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; MEDIFRM, 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, 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' Supplemental Response to Essence Entities' Motion to Dismiss or Stay Appeal Pending Cure of Jurisdictional Defect; Joinder

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On June 8, 2022, the Court issued an Order (the "Order") regarding the Essence Entities' Motion to Stay of Dismiss or Stay Appeal Pending Cure of Jurisdictional Defect (the "Motion"). In the Order, the Court requested the parties submit supplemental briefs that include the following: (1) demonstration of whether the orders challenged on appeal fully resolve any of the eight consolidated cases below, rendering them appealable as appeals from final judgments under the Court's holding in *Matter of Estate of Sarge,* 134 Nev. 866, 432 P.3d 718 (2018) ("**Issue 1**"); (2) analysis of whether appellants are estopped from asserting the judgments are final and appealing by reason of their argument in district court against taxation of costs at this point in the proceeding ("**Issue 2**"); and (3) whether NRAP 3A(b)(3) (allowing an appeal from an order granting or refusing to grant an injunction) provides the Court with jurisdiction over this appeal and if so, whether the Court's jurisdiction is limited to addressing issues solely concerning the injunction and which issues raised on appeal that would cover ("**Issue 3**").

Appellants Green Leaf Farms Holdings, LLC, Green Therapeutics, LLC, NevCann LLC and Red Earth, LLC ("GLF Appellants"), by and through the law firm of N.R. Donath & Associates, PLLC, hereby join the points, authorities and arguments contained and made in the remaining Appellants' supplemental response

briefs, filed concurrently herewith on June 22, 2022. The GLF Appellants further respond as set forth below.

ISSUE 1

In further support of Appellants' arguments on Issue 1, GLF Appellants direct the Court to two documents: (a) GLF Appellants' Second Amended Complaint filed May 21, 2019, attached hereto as Exhibit 1 (pleading portion only); and (b) the District Court's Amended Trial Protocol No. 2 filed July 2, 2020 ("Trial Protocol"), attached to the Essence Entities' Motion as Exhibit 4.

GLF's Second Amended Complaint asserted four claims against Appellee Nevada Department of Taxation: (1) violation of substantive due process; (2) violation of procedural due process; (3) violation of equal protection; and (4) declaratory judgment, and prayed for remedies as may be just (i.e. damages or injunctive relief). (*See* Ex. 1 hereto.)

Page 14 of the Trial Protocol stated that these issues would be heard and decided in Phase II:

> B. Second Phase - Legality of the 2018 recreational marijuana application process (claims for Equal Protection, Due Process, Declaratory Relief, Intentional Interference with Prospective Economic Advantage, Intentional Interference with Contractual Relations, and Permanent Injunction).
>
> 1. The Serenity Wellness Plaintiffs, ETW Plaintiffs, Nevada Wellness Center, LLC, Qualcan, LLC and Compassionate Team of Las

> Vegas, LLC and any other Plaintiffs with such claims will present their affirmative claims related to legality of 2018 recreational marijuana application process, including their claims for equal protection, due process, declaratory relief, and permanent injunction.
>
> …
>
> 4. The Court will deliberate, review the evidence, and render a decision on the claims raised in the Second Phase.

(*See* Essence Entities Mot., Ex. 4, Trial Protocol at Page 14-15.).

All of GLF's claims/remedies were resolved in the Phase II of the Trial. (*See* Essence Entities' Mot., Ex. 6, Phase II FFCL.) Neither the Appellants nor the Appellee Nevada Department of Taxation is a party to Phase III of the trial. Accordingly, under *Sarge*, this matter is ripe for appeal.

ISSUE 2

In granting Plaintiffs' Motion to Retax Costs, the District Court found that "[t]he award of costs is premature under NRS 18.110 as there is not a final judgment in this matter… Final judgment will be issued following completion of Phase 3 scheduled for a jury… This decision is without prejudice to seek recovery costs at the time of the final judgment." (*See* Essence Entities Mot. at Ex. 8, p. 2.)

However, in briefing the Motion to Retax, various plaintiffs had actually argued that final judgments existed for Phases I and II, and that the Memoranda of Costs were untimely (i.e. filed after the 5-day deadline):

> NRS 18.110(1) requires "the party in whose favor judgment is rendered, and who claims costs, must file with the clerk, and serve a copy upon the adverse party, within 5 days ***after the entry of judgment***, or such further time as the court or judge may grant, a memorandum of the items of the costs in the action or proceeding."
>
> Wellness Connection cannot recover for the costs it claims because the Memorandum is untimely. Wellness Connection filed the Memorandum on September 21, 2020, eighteen days after the entry of the Second Phase Judgment. Crucially, the statute's plain language requires the days to be counted from the entry of judgment, not the notice of entry of judgment. To comply with the Nevada Supreme Court's decree to construe NRS Chapter 18 narrowly and follow the plain language of a statute, the deadline for the Memorandum is calculated from September 3, 2020. Because the Memorandum was not filed within 5 days after the Second Phase Judgment, it is barred as untimely as to the Second Phase Claims.

(*See* Motion to Retax and Settle Costs dated Sept. 24, 2020, at p. 7:13-24, attached hereto as Exhibit 2.)

In finding that the cost issues under NRS 18.110 were premature, the District Court's order was in fact advantageous to defendants seeking costs because the 5-day deadline was extended indefinitely. Appellants should not be estopped from arguing in favor of jurisdiction in this Court based on a final order, when the same arguments were asserted before the District Court.

