

IN THE SUPREME COURT OF THE STATE OF NEVADA

NUVEDA, LLC,

Petitioner,

vs

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, THE
HONORABLE ELIZABETH
GONZALEZ, DISTRICT JUDGE,

Respondent,

SHANE TERRY, PHIL IVEY, AND
DOTAN Y. MELECH, receiver for
CWNEVADA, LLC, a Nevada limited
liability company,

Real Parties in Interest.

Electronically Filed
Jul 21 2021 02:21 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 82767
District Court Case No. A-20-817363-B

Lead Case: A-17-755479-B

Other Consolidated Cases with Lead
Case:
A-19-791405-C and A-19-796300-B

**ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, IN THE
ALTERNATIVE, PETITION FOR WRIT OF MANDAMUS**

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Michael R. Mushkin & Associates d/b/a Mushkin & Coppedge states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Michael R. Mushkin and L. Joe Coppedge are the attorneys who have appeared for Real Parties in Interest in this case.

Real Parties in Interest, Shane Terry, Phil Ivey, and Dotan Y. Melech, receiver, state that they have no parent corporation and that no publicly held corporation owns 10% or more of its stock.

DATED this 21st day of July, 2021.

MUSHKIN & COPPEDGE

/s/L. Joe Coppedge

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I. Statement of the Case

Shane Terry (“Terry”) (the Real Party in Interest), together with Dotan Y. Melech, the Court-appointed receiver (the “Receiver”) for CWNevada, LLC (“CWNevada”) and Phillip D. Ivey (“Ivey”, collectively, Terry, the Receiver, and Ivey are referred to as “Plaintiffs”) filed their Complaint on June 30, 2020 as Case No. A-20-817363-B (Dept. 13, now Dept. 11).¹ The Complaint includes nine (9) claims for relief asserted by Terry, including the following:

- The First Claim for Relief (by all Plaintiffs) against all Defendants for Declaratory Relief included requested relief specific to Terry that (i) the Terry Purchase Agreement is null and void resulting from a fraud in the inducement and for a complete failure of consideration, (ii) the Terry Interest was never transferred to BCP 7 or any other entity, and (iii) Terry is the sole and only owner of the Terry Interest;²
- The Fourth Claim for Relief (by Terry only) for Rescission of the Terry Purchase Agreement for Fraud in the Inducement and/or Failure of Consideration against Defendants BCP 7 and Padgett only;³
- The Fifth Claim for Relief (by Terry only) in the alternative for Breach of Contract against Defendants BCP 7 and Padgett only;⁴
- The Sixth Claim for Relief (by Terry only) in the alternative for Breach of the Covenant of Good Faith and Fair Dealing against Defendants BCP 7

¹ RA 001-35

² RA 021-022

³ RA 024-025

⁴ RA 025

and Padgett only;⁵

- The Ninth Claim for Relief (by all Plaintiffs) for Unjust Enrichment against Defendants NuVeda, Bady, Mohajer and Kennedy, specifically as to Terry, the claim for unjust enrichment relates to the transfer of the Terry Interest to Bady and Mohajer without Terry's knowledge or consent;⁶
- The Tenth Claim for Relief (by all Plaintiffs) for an accounting against Defendants NuVeda, Bady, Mohajer and Kennedy;⁷
- The Eleventh Claim for Relief (by all Plaintiffs) for Violation of NRS 225.084 against Defendants NuVeda, Bady, Mohajer and Kennedy;⁸
- The Thirteenth Claim for Relief (all Plaintiffs) for Injunctive Relief against all Defendants;⁹ and
- The Fourteenth Claim for Relief (by all Plaintiffs) for the Appointment of a Receiver against all Defendants.¹⁰

Only the First, Ninth, Tenth, Eleventh, Thirteenth, and Fourteenth claims for relief include claims by Terry against NuVeda, and none are solely claims for relief asserted by Terry against NuVeda. After NuVeda filed multiple motions to dismiss, Plaintiffs filed a motion to consolidate several related actions with the Receivership Action.¹¹ Included among the cases to be consolidated is the complaint in Case No. A-19-796300-B, which is a complaint filed by Mitchell Stipp on behalf of Terry

