred by requiring the Appellants in their Equal Protection Claims to show a "substantial likelihood" that they would have prevailed in the licensing process.

The District Court erred by not properly applying its own evidentiary sanction.

The District Court erred by failing to place the burden of proof on the DoT as to whether unequal and advantageous information resulted in a successful application.

For these reasons, the Appellants respectfully request that this Honorable Court reverse the District Court's decision, or remand for further proceedings.

CERTIFICATE OF COMPLIANCE

a. 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 2016 for Windows Version 2111 in 14-point Times New Roman font.

b. 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 does not exceed 30 pages.

c. 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 wherethe 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 ofthe Nevada Rules of Appellate Procedure.

DATED this 22nd day of December, 2021

N.R. DONATH & ASSOCIATES, PLLC

/s/ Nicolas R. Donath
Nicolas R. Donath, Esq.

Nevada Bar No. 13106
871 Coronado Center Dr. #200
Henderson, Nevada 89052

Attorneys for Appellants Green Leaf Farms Holdings, LLC, Green Therapeutics, LLC, NevCann LLC and Red Earth, LLC

CERTIFICATE OF SERVICE

The undersigned, an employee of N.R. Donath & Associates, PLLC, hereby certifies that on the 22nd day of December, 2021, he served a true and correct copy of the foregoing APPELLANTS' OPENING BRIEF, to be served to all registered parties, via the Court's Electronic Filing System.

Dated: December 22, 2021

/s/ *Nicolas R. Donath*
Employee of
N.R. Donath & Associates, PLLC