ISSUE 3

NRAP 3A(b)(3) instills jurisdiction in this Court for any appeal from "[a]n order granting or refusing to grant an injunction or dissolving or refusing to dissolve

an injunction." (Order at p. 3.) This Rule is clear on its face, and therefore the Court has jurisdiction to review and decide issues relating to injunctive relief in this case. *See New Horizon Kids Quest III, Inc. v. Eighth Judicial Dist. Court*, 133 Nev. 86, 89, 392 P.3d 166, 168 (2017) (quoting *Morrow v. Eighth Judicial Dist. Court*, 129 Nev. 110, 113, 294 P.3d 411, 414 (2013)) ("When a rule is clear on its face, we will not look beyond the rule's plain language.").

All issues raised on appeal emanate from an order that granted and/or refused to grant a preliminary injunction. (*See* Essence Entities' Mot., at Ex. 6, Findings of Fact, Conclusion of Law and Permanent Injunction; *see also* Mot., at Ex. 7, Findings of Fact, Conclusion of Law and Permanent Injunction.) Where the District Court failed to find equal protection or due process violations, those precursor findings ultimately resulted in a failure to grant a remedy in the form of an injunction. Accordingly, the Court has jurisdiction over all issues raised by Appellants in this appeal.

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Conclusion

The GLF Appellants respectfully request the Court deny the Essence Entities' Motion and allow this appeal to proceed.

DATED this 22nd day of June, 2022

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 June, 2022, he served a true and correct copy of the foregoing APPELLANTS' SUPPLEMENTAL RESPONSE TO ESSENCE ENTITIES' MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISDICTIONAL DEFECT; JOINDER, to be served to all registered parties, via the Court's Electronic Filing System.

Dated: June 22, 2022.

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

Exhibit 1

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

ETW MANAGEMENT GROUP LLC, a Nevada limited liability company; GLOBAL HARMONY LLC, a Nevada limited liability company; GREEN LEAF FARMS HOLDINGS LLC, a Nevada limited liability company; GREEN THERAPEUTICS LLC, a Nevada limited liability company; HERBAL CHOICE INC., a Nevada corporation; JUST QUALITY, LLC, a Nevada limited liability company; LIBRA WELLNESS CENTER, LLC, a Nevada limited liability company; ROMBOUGH REAL ESTATE INC. dba MOTHER HERB, a Nevada corporation; NEVCANN LLC, a Nevada limited liability company; RED EARTH LLC, a Nevada limited liability company; THC NEVADA LLC, a Nevada limited liability company; ZION GARDENS LLC, a Nevada limited liability company; and MMOF VEGAS RETAIL, INC., a Nevada corporation,

Plaintiffs,

v.

STATE OF NEVADA, DEPARTMENT OF TAXATION, a Nevada administrative agency;

CASE NO.: A-19-787004-B
DEPT NO.: XI

SECOND AMENDED COMPLAINT

(Exempt From Arbitration Pursuant to N.A.R. 3(A): Action Seeks Damages in Excess of $50,000 and Action Seeks Equitable or Extraordinary Relief)

DOES 1 through 20, inclusive; and ROE CORPORATIONS 1 through 20, inclusive,

Defendants.

AND ALL RELATED MATTERS

Plaintiffs ETW MANAGEMENT GROUP LLC ("ETW"), GLOBAL HARMONY LLC ("Global Harmony"), GREEN LEAF FARMS HOLDINGS LLC ("GLFH"), GREEN THERAPEUTICS LLC ("GT"), HERBAL CHOICE INC. ("Herbal Choice"), JUST QUALITY, LLC ("Just Quality"), LIBRA WELLNESS CENTER, LLC ("Libra"), ROMBOUGH REAL ESTATE INC. dba MOTHER HERB ("Mother Herb"), NEVCANN LLC ("NEVCANN"), RED EARTH LLC ("Red Earth"), THC NEVADA LLC ("THCNV"), ZION GARDENS LLC ("Zion"), and MMOF Vegas Retail, Inc. ("MMOF") (collectively, the "Plaintiffs"), by and through their undersigned counsel of record Adam K. Bult, Esq., Maximilien D. Fetaz, Esq., and Travis F. Chance, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP, and Adam R. Fulton, Esq., of the law firm of Jennings & Fulton, Ltd., hereby file their Second Amended Complaint against the STATE OF NEVADA, DEPARTMENT OF TAXATION (the "DOT"), DOES 1 through 20 inclusive, and ROE CORPORATIONS 1 through 20, inclusive, alleging and complaining as follows:

PARTIES

1. At all times relevant hereto, ETW is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

2. At all times relevant hereto, Global Harmony is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

3. At all times relevant hereto, GLFH is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

4. At all times relevant hereto, GT is and was a limited liability company organized

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and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

5. At all times relevant hereto, Herbal Choice is and was a Nevada corporation authorized to do business in Clark County, Nevada.

6. At all times relevant hereto, Just Quality is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

7. At all times relevant hereto, Libra is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

8. At all times relevant hereto, Mother Herb is and was a Nevada corporation and authorized to do business in Clark County, Nevada.

9. At all times relevant hereto, NEVCANN is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

10. At all times relevant hereto, Red Earth is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

11. At all times relevant hereto, THCNV is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

12. At all times relevant hereto, Zion is and was a limited liability company organized and existing under the laws of the State of Nevada and authorized to do business in Clark County, Nevada.

13. At all times relevant hereto, MMOF is and was a Nevada corporation authorized to do business in Clark County, Nevada.