⁵ RA 026

⁶ RA 028

⁷ RA 028-029

⁸ RA 029-030

⁹ RA 033

¹⁰ RA 033-034

¹¹ RA 037-127

during a time when Mr. Stipp represented Terry.¹² The Complaint filed by Mr. Stipp (the “Stipp Complaint”) was filed on June 7, 2019 against Defendants, BCP 7, LLC and Brian Padgett and included claims for breach of contract, unjust enrichment, and breach of the implied covenant of good faith and fair dealing.¹³ Notably, the Stipp Complaint did not include a claim for rescission of the Terry Purchase Agreement. The district court granted the motion to consolidate following a hearing on July 23, 2020.¹⁴ NuVeda’s motion to dismiss concerning the Receiver’s and Terry’s claims came before the Receivership Court for a hearing on August 31, 2020.¹⁵ The Court denied NuVeda’s motion to dismiss with respect to the Receiver’s claims. However, with respect to Terry’s claims, the Court stayed the motion “for a period of ninety (90) days from the date of the hearing for Mr. Terry to request any relief from the arbitrator, Ms. Nikki Baker, of the American Arbitration Association.”¹⁶ Terry submitted a Motion to Set Aside Dismissal on Monday, November 30, 2020 in the matter proceeding before the American Arbitration Association (“AAA”).¹⁷ The AAA responded that the matter was “closed on March 20, 2019, and the Association no longer has jurisdiction regarding this matter.” See electronic mail correspondence with AAA.¹⁸

After having its motion for an order to enter judgment on Shane Terry’s

¹² RA 065-088

¹³ The Stipp Complaint was subject to dismissal pursuant to NRCP 4(e) for counsel’s failure to timely serve the complaint.

¹⁴ RA 0128-129

¹⁵ RA 0130-0138. The Motion to Dismiss was only made on behalf of NuVeda and did not include any undisclosed “affiliates”.

¹⁶ RA 0131

¹⁷ RA139 - 207

¹⁸ RA 208-209

claims denied, NuVeda filed its Motion to Stay on Order Shortening Time. Based on the briefing and argument by counsel, in which NuVeda acknowledged the existence of factual issues and raised the case of *Helpstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 362 P.3d 91 (2015) for the first time, “the Court reconsidered its prior decision to set an evidentiary hearing on the issue of rescission (because there are factual issues to be resolved at trial.”¹⁹ NuVeda’s writ followed.

II. Statement of Facts

1. On or about July 9, 2014, Terry entered into an Operating Agreement for NuVeda, LLC (the “NuVeda Operating Agreement”) with Pejman Bady (“Bady”), Pouya Mohajer (“Mohajer”) and Jennifer Goldstein (“Goldstein”) to apply for and operate marijuana dispensaries, cultivation, and processing facilities for medical marijuana pursuant to licenses obtained from certain governmental divisions. Complaint, ¶ 16;²⁰ Terry Declaration, ¶ 3;²¹ NuVeda Operating Agreement.²²

2. The NuVeda Operating Agreement was also signed by Joseph Kennedy, John Penders and Ryan Winmill. Complaint, ¶ 17;²³ Terry Declaration, ¶ 4.²⁴

3. Since NuVeda’s formation, Terry has been a manager, voting member and at times, NuVeda’s Chief Executive Officer and Chief Operations Officer.

¹⁹ RA 211-216

²⁰ RA 004

²¹ RA 153-154

²² RA 173-195

²³ RA 004

²⁴ RA 154

Complaint, ¶20;²⁵ Terry Declaration, ¶ 7.²⁶

4. Initially, Terry owned 21.5% of NuVeda and its subsidiaries, Clark NMSD, LLC (“Clark NMSD”), a Nevada limited liability company, Clark natural Medicinal Solutions, LLC (“Clark Natural”), a Nevada limited liability company, and Nye Natural Medicinal Solutions, LLC (“Nye Natural”), a Nevada limited liability company (the “Terry Interest”). The Terry Interest was later increased to 22.88%. Complaint, ¶ 21;²⁷ Terry Declaration, ¶ 8.²⁸

5. During the month of December 2015, NuVeda’s annual license renewal paperwork was due to the State of Nevada. Complaint, ¶ 55;²⁹ Terry Declaration, ¶ 9.³⁰

