**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.: 82034

District Court Case No.: A787004

**THC NEVADA, LLC AND HERBAL CHOICE, INC.'S JOINDER TO APPELLANTS' SUPPLEMENTAL RESPONSES TO ESSENCE ENTITIES' MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISIDICTIONAL DEFECT**

THC NEVADA, LLC ("THC NV") by and through its counsel of record, Sugden Law, and HERBAL CHOICE, INC., ("HERBAL CHOICE") by and through its counsel of record, Chattah Law Group, hereby join in and concur with the June 22, 2022 Supplemental Responses to Essence Entities' Motion to Dismiss or Stay

Appeal Pending Cure of Jurisdictional Defect filed by TGIG Appellants and GLF Appellants (collectively "Appellants' Supplements").

In addition to the arguments set forth in Appellants' Supplements, THC and HERBAL CHOICE, further submit the following in response to this Court's June 8, 2022 Order:

## I. Demonstration of Whether the Orders Challenged on Appeal Fully Resolve Any of the Eight Consolidated District Court Cases Below, Rendering Them Appealable As Appeals From Final Judgments Under this Court's holding in *Sarge*.

Section VIII(C) of the district court's July 2, 2020 Amended Trial Protocol No. 2, states as follows:

C. Third Phase[5] - Writ of mandamus (Improper scoring of applications related to calculation errors on the 2018 recreational marijuana application).

1. MM Development Company, Inc. and Livfree Wellness LLC and any other Plaintiffs with mandamus claims will present their affirmative claims related to their writ of mandamus claim based on the allegation of improper scoring of their applications due to calculation errors.

[5] This phase has been partially resolved by motion practice. Any remaining issues will be presented following Phase 1.

a) The Plaintiffs will have three (3) days to present testimony and evidence their affirmative claims, unless good cause is shown to extend the time.

2. The DOT and Defendants will present their defense and affirmative claims, if any, related to the claims by the MM Development Company, Inc. and Livfree Wellness LLC.

a) The DOT and Defendants will have one (1) day to present testimony and evidence its defenses and affirmative claims, if any, unless good cause is shown to extend the time.

3. The Plaintiffs will present their rebuttal on their affirmative claims.

a) The Plaintiffs will have one (1) day to present testimony and evidence in rebuttal on its affirmative claims, unless good cause is shown to extend the time.

4. The Court will deliberate, review the evidence, and render a decision on the claims raised in the Third Phase.

*See* Exhibit "1" to TGIG Appellants' Supplement at page 15.

However, as evidenced by the settlement agreement entered into between MM Development Company, Inc. and Livfree Wellness LLC and the State of Nevada, on relation of its Department of Taxation ("DOT"), it was agreed for a dismissal of the MM Development/LivFree action, Case No. A-18-785818-W, entitled Complaint

and Petition for Judicial Review or Writ of Mandamus. (Vol 342 JPA 048108-048111). It is unclear and/or otherwise unknown why the dismissal was not subsequently filed and entered with the district court. However, there has certainly been no indication in the record otherwise that this mandamus action is moving forward. In fact, the Essence Entities acknowledge the same when they state that the "mandamus claims originally contemplated for the third phase were partially resolved by pretrial motion practice and the affected parties settled with the State during Phase 2. . . . Because those claims have been resolved, the last, third phase will only involve the remaining jury trial for Section 1983 claims." *See* Essence Entities' Motion to Dismiss or Stay Appeal Pending Cure of Jurisdictional Defect at page 5.

Thus, the only portion of the litigation that appears to be remaining is the 1983 action that Nevada Wellness Center, LLC ("NWC") and Rural Remedies, LLC have against Jorge Pupo, individually, and not the DOT. *See* TGIG Appellants' March 21, 2022 Response to Essence Entities' Motion to Dismiss or Stay Appeal Pending Cure of Jurisdictional Defect and the Joinders thereto confirming that each of the existing appellants hereto have no issues still pending before the district court. Moreover, THC NV and HERBAL CHOICE maintained no cause of action for a writ of mandamus. *See* Second Amended Complaint attached as Exhibit "1" to GLF Appellants' Supplement. Accordingly, based on the foregoing and the arguments

set forth in the other Appellants Supplements, the district court has issued orders finally resolving all issues related to the parties eight consolidated cases, save for the 1983 action against Mr. Pupo, as an individual, maintained by two parties that are not appellants herein.