14. At all times relevant hereto, the DOT is and was an agency and political subdivision of the State of Nevada.

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15. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants Does 1-20, inclusive, and Roe Corporations 1-20, inclusive, are unknown to Plaintiffs, which therefore sue said Defendants by such fictitious names. Plaintiffs will amend this Second Amended Complaint to state the true names and capacities of said fictitious Defendants when they have been ascertained.

16. Plaintiffs are informed and believe, and thereon allege, that each of the fictitiously named Defendants are responsible in some manner for the occurrences herein alleged, and that Plaintiffs' damages as herein alleged were proximately caused by Defendants' acts. Each reference in this Complaint to "Defendant" or "Defendants," or a specifically named Defendant refers also to all Defendants sued under fictitious names.

JURISDICTION AND VENUE

17. Jurisdiction is proper in this Court pursuant to the Nevada Constitution, Article 6, § 6, NRS 4.370(2), NRS 30, and because the acts and omissions complained of herein occurred and caused harm within Clark County, Nevada. Further, the amount in controversy exceeds $15,000.00.

18. Venue is proper in this Court pursuant to NRS 13.020(2)-(3).

GENERAL ALLEGATIONS

19. Plaintiffs incorporate and reallege Paragraphs 1 through 18 as though fully set forth herein.

The Statutory Scheme Governing Retail Marijuana Licenses

20. In or around November 2016, the citizens of the State of Nevada approved a statutory ballot initiative that, *inter alia*, legalized the recreational use of marijuana and allowed for the licensing of recreational marijuana dispensaries.

21. The statutory scheme approved by the voters was codified in NRS Chapter 453D and vested authority for the issuance of licenses for retail marijuana dispensaries in the DOT.

22. NRS 453D.200(1) required the DOT to "adopt all regulations necessary or convenient to carry out the provisions of" that Chapter, including procedures for the issuance of retail marijuana licenses, no later than January 1, 2018.

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23. NRS 453D.210(d)(1) limits the number of retail marijuana licenses in Clark County to a total of 80.

24. However, NRS 453D.210(d)(5) provides that Clark County may request that the DOT issue retail marijuana licenses above the limit set forth in NRS 453D.210(d)(5).

25. As mandated by NRS 453D.210(6), "[w]hen competing applications are submitted for a proposed retail marijuana store within a single county, the Department **shall use an impartial and numerically scored competitive bidding process** to determine which application or applications among those competing will be approved."

The DOT's Adoption of Flawed Regulations that Do Not Comply with Chapter 453D

26. On or around May 8, 2017, the DOT adopted temporary regulations pertaining to, *inter alia*, the application for and the issuance of retail marijuana licenses.

27. The DOT continued preparing draft permanent regulations as required by NRS 453D.200(1) and held public workshops with respect to the same on July 24 and July 25, 2017.

28. On or around December 16, 2017, the DOT issued a Notice of Intent to Adopt permanent regulations pursuant to the mandates of NRS 453D.200(1).

29. On or around January 16, 2018, the DOT held a public hearing on the proposed permanent regulations (LCB File No. R092-17), which was attended by numerous members of the public and marijuana business industry.

30. At the hearing, the DOT was informed that the licensure factors contained in the proposed permanent regulations would have the effect of favoring vertically-integrated cultivators/dispensaries and would result in arbitrary weight being placed upon certain applications that were submitted by well-known, well-connected, and longtime Nevada families.

31. Despite the issues raised at the hearing, on or around January 16, 2018, the DOT adopted the proposed permanent regulations in LCB File No. R092-17 (the "Regulations"). A true and correct copy of the Regulations is attached hereto as **Exhibit 1**.[1]

32. Section 80 of the Regulations relates to the DOT's method of evaluating

[1] The Regulations have been adopted but have yet to be codified in the Nevada Administrative Code.

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competing retail marijuana license applications.

33. Section 80(1) of the Regulations provides that where the DOT receives competing applications, it will "rank the applications...in order from first to last based on compliance with the provisions of this chapter and chapter 453D of NRS and on the content of the applications relating to" several enumerated factors.

34. The factors set forth in Section 80(1) of the Regulations that are used to rank competing applications (collectively, the "Factors") are:

a. Whether the owners, officers or board members have experience operating another kind of business that has given them experience which is applicable to the operation of a marijuana establishment;

b. The diversity of the owners, officers or board members of the proposed marijuana establishment;

c. The educational achievements of the owners, officers or board members of the proposed marijuana establishment;

d. The financial plan and resources of the applicant, both liquid and illiquid;

e. Whether the applicant has an adequate integrated plan for the care, quality and safekeeping of marijuana from seed to sale;

f. The amount of taxes paid and other beneficial financial contributions, including, without limitation, civic or philanthropic involvement with this State or its political subdivisions, by the applicant or the owners, officers or board members of the proposed marijuana establishment;

g. Whether the owners, officers or board members of the proposed marijuana establishment have direct experience with the operation of a medical marijuana establishment or marijuana establishment in this State and have demonstrated a record of operating such an establishment in compliance with the laws and regulations of this State for an adequate period of time to demonstrate success;

h. The experience of key personnel that the applicant intends to employ in

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operating the type of marijuana establishment for which the applicant seeks a license; and

i. Any other criteria that the DOT determines to be relevant.

35. Aside from the Factors, there is no other competitive bidding process used by the DOT to evaluate competing applications.

36. Section 80(5) of the Regulations provides that the DOT will not issue more than one retail marijuana license to the same person, group of persons, or entity.

37. NRS 453D.210(4)(b) and Section 91(4) of the Regulations requires the DOT to provide the specific reasons that any license application is rejected.