6. During this time, Terry was NuVeda’s designated and registered point of contact with the State of Nevada for all regulatory correspondence. Complaint, ¶ 56;³¹ Terry Declaration, ¶ 10.³²

7. However, NuVeda removed Terry as NuVeda’s State of Nevada designated point of contact and refused to provide Terry with access to any records. Terry Declaration, ¶ 11.³³

Acts of Self-Dealing and other Misconduct

8. Bady, Mohajer and Kennedy, individually and at times through

²⁵ RA 004

²⁶ RA 154

²⁷ RA 004

²⁸ RA 154

²⁹ RA 008

³⁰ RA 154

³¹ RA 008

³² RA 154

³³ RA 154

NuVeda or other entities, engaged in fraudulent acts of self-dealing and other acts of misconduct. Complaint, ¶ 30;³⁴ Terry Declaration, ¶ 12.³⁵

9. For instance, Terry and other members of NuVeda learned that Bady misrepresented the source of funds he originally contributed to NuVeda in exchange for equity. Complaint, ¶ 31;³⁶ Terry Declaration, ¶ 13.³⁷

10. While Bady averred that his funding came from the sale of a business, upon information and belief, Bady, in concert with Mohajer, in fact funded his contributions from money he acquired from his friend, Majid Golpa (“Golpa”). Complaint, ¶ 33;³⁸ Terry Declaration, ¶ 15.³⁹

11. Upon information and belief, Bady and Mohajer then promised that in exchange for the funds, Golpa would receive a 5.5% membership interest in NuVeda, a pledge that was prohibited by Nevada law. Complaint, ¶ 34;⁴⁰ Terry Declaration, ¶ 16.⁴¹

12. Mohsen Bahri (“Bahri”) and Bady also negotiated the terms of a \$500,000 promissory note. Complaint, ¶ 35;⁴² Terry Declaration, ¶ 17.⁴³

13. Bady then made an undisclosed deal with Bahri to provide Bady with a \$500,000 investment in which Bahri would receive a 4% interest in NuVeda.

³⁴ RA 005

³⁵ RA 154

³⁶ RA 005

³⁷ RA 154

³⁸ RA 005

³⁹ RA 155

⁴⁰ RA 005

⁴¹ RA 155

⁴² RA 005-006

⁴³ RA 155

Complaint, ¶ 35;⁴⁴ Terry Declaration, ¶ 18.⁴⁵

14. Following discovery of the true nature of Bady and Mohajer's wrongful side deals with third parties, a dispute arose between Terry and Goldstein on the one hand and Bady and Mohajer on the other hand regarding Defendants' clandestine and wrongful side deals, pursuant to which Bady and Mohajer attempted to allocate ownership interests to their friends, and the true source of Bady's capital contribution, Golpa and Bahri. Complaint, ¶ 37;⁴⁶ Terry Declaration, ¶ 20.⁴⁷

15. Bady and Mohajer were not authorized to pledge to Golpa or Bahri a 5.5% or 4% interest in NuVeda, yet Bady demanded that the members, including Terry and Goldstein, agree to ratify his apparent promises to provide such interest to Golpa and Bahri. Complaint, ¶ 38;⁴⁸ Terry Declaration, ¶ 21.⁴⁹

16. Upon information and belief, the transfer of the interests, as proposed by Bady, jeopardized NuVeda's licenses. Complaint, ¶ 39;⁵⁰ Terry Declaration, ¶ 22.⁵¹

17. On or about November 1, 2015, a monthly payment was due to Bahri on the \$500,000 promissory note. Complaint, ¶ 40;⁵² Terry Declaration, ¶ 23.⁵³

18. Bady, a long-time personal friend with Bahri, instructed Terry to not

⁴⁴ RA 005-006

⁴⁵ RA 155

⁴⁶ RA 006

⁴⁷ RA 155

⁴⁸ RA 006

⁴⁹ RA 155

⁵⁰ RA 006

⁵¹ RA 155

⁵² RA 006

⁵³ RA 155

pay the monthly payment and stated he “would take care of it.” Complaint, ¶ 40;⁵⁴ Terry Declaration, ¶ 24.⁵⁵

