IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DOT LITIGATION

TGIG, LLC; NEVADA HOLISTIC 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 GREEN LEAF FARMS HOLDINGS LLC,

Appellants,

vs.

THE STATE OF NEVADA DEPARTMENT OF TAXATION,

Respondent.

Case No. 82014

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Elizabeth A. Brown
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THE ESSENCE ENTITIES' REPLY IN SUPPORT OF MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISDICTIONAL DEFECT

I. INTRODUCTION

After months of meeting and conferring, Appellants for the first time argue that the Motion should be denied based on an overruled opinion in a different line of cases than that cited by the Essence Entities. *Matter of Estate of Sarge* does not change the analysis or outcome. It did not deal with a phased trial proceeding, and it does not authorize an appeal by some (but not all) losing parties in the middle of an ongoing trial.

Appellants contend that they "would be highly prejudiced" if forced to wait for the last phase before appealing.[1] But they cannot have it both ways. Appellants have delayed the prevailing parties' six-figure memorandums of costs due to the lack of a final judgment, with the district court explaining that any award of costs is premature until the end of the case. But Appellants now claim there is a final-enough order justifying an appeal. Both cannot be so. Therefore, the appeal should be dismissed or stayed until the Appellants cure the jurisdictional defect.

II. ARGUMENT

Appellants do not dispute that – under the default final judgment rule – parties cannot appeal from an interim order or injunction before all completed phases of a multiphase trial. (Mot. 6-10.) Instead, Appellants contend that the consolidated nature of this case provides an exception. Appellants spend much

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[1] (Resp. at 5.)

effort arguing how *Matter of Estate of Sarge*, 134 Nev. 866, 432 P.3d 718 (2018) overruled *Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 797 P.2d 978 (1990). But neither the Essence Entities nor the cases they cited relied on *Mallin*. Its overruling has no effect on *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 106 P.3d 134 (2005) or the other authorities the Essence Entities advance.

Although *Matter of Estate of Sarge* held "that an order finally resolving a constituent consolidated case is immediately appealable as a final judgment," it did not involve a trial, let alone an ongoing phased trial. 134 Nev. at 866, 432 P.3d at 720. Rather, it arose from a successful motion to dismiss in one of three consolidated cases. *Id.* at 867, 432 P.3d at 720. Thus, the litigation event leading to the executrix's loss (*i.e.* the motion to dismiss briefing/hearing) was entirely concluded when order granting the motion to dismiss was entered.

The Supreme Court case at the center of this Court's *Matter of Estate of Sarge* decision – *Hall v. Hall*, 138 S. Ct. 1118 (2018) – is closer to the mark. There, siblings sued each other. The sister, as their mother's trustee, sued her brother. *Id*. at 1122-23. Eventually, the brother separately sued the sister in her individual capacity and the two cases were consolidated. *Id*. at 1123. The consolidated cases were tried in a single non-phased jury trial. *Id*. In the brother's case, the jury returned a verdict in his favor. *Id*. The clerk entered judgment in his case, but the district court granted a new trial. *Id*. In the sister's case, the jury

returned a verdict against her. *Id*. Again, the clerk entered a judgment in her case. *Id*. The sister appealed even though the brother's new trial remained pending. *Id*.

The brother moved to dismiss the sister's appeal. *Id*. The Third Circuit granted the motion, but the Supreme Court reversed. *Id*. Analyzing FRCP 42(a)'s history, the Supreme Court held "that constituent [consolidated] cases retain their separate identities *at least to the extent that a final decision* in one is immediately appealable by the losing party." *Id.* at 1131 (emphasis added). The Supreme Court emphasized that "*separate verdicts and judgments* are normally necessary." *Id*. at 1130 (quotations omitted); *see also id*. at 1128. The Supreme Court explained "the jury's verdict against [the sister] resolved all of the claims in the trust case, and the clerk accordingly entered judgment in that case providing that 'the action be dismissed on the merits.'" *Id*. at 1124. "*With the entry of judgment*," the Court continued, "the District Court 'completed its adjudication of [the sister's] complaint and terminated [her] action.'" *Id*. (emphasis added). In other words, the litigation event leading to the sister's loss (*i.e.* the trial) was entirely concluded when a separate judgment was entered for her case.

By contrast, the litigation event leading to Appellants' loss and appeal has not concluded (*i.e.* the trial). A phase remains pending, which is why no party has been allowed to recover costs. And, unlike *Hall*, no separate judgment has been entered in Appellants' respective cases. NRCP 54(a) defines a "judgment" as "a

decree and any order from which an appeal lies. *A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings."* (emphasis added). NRCP 52 distinguishes "findings and conclusions" of the court from "judgments." *See* NRCP 52(a)(1). The district court's Findings of Fact, Conclusions of Law, and Permanent Injunctions entered after Phases 1 and 2 do not constitute separate "judgments." They are as titled: "Findings of Fact and Conclusions of Law" with recitals and a record of prior proceedings. (Exs. 6-7.) The same Findings and Conclusions also address the claims of the parties participating in Phase 3.

The district court expressed its intent to enter a separate written judgment after the third phase. When granting Appellants' motions to retax certain prevailing parties' memoranda of costs, the district court ruled a "[f]inal judgment will be issued following completion of Phase 3 [then] scheduled for a jury trial on June 28, 2021." (Ex. 8.) The court thus ruled that any requests for costs were premature pending the entry of that anticipated judgment. The district court's statement is an acknowledgment that the prior Findings of Fact and Conclusions of Law are not final judgments. Accordingly, no appealable judgment has been entered even if

Matter of Estate of Sarge and *Hall* govern rather than *Verderber* and the analogous California case law. [2]

Appellants' interpretation would have harmful consequences. For instance, if Appellants are correct, a plaintiff on the losing end of a NRCP 50(a) motion for judgment as a matter of law at the close of its case in a consolidated matter could immediately appeal in the middle of trial even while other constituent cases proceed to the defense case in chief. This Court would then review the same trial record twice in two (or more) separate appeals. This process is highly inefficient and would increase the Court's and the parties' work and expense. *Cf. Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 823-24, 407 P.3d 702, 709 (2017) (The final judgment rule "is a crucial part of an efficient justice system.").

The final judgment rule, *Verderber*, analogous cases, and judicial efficiency preclude jurisdiction for appeals of interim rulings in the middle of a multiphase trial without a final judgment – even in consolidated cases.

III. CONCLUSION

For these reasons, the Essence Entities respectfully request that this appeal be dismissed or, alternatively, stayed to cure the jurisdictional defects.

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[2] The State's joinder raises the additional point that there is no written order or judgment memorializing Appellants' prior abandonment of their mandamus claims.

DATED this 28th day of March, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Pisanelli Bice PLLC, and pursuant to NRAP 25(b) and NEFR 9(d), that on this 28th day of March, 2022, I electronically filed and served the foregoing **THE ESSENCE ENTITIES' REPLY IN SUPPORT OF MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISDICTIONAL DEFECT** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Courts E-Filing system (Eflex), to all participants in the case who are registered with Eflex system.

/s/ Shannon Dinkel
An employee of Pisanelli Bice PLLC