Plaintiffs Receive Arbitrary Denials of their Applications for Retail Marijuana Licenses

38. NRS 453D.210 required the DOT to accept applications and issue licenses only to medical marijuana establishments for 18 months following the date upon which the DOT began to receive applications for recreational dispensaries (the "Early Start Program").

39. Upon information and belief, the DOT began to accept applications for recreational dispensary licenses on or around May 15, 2017.

40. Beginning upon the expiration of the Early Start Program (or on or around November 15, 2018), the DOT was to receive and consider applications for a recreational dispensary license from any qualified applicant.

41. The DOT released the application package for non-Early Start Program applicants on July 6, 2018 and required those applications to be returned in complete form between September 7 and September 20, 2018. A true and correct copy of the application package is attached hereto as **Exhibit 2**.

42. Each of the Plaintiffs submitted an Application for issuance of a retail marijuana license after the expiration of the Early Start Program during the period specified by the DOT and some Plaintiffs submitted multiple Applications for different localities that contained the same substantive information.

43. Each and every Application submitted by Plaintiffs was full, complete, and contained substantive information and data for each and every factor outlined in the application

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form.

44. Some of the information requested by the form application was "identified," such that the reviewer would know the identity of the applicant when scoring the same, while some was unidentified, such that the reviewer would not know the identity of the applicant.

45. On or around December 5, 2018, each of the Plaintiffs' Applications was denied by identical written notices issued by the DOT.

46. Each of the written notices from the DOT does not contain any specific reasons why the Applications were denied and instead states merely that "NRS 453D.210 limits the total number of licenses that can be issued in each local jurisdiction. This applicant was not issued a conditional license because it did not achieve a score high enough to receive an available license..."Upon information and belief, the DOT utilized the Factors in evaluating each of the Applications, assigning a numerical score to each Factor, but the Factors are partial and arbitrary on their face.

47. In addition, the DOT's review and scoring of each of the Plaintiffs' Applications was done errantly, arbitrarily, irrationally, and partially because, *inter alia*:

a. The Applications were complete but received zero scores for some Factors and the only way to receive a zero score is to fail to submit information with respect to that Factor;

b. The scoring method used by the DOT combined certain Factors into one grouping, effectively omitting certain Factors from consideration;

c. Plaintiffs that submitted multiple Applications containing the same substantive information and data for different localities received widely different scores for certain Factors; and

d. The Plaintiffs received much higher scores for the unidentified data and information when compared with the identified data and information submitted.

48. Moreover, the highest scored Factor was the organizational structure of the application and the DOT required that Plaintiffs disclose information about the identities of "key

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personnel" with respect to that Factor, resulting in arbitrary and partial weight being placed upon applications from well-known and well-connected applicants.

49. Upon information and belief, the DOT improperly engaged Manpower US Inc. ("Manpower") to provide temporary personnel for the review and scoring of submitted license Applications without providing them with any uniform method of review to ensure consistency and impartiality, which further contributed to the arbitrary and partial scoring of Plaintiff's Applications.

50. Upon information and belief, the DOT issued multiple licenses to the same entity or group of persons to the exclusion of other applicants, including Plaintiffs, in violation of the DOT's own Regulations.

FIRST CLAIM FOR RELIEF

Violation of Substantive Due Process

51. Plaintiffs incorporate and reallege Paragraphs 1 through 50 as though fully set forth herein.

52. The Fourteenth Amendment to the United States Constitution provides that "no state [may] deprive any person of life, liberty, or property, without due process of law."

53. Similarly, Article 1, Section 8 of the Nevada Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

54. Plaintiffs are persons within the meaning of the United States and Nevada Constitutions' guarantees of due process.

55. Retail marijuana licenses constitute protectable property interests under the Nevada and United States Constitutions.

56. The denials of Plaintiffs' Applications were based upon the Factors.

57. The Factors are arbitrary, irrational, and lack impartiality on their face.

58. As a result of the DOT's use of the Factors in denying Plaintiffs' Applications, Plaintiffs have been deprived of their fundamental property rights in violation of the substantive due process guarantees of the Nevada and United States Constitutions.

59. In addition, the Factors violate due process as applied to Plaintiffs' Applications

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because, *inter alia*:

a. The Applications were complete but received zero scores for some Factors and the only way to receive a zero score is to fail to submit information with respect to that Factor;

b. The scoring method used by the DOT combined certain Factors into one grouping, effectively omitting certain Factors from consideration;

c. Plaintiffs that submitted multiple Applications containing the same substantive information and data for different localities received widely different scores for certain Factors;

d. The Plaintiffs received much higher scores for the unidentified data and information when compared with the identified data and information submitted;

e. The DOT placed improper weight upon other applications simply because they were submitted by well-known and well-connected persons; and

f. The DOT improperly utilized Manpower temporary workers who had little to no experience in retail marijuana licensure to review the Applications and failed to provide those persons with a uniform system of review to ensure consistency and impartiality in the scoring process.

60. As a result of the DOT's arbitrary, irrational, and partial application of the Factors to Plaintiffs' applications, Plaintiffs have been deprived of their fundamental property rights in violation of the substantive due process guarantees of the Nevada and United States Constitutions, as applied.

61. As a direct and proximate result of the DOT's constitutional violations, as set forth hereinabove, Plaintiffs have sustained damages in an amount in excess of $15,000.00.

62. Plaintiffs have been forced to retain counsel to prosecute this action and are thus entitled to an award of attorneys' fees and costs as provided by applicable law.

. . .

. . .

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SECOND CLAIM FOR RELIEF

Violation of Procedural Due Process

63. Plaintiffs incorporate and reallege Paragraphs 1 through 62 as though fully set forth herein.

64. The Fourteenth Amendment to the United States Constitution provides that "no state [may] deprive any person of life, liberty, or property, without due process of law."