19. On November 11, 2015, Bahri sent demand for the November 1, 2015 payment. Complaint, ¶ 40;⁵⁶ Terry Declaration, ¶ 25.⁵⁷

20. Bady admitted he did not make the monthly payment, but that he and Bahri had agreed to extend the monthly payment to November 15, 2015. Complaint, ¶ 40; Terry Declaration, ¶ 26.⁵⁸

21. Bady’s non-payment of the Bahri loan and subsequent negotiations were done without Terry’s knowledge and jeopardized NuVeda’s operations. Complaint, ¶ 41;⁵⁹ Terry Declaration, ¶ 27.⁶⁰

22. Bahri subsequently presented a lawsuit against Terry and Goldstein, individually, falsely alleging that they were liable for his investment through Bady. Complaint, ¶ 42;⁶¹ Terry Declaration, ¶ 28.⁶²

23. Bady and Bahri then acted in concert to allege that Goldstein and Terry were liable for the \$500,000 promissory note, as neither NuVeda nor Bady, who single-handedly communicated with Bahri and who negotiated all terms of the clandestine deal with his friend Bahri, were named as defendants. Complaint, ¶ 43;⁶³

⁵⁴ RA 006

⁵⁵ RA 155

⁵⁶ RA 006

⁵⁷ RA 155-156

⁵⁸ RA 156

⁵⁹ RA 006

⁶⁰ RA 156

⁶¹ RA 006

⁶² RA 156

⁶³ RA 006

Terry Declaration, ¶ 29.⁶⁴

24. Bady and Bahri acted in concert to paralyze Terry and Goldstein from obtaining the necessary funding by threatening to file frivolous and factually unfounded lawsuits against Terry and Goldstein for Bady's strategic gain. Complaint, ¶ 44;⁶⁵ Terry Declaration, ¶ 30.⁶⁶

25. Additionally, when Kennedy (an IRS enrolled agent) was preparing NuVeda's K-1s, Bady asked Terry to allocate his tax losses to Bady to offset Bady's income from an unrelated medical business. Complaint, ¶ 45; Terry Declaration, ¶ 31.⁶⁷

26. Terry refused and explained to Bady that loss-shifting was wrongful and potentially constituted fraud, but Bady ignored Terry's concern and collaborated with Mohajer to shift Mohajer's losses to him instead. Complaint, ¶ 45;⁶⁸ Terry Declaration, ¶ 32.⁶⁹

27. Bady and Mohajer then had nominal-member Kennedy amend the K-1s to reflect the loss-shifting to Bady in violation of the terms of the NuVeda Operating Agreement without notifying any other NuVeda members. Complaint, ¶ 45;⁷⁰ Terry Declaration, ¶ 33.⁷¹

28. Goldstein and Terry made demands for the original K-1s and other financial documents for NuVeda, but Bady and Kennedy denied the records request

⁶⁴ RA 156

⁶⁵ RA 006-007

⁶⁶ RA 156

⁶⁷ RA 156

⁶⁸ RA 007

⁶⁹ RA 156

⁷⁰ RA 007

⁷¹ RA 156

in violation of Terry's right to review the business records of NuVeda pursuant to Section 7.2 of the NuVeda Operating Agreement. Complaint, ¶ 46;⁷² Terry Declaration, ¶ 34.⁷³

29. It was also discovered that Bady engaged in self-dealing on multiple occasions. An entity known as 2 Prime, LLC ("2 Prime") entered into a financing agreement with NuVeda. Complaint, ¶ 47;⁷⁴ Terry Declaration, ¶ 35-36.⁷⁵

30. Bady exclusively negotiated the agreement with favorable terms to 2 Prime. Thereafter, it was discovered after the fact that Bady had an undisclosed 50% interest in 2 Prime, which was also co-owned by Golpa. Complaint, ¶ 47;⁷⁶ Terry Declaration, ¶ 37-38.⁷⁷

31. On or about November 20, 2015 under the guidance of NuVeda's corporate counsel, who was hired directly by Bady, Bady's and Mohajer's NuVeda interests were terminated pursuant to Section 6.2 of the Operating Agreement. Complaint, ¶ 48;⁷⁸ Terry Declaration, ¶ 39.⁷⁹

