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.	Supreme Court Case No.: 82014 District Court Case No.: A787004

APPELLANTS' RESPONSE TO ESSENCE ENTITIES' MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISDICTIONAL DEFECT

Appellants, by and through their attorneys of record, of the law firm of Clark Hill, PLLC, hereby submit their Response to Essence Entities' Motion to Dismiss or Stay Appeal Pending Cure of Jurisdictional Defect.

This Response is made and based upon the papers and pleadings on file, any attached exhibits, the following points and authorities, and any oral argument the court may allow.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

ARGUMENT

The instant Motion to Dismiss or Stay Appeal must be denied because it is inherently based upon legal precedent that this Court has previously overruled. While Movants herein did not expressly cite to *Mallin v. Farmers Insurance Exchange,* 106 Nev. 606, 609, 797 P.2d 978, 980 (1990) as supporting precedent, the legal principles set forth therein that have been expressly overruled by this Court from the basis of Movant's argument.

At its core, Movants argue that this Court lacks jurisdiction because the appeal involves consolidated district court cases and all issues respecting all consolidated cases have not been resolved by a final order of the district court. Movants point out that the consolidated cases were subject to a trial protocol or bifurcation order in which the claims were to be heard in three (3) phases. It is uncontested by any party that Phase 1 and Phase 2 have both been completed having gone through trial and judicial review proceedings resulting in the issuance of two separate Findings of Fact, Conclusions of Law and Orders which are the subject of the instant appeal. It is further uncontested by any party that Phase 3 has not been concluded and no final order as to Phase 3 has been issued.

The determinative fact which should result in the denial of the instant Motion is that no Appellant has alleged a claim in their respective Complaints that is subject to Phase 3 nor is any Appellant a party to or participating in Phase 3. As set forth by Movants, the "third phase will only involve the remaining jury trial for Section 1983 claims." (*See* Motion at pg. 5 and Ex. 5 thereto). Crucially, Appellants only raised claims subject to Phase 1 and 2 and state no claims under Section 1983.

Thus, at issue in this Motion is whether an order finally resolving certain constituent consolidated cases is immediately appealable as a final judgment even where there is another constituent consolidated case still pending. In *Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990), the Court held that cases consolidated by the district court become a single case for all appellate purposes and that an order that resolves fewer than all claims in a consolidated action is not appealable as a final judgment, even if the order resolves all of the claims in one of the consolidated cases. However, *Malin*, supra. was expressly overruled in *Matter of Est. of Sarge*, 134 Nev. 866, 866–67, 432 P.3d 718, 719–20 (2018).

> Based on foundational problems with *Mallin*, the history of NRCP 42(a), and the United States Supreme Court's recent decision in *Hall v. Hall*, 584 U.S. ——, 138 S.Ct. 1118, 200 L.Ed.2d 399 (2018), we overrule the consolidation rule announced in *Mallin* and hold that an order finally resolving a constituent consolidated case is immediately appealable as a final judgment even where the other constituent case or cases remain pending. Because the order challenged on appeal here finally

> resolved one of three consolidated cases, it is appealable and this appeal may proceed.
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> *Matter of Est. of Sarge*, 134 Nev. 866, 866–67, 432 P.3d 718, 719–20 (2018)

Recognizing that the doctrine of stare decisis should not be set aside absent "compelling circumstances," this Court carefully examined the rules of consolidation, the applicability of Rule 54(b) certification and countervailing precedent before overruling *Malin*. Since *Sarge,* Rule 54(b) certification is not required to have a final appealable order in consolidated cases if there is a final resolution of a constituent case.

The underlying motion presumes that the consolidated cases were all inextricably merged into a single action. However, consolidation does not necessarily cause a merger of actions.

> The term "consolidation" is used in different senses. One use is where several actions are combined into one, lose their separate identities and become a single action; another is where several actions are tried together but each retains its separate character. *Herstein v. Kemker,* 19 Tenn.App. 681, 94 S.W.2d 76 (1936). An order consolidating actions does not necessarily work a merger of the issues and render the litigants parties to each other's suits. *See Mikulich v. Carner,* 68 Nev. 161, 228 P.2d 257 (1951); *Wineglass Ranches, Inc. v. Campbell,* 12 Ariz.App. 571, 473 P.2d 496 (1970).
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> *Randall v. Salvation Army*, 100 Nev. 466, 686 P.2d 241, 244 (1984)

In the case sub judice, the consolidated matters were clearly not merged into a single action for all purposes. Some of the plaintiffs below asserted claims under Section 1983 and those claims were severed for trial purposes from all other claims at issue in Phases 1 and 2. To delay appellate relief to Appellants on their fully resolved claims because other persons and entities want to try 1983 claims that do not implicate Appellants at all would be highly prejudicial.

The case law cited by Movants does not support the proposition that they are advancing or addressing the determinative issue before the Court. *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 106 P.3d 134 (2005) involved an appeal from a district court order denying a new trial as to Phase I of a bifurcated class action and did not involve issues of final orders in consolidated cases. Nor did *Kuang v. Sawyer*, No. B188747, 2007 WL 2307036, at *1 (Cal. Ct. App. Aug. 14, 2007) involve consolidated cases wherein some of the constituent cases were fully resolved. Similarly, *Engle v. City of Oroville*, 238 Cal. App. 2d 266, 269, 47 Cal. Rptr. 630, 632 (Ct. App. 1965) did not involve consolidated cases. In all of those cases, all of the parties to the action were parties to all of the phases of trial. The order/ruling following the initial phase did not resolve all claims at issue in the litigation as to the appealing parties.

Although *McCarty v. Macy & Co.*, 153 Cal. App. 2d 837, 315 P.2d 383 (1957) involved consolidated cases, all of the consolidated constituent parties were involved in both the first phase of injunctive proceedings and the second phase for damages. The question was whether the court had appellate jurisdiction over minute orders denying a permanent injunction when all consolidated constituent parties were also still litigating in the damages phase. None of the appealing constituent parties asserted that minute orders denying a permanent injunction in phase 1 injunctive proceedings were final orders as they were parties to the damages claims subject to the damages trial.

Appellants herein concede that if any of them were parties making Section 1983 claims as part of Phase 3 of these consolidated cases, there would not be a final order fully resolving all claims set forth in their constituent Complaints. If that were the case, the appeal for such an appellant who is also participating in Phase 3 would be premature subject to dismissal. However, the appeals of the remaining Appellants who are not parties to Phase 3 are timely and should move forward.

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II.

CONCLUSION

For the above and foregoing reasons, the Motion to Dismiss or Stay should be denied.

Dated this 21st day of March, 2022.

CLARK HILL PLLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that pursuant to NRAP 25(1(d) on the 21st day of March, 2022, I did serve at Las Vegas, Nevada a true and correct copy of **APPELLANTS' RESPONSE TO ESSENCE ENTITIES' MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISDICTIONAL DEFECT** on all parties to this action by Electronic Filing.

/s/Tanya Bain
An employee of Clark Hill PLLC