65. Similarly, Article 1, Section 8 of the Nevada Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

66. Plaintiffs are persons within the meaning of the United States and Nevada Constitutions' guarantees of due process.

67. Retail marijuana licenses constitute protectable property interests under the Nevada and United States Constitutions.

68. NRS 453D, in conjunction with the Regulations, govern the application for and the issuance of retail marijuana licenses within the State of Nevada.

69. Under those provisions, the DOT denied Plaintiffs' Applications for a retail marijuana license without notice or a hearing.

70. The denial notices sent by the DOT did not comply with NRS 453D.210(4)(b) or procedural due process because they do not specify the substantive reasons that Plaintiffs' Applications were denied.

71. Neither NRS 453D nor the Regulations provide for a mechanism through which Plaintiffs may have their Applications fully and finally determined, either before or after denial of the same.

72. As a result of the denial of Plaintiffs' Applications without notice or a hearing, Plaintiffs have been denied their right to procedural due process guaranteed by the Nevada and United States Constitutions.

73. As a direct and proximate result of the DOT's constitutional violations, as set forth hereinabove, Plaintiffs have sustained damages in an amount in excess of $15,000.00.

74. Plaintiffs have been forced to retain counsel to prosecute this action and are thus

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entitled to an award of attorneys' fees and costs as provided by applicable law.

THIRD CLAIM FOR RELIEF

Violation of Equal Protection

75. Plaintiffs incorporate and reallege Paragraphs 1 through 74 as though fully set forth herein.

76. The Fourteenth Amendment to the United States Constitution provides that no "state [may]...deny to any person within its jurisdiction the equal protection of the laws."

77. Similarly, Article 4, Section 21 of the Nevada Constitution requires that all laws be "general and of uniform operation throughout the State."

78. Plaintiffs are persons within the meaning of the Nevada and United States Constitutions' guarantees of equal protection.

79. Plaintiffs have a fundamental right to engage in a profession or business, including that of retail marijuana establishments.

80. The DOT utilized the Factors when evaluating Plaintiffs' Applications.

81. The Factors violate equal protection on their face because they contain arbitrary, partial, and unreasonable classifications that bear no rational relationship to a legitimate governmental interest.

82. The Factors further violate equal protection on their face because they contain arbitrary, partial, and unreasonable classifications that are not narrowly tailored to the advancement of any compelling interest.

83. In addition, the application of the Factors to Plaintiffs' Applications violates equal protection because it was arbitrary, partial and unreasonable, bearing no rational relationship to a legitimate governmental interest and/or failing to be narrowly tailored to any compelling government interest, to wit:

a. The Applications were complete but received zero scores for some Factors and the only way to receive a zero score is to fail to submit information with respect to that Factor;

b. The scoring method used by the DOT combined certain Factors into one

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grouping, effectively omitting certain Factors from consideration;

c. Plaintiffs that submitted multiple Applications containing the same substantive information and data for different localities received widely different scores for certain Factors;

d. The Plaintiffs received much higher scores for the unidentified data and information when compared with the identified data and information submitted;

e. The DOT placed improper weight upon other applications simply because they were submitted by well-known and well-connected persons; and

f. The DOT improperly utilized Manpower temporary workers who had little to no experience in retail marijuana licensure to review the Applications and failed to provide those persons with a uniform system of review to ensure consistency and impartiality in the scoring process.

84. As a result of the DOT's actions as set forth herein, Plaintiffs' rights to equal protection of the law were violated.

85. As a direct and proximate result of the DOT's constitutional violations, as set forth hereinabove, Plaintiffs have sustained damages in an amount in excess of $15,000.00.

86. Plaintiffs have been forced to retain counsel to prosecute this action and are thus entitled to an award of attorneys' fees and costs as provided by applicable law.

FOURTH CLAIM FOR RELIEF

Declaratory Judgment

87. Plaintiffs incorporate and reallege Paragraphs 1 through 86 as though fully set forth herein.

88. Under NRS 30.010, *et seq.*, the Uniform Declaratory Judgment Act, any person whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

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89. The DOT enacted the Regulations, including the Factors and Section 80(5) of the Regulations, pursuant to NRS 453D.200 and NRS 453D.210(6).

90. NRS 453D.210(6) requires that the Factors be "an impartial and numerically scored competitive bidding process."

91. Plaintiffs contend that the DOT violated NRS 453D.210(6) because the Factors are not impartial and are instead partial, arbitrary, and discretionary, in contravention of NRS 453D.210(6).

92. Plaintiffs further contend that the DOT applied the Factors to their Applications in an arbitrary and partial manner, including because:

a. The Applications were complete but received zero scores for some Factors and the only way to receive a zero score is to fail to submit information with respect to that Factor;

b. The scoring method used by the DOT combined certain Factors into one grouping, effectively omitting certain Factors from consideration;

c. Plaintiffs that submitted multiple Applications containing the same substantive information and data for different localities received widely different scores for certain Factors;

d. The Plaintiffs received much higher scores for the unidentified data and information when compared with the identified data and information submitted;

e. The DOT placed improper weight upon other applications simply because they were submitted by well-known and well-connected persons; and

f. The DOT improperly utilized Manpower temporary workers who had little to no experience in retail marijuana licensure to review the Applications and failed to provide those persons with a uniform system of review to ensure consistency and impartiality in the scoring process.

93. Plaintiffs further contend that the DOT violated NRS 453D.210(6) because the Factor evaluation procedure is not a competitive bidding process, as required by NRS

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453D.210(6).

