IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants' Reply Brief

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Appellants Green Therapeutics, LLC, NevCann LLC, Red Earth LLC, and Green Leaf Farms Holdings, LLC (hereinafter referred to as the "Appellants"), hereby reply to answering briefs submitted by (i) Nevada Department of Taxation ("DoT"), (ii) Essence Tropicana LLC and Essence Henderson LLC (the "Essence Entities"), and (iii) Lone Mountain Partners LLC ("Lone Mountain") (collectively, the "Appellees"). Appellants understand that other plaintiffs/appellants in this case are submitting other issues/arguments on appeal, the disposition of which will affect all parties. So as not to duplicate briefing, Appellants join in all other relevant issues/arguments submitted by other plaintiffs/appellants.

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I. Introduction

In addition to those raised by other appellants, the above-named Appellants in their Opening Brief raised three related and additional points on appeal:

1. After having found that the Nevada Department of Taxation ("DoT") "provided unequal, advantageous and supplemental information to some applicants," and having levied an evidentiary sanction against the DoT, did the District Court apply the wrong standard to deny relief to Appellants on the basis plaintiffs had not shown "that there is a substantial likelihood they would have been successful in the rankings process?"
2. Did the District Court err when it entered an adverse presumption against communications destroyed by Jorge Pupo ("Pupo")/DoT, but then ruled that no matter what those missing communications contained, Appellants had not prevailed on their Equal Protection claim; or, should the adverse presumption have applied to prove the content of the missing communications would have allowed Appellants to succeed in the licensing process (and by extension succeed on their claim for equal protection)?
3. Did the District Court err when it assigned the burden of proof to the Appellants as to whether unequal and advantageous information resulted in a successful application?

Appellants address herein the arguments of Appellee with respect to these issues and, so as not to duplicate briefing, join with arguments on reply by all other Appellants. The District Court erred by (i) not shifting the burden of proof to the DoT in light of the presumption about Pupo's texts; (ii) requiring the Plaintiffs/Appellants to prove there was a "substantial likelihood" they would have been successful in the rankings/licensing process; and (iii) not concluding the adverse presumption regarding Pupo's text messages served to prove that plaintiffs would have been successful in the licensing process.

II. Argument

The DoT argues that an adverse "inference" (as opposed to an adverse "presumption") does not shift the burden of proof. (DoT Brief 35 (citing *Bass-Davis v. Davis*, 122 Nev. 422, 134 P.3d 103 (2006).) However, in this case District Court did in fact find an adverse presumption, not an adverse inference. (Vol. 333 JPA046854, ln. 2-3, 13 (using the word "presumption" when discussing the sanction.)) Accordingly, the burden should have shifted to Appellees. *See* NRS 47.180(1) ("A presumption not only fixes the burden of going forward with evidence, but it also shifts the burden of proof.").

Jorge Pupo had "pervasive communications" with and gave "preferential information" to certain applicants. (Vol. 333 JPA046868, at ¶ 63.) After issuance of a preservation order, Pupo "deleted text messages from [his] phone" and "was

unable to produce his phone for a forensic examination and extraction of discoverable materials." (Vol. 333 JPA046853, ln. 14-19.) Without the information on Pupo's phone, Appellants could not prove they would have succeeded in the application process had they received the "preferential information" given to other applicants, as the scope of the that preferential information is unknown. The burden of proof should have shifted to Appellees.

In an attempt to show that information deleted by Pupo would not have affected the outcome of Appellants' application, the DoT refers the Court repeatedly to a list of unsuccessful applicants who scored higher than Appellants. (*See, e.g.*, DoT Brief at 14, 35-36.). However, that list is the result of exactly the unfair and unequal process that forms the basis for this litigation. Appellees cannot use such a tainted list as proof that Appellants would have not have received a license had they received the preferential treatment. In sum, it should have been the Appellees' burden to show by a preponderance of the evidence a "substantial likelihood" that Appellants *would not* have been successful in the application process, and they did not do so.

This point is important because the District Court found only one basis for relief: "With respect to the decision by the DoT to arbitrarily and capriciously replace the mandatory requirement of BQ2, for the background check of each prospective owner, officer and board member," the DoT violated equal protection.

(Vol. 33 JPA 046876.). The resulting remedy (or lack thereof) was based on this finding, despite the many errors the District Court found in the licensing process. The District Court should have found a separate basis for relief based on improper communications, and a separate remedy should be fashioned.

III. Conclusion

The District Court erred by failing to place the burden of proof on the DoT as to whether unequal and advantageous information resulted in a successful application. The District Court further erred by requiring the Appellants in their Equal Protection Claims to show a "substantial likelihood" that they would have prevailed in the licensing process, and by not properly applying its own evidentiary sanction.

For these reasons, and the reasons set forth in the briefs of all other appellants, the Appellants herein respectfully request that this Honorable Court reverse the District Court's decision, or remand for further proceedings.

CERTIFICATE OF COMPLIANCE

a. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.10 in 14-point Times New Roman font.

b. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and does not exceed 25 pages.

c. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript

or appendix wherethe matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements ofthe Nevada Rules of Appellate Procedure.

DATED this 30th day of November, 2022

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CERTIFICATE OF SERVICE

The undersigned, an employee of N.R. Donath & Associates PLLC, hereby certifies that on the 30th day of November, 2022, he served a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF, to be served to all registered parties, via the Court's Electronic Filing System.

Dated: November 30, 2022

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