## II. Analyses 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

Appellants THC NV and HERBAL CHOICE did not argue, in response to any motion against taxation, that the requests were premature. Rather, THC NV and HERBAL CHOICE submitted a joinder to TGIG Plaintiffs' Motion to Retax and Settle Costs as well as a joinder to ETW's Plaintiffs' Motion to Retax and Settle Costs (collectively "Joinder to Motion to Retax"). *See* Joinder to Motion to Retax attached hereto as Exhibit "1". As set forth in detail its Supplemental Response, TGIG Plaintiffs did not argue against taxation of costs due to lack of a final order. *See* Exhibit "5" to TGIG Appellants' Supplemental Response. Further, ETW Plaintiffs argued that costs could not be recovered because its September 21, 2020 memorandum of costs was filed eighteen days after the Second Phase Judgment (and therefore did not meet the five-day deadline for submission after entry of judgment). *See* ETW Plaintiffs' Motion to Retax and Settle Costs attached hereto as Exhibit "2". Finally, in preparing the Order Granting Motions to Retax ("Order to Retax"), THC

NV and HERBAL CHOICE (nor apparently any of the other Appellants) were consulted as to the form and substance of the Order to Retax prior to its submissions to the district court for consideration. *See* Exhibit "11" to Appellants' Supplement.

## CONCLUSION

As such, THC NV and HERBAL CHOICE respectfully request that the Court deny Essence Entities Motion to Dismiss or Stay Appeal Pending Cure of Jurisdictional Defect and allow this appeal to proceed.

Dated this 22nd day of June, 2022.

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AMY L. SUGDEN, ESQ.

*/s/ Amy L. Sugden*
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*THC Nevada, LLC*

## CERTIFICATE OF SERVICE

I hereby certify that on this day, I caused a true and correct copy of the foregoing **THC NEVADA, LLC AND HERBAL CHOICE, INC.'S JOINDER TO APPELLANTS' SUPPLEMENT TO ESSENCE ENTITIES' MOTION TO DISMISS OR STAY APPEAL PENDING CURE OF JURISIDICTIONAL DEFECT** to be served to all registered parties, via the Court's Electronic Filing System.

Dated: June 22, 2022

/s/ *Amy L. Sugden*
Counsel for THC Nevada, LLC

# EXHIBIT “1”

# EXHIBIT “1”

**JOIN**
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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| | |
|---|---|
| In Re: D.O.T. Litigation, | Case No.: A-19-787004-B |
| | Dept. No: XI |
| | 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 |

**JOINDER TO TGIG PLAINTIFFS' MOTION TO RETAX AND SETTLE COSTS (re: *Memorandum of Costs of Wellness Connection of Nevada, LLC* filed September 21, 2020) AND JOINDER TO ETW PLAINTIFFS' MOTION TO RETAX AND SETTLE COSTS**

COME NOW, THC NEVADA, LLC ("THC NV"), by and through its counsel, Amy L. Sugden, and HERBAL CHOICE, INC. ("Herbal Choice") by and through its Counsel, SIGAL CHATTAH, ESQ. of CHATTAH LAW GROUP, and hereby submit their Joinder to TGIG's Motion to Retax and Settle Costs (re: Memorandum of Costs of Wellness Connection of Nevada, LLC filed September 21, 2020) and ETW Plaintiff's Motion to Retax and Settle Costs filed on September 24, 2020 (collectively "Motions to Retax").

THC NV and HERBAL CHOICE, INC. hereby join, in full, the evidence and legal arguments in the Motions to Retax. THC NV and HERBAL CHOICE, INC. hereby incorporates by reference the arguments and evidence set forth in the Motions to Retax, as if fully set forth herein.

Dated this 28st day of September, 2020.

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*THC Nevada, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, I caused a true and correct copy of the foregoing **JOINDER TO TGIG PLAINTIFFS' MOTION TO RETAX AND SETTLE COSTS (re: Memorandum of Costs of Wellness Connection of Nevada, LLC filed September 21, 2020) AND JOINDER TO ETW PLAINTIFFS' MOTION TO RETAX AND SETTLE COSTS** to be served to all registered parties, via the Court's Electronic Filing System.

Dated: September 28tht, 2020

/s/ *Amy L. Sugden*
Attorney

# EXHIBIT “2”

# EXHIBIT “2”

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*Attorneys for ETW Management Group LLC; et al.*



**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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

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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.

**BROWNSTEIN HYATT FARBER SCHECK, LLP**

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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.

*/s/ Wendy Cosby*
an employee of Brownstein Hyatt Farber Schreck, LLP

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