94. Plaintiffs further contend that the DOT violated Section 80(5) of the Regulations because multiple retail marijuana licenses were issued to the same entity or group of persons.

95. Plaintiffs further contend that the denial notices sent by the DOT failed to comply with NRS 453D.210(4)(b) because they do not give the specific substantive reasons for the denial of Plaintiffs' Applications.

96. The DOT contends that that Factors are compliant with NRS 453D.210(6), that all applications it approved were done so in a valid manner, and that the denial notices complied with NRS 453D.210(4)(b).

97. The foregoing issues are ripe for judicial determination because there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

98. Accordingly, Plaintiffs request a declaratory judgment from this Court that: (1) the Factors do not comply with NRS 453D.210(6) because they are not impartial or a competitive bidding process; (2) the DOT applied the Factors to Plaintiffs' Applications in a wholly arbitrary and irrational manner; (3) the DOT violated Section 80(5) of the Regulations by issuing multiple retail marijuana licenses to the same entity or group of persons; and (4) the denial notices did not comply with NRS 453D.210(4)(b).

Plaintiffs have been forced to retain counsel to prosecute this action and are thus entitled to an award of attorneys' fees and costs as provided by applicable law.

WHEREFORE, Plaintiffs pray for relief from this Court as follows:

1. For an award of compensatory damages in an amount to be determined at trial for the DOT's violation of Plaintiffs' substantive due process rights, as set forth herein;
2. For an award of compensatory damages in an amount to be determined at trial for the DOT's violation of Plaintiffs' procedural due process rights, as set forth herein;
3. For an award of compensatory damages in an amount to be determined at

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trial for the DOT's violation of Plaintiffs' rights to equal protection of the law, as set forth herein;

4. For relief in the form of a judgment from this Court that: (1) the Factors do not comply with NRS 453D.210(6) because they are not impartial or a competitive bidding process; (2) the DOT applied the Factors to Plaintiffs' Applications in a wholly arbitrary and irrational manner; (3) the DOT violated Section 80(5) of the Regulations by issuing multiple retail marijuana licenses to the same entity or group of persons; and (4) the denial notices did not comply with NRS 453D.210(4)(b);

5. For an award of attorneys' fees and costs in bringing the instant action as provided by applicable law; and

6. For any additional relief this Court deems just and proper.

DATED this 21st day of May, 2019.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Adam K. Bult

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Adminstrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **SECOND AMENDED COMPLAINT** to be submitted electronically for filing and/or service with the Eighth Judicial District Court's Electronic Filing System on the 21st day of May, 2019, to the following:

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Exhibit 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

In Re: D.O.T. Litigation,	Case No.: A-19-787004-B Consolidated with: A-785818 A-786357 A-786962 A-787035 A-787540 A-787726 A-801416 Dep.t No.: XI **MOTION TO RETAX AND SETTLE COSTS** **[HEARING REQUESTED]**

Plaintiffs, ETW MANAGEMENT GROUP, LLC ("ETW"), GLOBAL HARMONY, LLC ("Global Harmony"), JUST QUALITY, LLC ("Just Quality"), LIBRA WELLNESS CENTER, LLC ("Libra"), ROMBOUGH REAL ESTATE, INC. dba MOTHER HERB ("Mother Herb"), and ZION GARDENS, LLC ("Zion") (collectively, "ETW Plaintiffs"), by and through their undersigned counsel of record, Adam K. Bult, Esq., Maximilien D. Fetaz, Esq., and Travis F.

Chance, Esq., of the law firm of Brownstein Hyatt Farber Schreck, LLP, and Adam R. Fulton, Esq., of the law firm of Jennings & Fulton, Ltd.; NEVADA WELLNESS CENTER, LLC ("NWC") by and through its undersigned counsel of record, Theodore Parker, III, Esq., of the law firm of Parker, Nelson & Associates, Chtd.; MM DEVELOPMENT COMPANY, INC. D/B/A/ PLANET 13 ("MM") and LIVFREE WELLNESS, LLC D/B/A THE DISPENSARY ("LivFree"), by and through their counsel of record, Will Kemp, Esq. and Nathanael R. Rulis, Esq., of the law firm of Kemp Jones, LLP; and QUALCAN LLC ("Qualcan") by and through its counsel of undersigned counsel of record, Peter Christiansen, Esq. and Whitney Barrett, Esq., of the law firm Christiansen Law Offices (ETW Plaintiffs, NWC, MM, Livfree, and Qualcan are collectively referred to herein as "Settling Plaintiffs"), hereby move this court to retax and settle the costs set forth in Defendant Wellness Connection of Nevada, LLC's ("Wellness Connection") Memorandum of Costs filed September 21, 2020 (the "Memorandum"). This Motion is made pursuant to NRS 18.110, and is supported by the following Memorandum of Points and

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Authorities, the pleadings and papers on file herein, and any arguments by counsel on the hearing on this matter.

DATED this 24th day of September, 2020.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Wellness Connection cannot recover the costs claimed in the Memorandum against the Settling Plaintiffs. Instead, the Memorandum must be struck because it is not signed by an attorney of record. Additionally, the Memorandum was untimely filed. Wellness Connection also cannot recover costs because it is neither a prevailing party in this action against the Settling Plaintiffs nor does Wellness Connection have a statutory right to recover its costs. Finally, even if the Memorandum is considered timely as to the judgment for the petition for judicial review, none of the claimed costs were reasonably, necessarily, and actually incurred as to that cause of action. As a result, Settling Plaintiffs request that this Court award no costs to Wellness Connection.

II. RELEVANT FACTUAL BACKGROUND

A. The Proceedings and Settlement

This matter was commenced on January 4, 2019. Even though several parties were named as defendants, they were added only to comply with statutory mandate. The primary and substantive causes of action were asserted against only the Nevada Department of Taxation (the "Department"). Namely, the causes of action for violation of substantive due process, violation of procedural due process, violation of equal protection, and petition for writ of mandamus were asserted exclusively against the Department.

Prior to the commencement of the proceedings in this matter, Settling Plaintiffs prevailed on several issues before the Court, including summary judgment that (i) the Department acted beyond the scope of its authority by replacing the requirement for a background check on each prospective owner with the 5 percent or greater standard in NAC 453D.255(1)[1] and (ii) that MM and LivFree's appeals are to be heard arising from the denial of their licensure of their applications in the September 2018 retail licensure application competition.[2]

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[1] *See* Order Regarding Plaintiff Nevada Wellness Center, LLC's Motion for Summary Judgment on First Claim for Relief ("Order Granting Summary Judgment"), at 6:4-8, dated Aug. 15, 2020, on file herein.

[2] [2] *See* Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part MM

The trial in these proceedings began on July 13, 2020. Importantly, the proceedings were conducted in a series of three phases where only certain claims would be examined and determined in each phase. The First Phase addressed only the petition for judicial review (the "First Phase Claim"), the Second Phase addressed the equal protection, due process, declaratory relief, and permanent injunction claims (the "Second Phase Claims"),[3] and the Third Phase would address writ of mandamus claims (the "Third Phase Claim").[4]

During the Second Phase of the proceedings, the Settling Plaintiffs settled with certain Defendants. The Second Phase concluded with a decision issued by the Court on September 3, 2020.[5] Therein, the Court granted declaratory relief.[6]

Before beginning the next phase (*i.e.*, the First Phase), the Court limited the evidence and record that could be considered for that phase to only the administrative record pursuant to the requirements of NRS 233B.135(1)(b).[7] More specifically, the Court determined that evidence related to a claim for judicial review is to be restricted to the administrative record because it contains all relevant evidence that resulted in the Department's analysis of the plaintiffs' applications.[8] The Court proceeded with and completed the First Phase thereafter.

Development Company, Inc. and LivFree Wellness, LLC's Motion for Summary Judgment or for Writ of Mandamus ("FFCL re Summary Judgment"), at 3:10-14, dated July 11, 2020, on file herein.

[3] Claims for intentional interference with prospective economic advantage and intentional interference with contractual relations that were asserted by only certain plaintiffs were also heard during this Phase. ETW Plaintiffs' only claim asserted against other defendants other than the Department was their declaratory judgment claim. *See* ETW Plaintiffs' Third Amended Complaint, at 19:9-22:18, dated Jan. 29, 2020, on file herein. NWC's only claim asserted against other defendants other than the Department was their declaratory judgment claim. *See* NWC's Second Amended Complaint, at 33:10-35:6, dated March 26, 2020, on file herein.

[4] *See* Amended Trial Protocol No. 2, dated July 2, 2020, on file herein. The Second Phase preceded the First Phase.

[5] *See* Findings of Fact, Conclusions of Law and Permanent Inj., at 6 n.8, Sept. 3, 2020 (the "Second Phase Judgment"). As noted therein, two additional Plaintiffs reached a settlement with the Department and certain Defendants prior to the issuance of the Second Phase Judgment. *Id.*

[6] *Id.* at 29:3.

[7] *See* Findings of Fact, Conclusion of Law and Permanent Inj., at 11:4-9, Sept. 16, 2020 (the "First Phase Judgment").

[8] *Id.*

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B. The Memorandum of Costs

On September 21, 2020, Wellness Connection filed the Memorandum, approximately eighteen days after the Second Phase Judgment was entered and five days after the First Phase Judgment was entered.[9] In the Memorandum, Wellness Connection impermissibly claims a total of $55,301.48 in costs that is comprised of: $1,490.00 in various filing fees; $12,856.35 in unidentified Westlaw Legal Research; $312.00 in unidentified photocopies; $31,885.17 in deposition transcript expenses; $1,165.92 in unidentified runner expenses; $120.00 in parking fees; $235.00 in witness fees; and $7,237.04 in vaguely described trial costs. Notably, the Memorandum is not signed by an attorney.[10]

III. LEGAL STANDARD AND ARGUMENT

A. Legal Standard

Even though trial courts have discretion to determine allowable costs, the Nevada Supreme Court requires that "statutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998); *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (1994). The trial court's discretion should also "be sparingly exercised when considering whether or not to allow expenses not specifically allowed by statute and precedent." *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 566 (1993). Notwithstanding the court's discretion, the party seeking costs "must provide sufficient support for the court to conclude that each taxed cost was reasonable, necessary, and actually incurred." *Village Builders 96 L.P. v. U.S. Laboratories, Inc.*, 121 Nev. 261, 277-78, 112 P.3d 1082, 1093 (2005).

In addition, the plain language of a statute governs the manner in which it is applied according to the language's ordinary meaning. *A.F. Const. Co. v. Virgin River Casino Corp.*, 118 Nev. 699, 703, 56 P.3d 887, 890 (2002); *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252

[9] *See* First Phase Judgment and Second Phase Judgment, respectively.
[10] *See* Mem. of Costs of Wellness Connection of Nevada, LLC, at 4:7-15, Sept. 21, 2020.

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P.3d 206, 209 (2011); *Waste Mgmt. of Nevada, Inc. v. W. Taylor St., LLC*, 135 Nev. 168, 170, 443 P.3d 1115, 1117 (2019).

B. The Memorandum Must be Stricken.

As an initial matter, the Memorandum is not signed by an attorney and must be stricken pursuant to Nevada Rule of Civil Procedure 11(a). Rule 11(a) requires that "every pleading, written motion, and other paper" be signed by an attorney of record and that the court must strike any unsigned papers. Because the Memorandum is not signed, it must be stricken. As further explained below, in the event counsel signs and refiles the Memorandum, it will be untimely pursuant to NRS 18.110(1), and cannot apply to either the First Phase Claim or the Second Phase Claims.

C. Wellness Connection Cannot Recover the Claimed Costs.

1. The Memorandum is Untimely.

NRS 18.110(1) requires "the party in whose favor judgment is rendered, and who claims costs, must file with the clerk, and serve a copy upon the adverse party, within 5 days ***after the entry of judgment***, or such further time as the court or judge may grant, a memorandum of the items of the costs in the action or proceeding."

Wellness Connection cannot recover for the costs it claims because the Memorandum is untimely. Wellness Connection filed the Memorandum on September 21, 2020, eighteen days after the entry of the Second Phase Judgment. Crucially, the statute's plain language requires the days to be counted from the entry of judgment, not the notice of entry of judgment. To comply with the Nevada Supreme Court's decree to construe NRS Chapter 18 narrowly and follow the plain language of a statute, the deadline for the Memorandum is calculated from September 3, 2020. Because the Memorandum was not filed within 5 days after the Second Phase Judgment, it is barred as untimely as to the Second Phase Claims.[11]

[11] As discussed *infra*, Wellness Connection was not a prevailing party in the Second Phase. Thus, the timeliness of Wellness Connection's filing is moot. Settling Plaintiffs, nonetheless, address the timeliness of the Memorandum as related to the Second Phase in order to address and preserve the argument.

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The Memorandum is also untimely as to the First Phase Claim. Although the Memorandum was initially filed within five days of the First Phase Judgment, it must be stricken according to Rule 11(a) as set forth above. Even if counsel signs and refiles the Memorandum, more than five days will have passed since the entry of the First Phase Judgment, and it will therefore be untimely as to the First Phase Claim. Taking the requirements of Rule 11 together with the Nevada Supreme Court's orders to narrowly construe NRS Chapter 18 and adhere to the plain language of the statutes, the Memorandum is also untimely as to the First Phase Claim.

2. Wellness Connection is Nether a Prevailing Party Nor Statutorily Permitted to Recover its Costs.

Wellness Connection also cannot recover against the Settling Plaintiffs because it is not a prevailing party in this matter. NRS Chapter 18 plainly states that costs are allowed only "***to the prevailing party*** against any adverse party against whom judgment is rendered," and only to "the party ***in whose favor judgment is rendered***." *See* NRS 18.020, 18.110(1). Indeed, the Nevada Supreme Court persistently holds that a party cannot be considered a prevailing party where the matter does not proceed to judgment. *Northern Nevada Homes, LLC v. GL Construction, Inc.*, 134 Nev. 498, 500, 422 P 3d 1234, 1237 (2018); *Works v. Kuhn*, 103 Nev. 65, 68, 732 P.2d 1373, 1376 (1987).

The Settling Plaintiffs' First Phase Claims and Second Phase Claims were not litigated, they were settled. Notwithstanding, the Court entered summary judgment in favor of the Settling Plaintiffs.[12] Consequently, the Second Phase Claims did not proceed to judgment in favor of Wellness Connection, and there is no court order declaring any party as the prevailing party as to those claims. Further, pursuant to NRS 18.020, Wellness Connection does not fall within any of the identified categories to recover its costs. *See* NRS 18.020. Indeed, with no judgment against Settling Plaintiffs for either the Second Phase Claims or the First Phase Claim, Wellness Connection cannot recover its claimed costs.

[12] *See* Order Granting Summary Judgment; *see also* FFCL re Summary Judgment.

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D. The Claimed Costs are Not Reasonable and Necessary.

Even if the Memorandum was timely as to the First Phase Judgment and considered prevailing, which it is neither, Wellness Connection cannot recover any of the claimed costs because they were not reasonably, necessarily, and actually incurred as part of the First Phase Claim. Following the mandate of NRS 233B.135(1)(b), the Court restricted the record and evidence for the First Phase to include only the administrative record.[13] This necessarily excluded from the record all court filings, Westlaw legal research, photocopies, deposition and transcripts, documents delivered by runner, witness testimony, trial exhibits, trial transcripts, and any trial administrative services; which comprise all of Wellness Connection's claimed costs. Indeed, the record consisted of only the plaintiffs' applications and related information that was before the Department when it evaluated the applicants and awarded the licenses.

Because the record for the First Phase Claim was restricted and did not include any of the evidence related to Wellness Center's claimed costs, the claimed costs were not reasonably, necessarily, and actually incurred as to the First Phase Claim. As costs that were not reasonable, necessary, and actually incurred for the First Phase Claim, they cannot be recovered in connection with the First Phase Judgment.

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[13] *See* First Phase Judgment, at 11:4-9.

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IV. CONCLUSION

Based on the foregoing, Settling Plaintiffs respectfully request that this Court grant this Motion to Retax and Settle Costs in its entirety and award Wellness Connection no costs.

DATED this 24th day of September, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **MOTION TO RETAX AND SETTLE COSTS** to be submitted electronically to all parties currently on the electronic service list on September 24, 2020.

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