32. However, Bady and Mohajer disregarded the expulsion and claimed they remained voting members, managers, and officers with authority to act on behalf of NuVeda. Complaint, ¶ 49;⁸⁰ Terry Declaration, ¶ 40.⁸¹

33. Between November 20th, 2015 and December 3, 2015, Bady and

⁷² RA 007

⁷³ RA 156

⁷⁴ RA 007

⁷⁵ RA 156

⁷⁶ RA 007

⁷⁷ RA 157

⁷⁸ RA 007

⁷⁹ RA 157

⁸⁰ RA 007

⁸¹ RA 157

Mohajer, acting as purported representatives of NuVeda, attempted to sell NuVeda's interests in its highly valuable and privileged licenses to multiple parties, including Padgett's company, CWNevada. Complaint, ¶ 50;⁸² Terry Declaration, ¶ 41.⁸³

The District Court Action

34. Over concerns that any attempted and unauthorized transfer of interest could jeopardize NuVeda's licenses, on December 3, 2015, Goldstein and Terry filed a complaint, as individuals and on behalf of NuVeda in the District Court for Clark County, Nevada against Bady and Mohajer as Case Number A-15-728510-B (the "District Court Action") and contemporaneously filed a Motion for a Preliminary Injunction requesting that the Court enjoin any transfer of NuVeda's membership interests. Complaint, ¶ 51;⁸⁴ Terry Declaration, ¶ 42.⁸⁵

35. The District Court Action sought, among other things, the issuance of a preliminary and permanent injunction maintaining the status quo pending a final resolution of the parties' disputes in an arbitral proceeding. Complaint, ¶ 52;⁸⁶ Terry Declaration, ¶ 43.⁸⁷ NuVeda acknowledges that the District Court Action was an attempt "to stop the potential joint venture between [CWNevada] and NuVeda" and that the District Court Action "was referred to [AAA] for binding arbitration." Writ, p. 6.

⁸² RA 007

⁸³ RA 157

⁸⁴ RA 007-008

⁸⁵ RA 157

⁸⁶ RA 008

⁸⁷ RA 157

36. Although the district court did not issue a preliminary injunction in the District Court Action, on January 13, 2016, the Court ordered (the “January 13, 2016 Order”), among other things, “IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pending the completion of the contemplated arbitration, the parties are to take no further action to expulse each other on the factual bases presented to the Court during the evidentiary hearing.” Complaint, ¶ 53;⁸⁸ Terry Declaration, ¶ 44.⁸⁹

37. Goldstein and Terry commenced a private arbitration proceeding with the American Arbitration Association against NuVeda, Bady and Mohajer captioned as *Terry, et al. v. NuVeda LLC, et al.*, AAA Case No. 01-15-005-8574 (the “Arbitration”). Complaint, ¶ 54;⁹⁰ Terry Declaration, ¶ 45.⁹¹

38. Notwithstanding the express language of the January 13, 2016 Order, in a March 10, 2016 meeting attended by Terry, Bady called for a vote to expel Terry from NuVeda. Complaint, ¶ 59;⁹² Terry Declaration, ¶ 46.⁹³

39. Bady, Mohajer and Kennedy voted in favor of the motion to expel Terry in violation of the January 13, 2016 Order. Complaint, ¶ 60;⁹⁴ Terry Declaration, ¶ 47.⁹⁵

40. The purported expulsion was further documented in a meeting on or about September 19, 2017, where the NuVeda Meeting Minutes indicate the Terry

⁸⁸ RA 008

⁸⁹ RA 157

⁹⁰ RA 008

⁹¹ RA 157-158

⁹² RA 008

⁹³ RA 158

⁹⁴ RA 009

⁹⁵ RA 158

Interest was distributed to Bady and Mohajer in yet another act of blatant self-dealing. Complaint, ¶ 61;⁹⁶ Terry Declaration, ¶ 48.⁹⁷

41. NuVeda, Bady and Mohajer transferred the Terry Interest in NuVeda directly to Bady and Mohajer without Terry’s consent. Complaint, ¶ 62;⁹⁸ Terry Declaration, ¶ 49.⁹⁹

Purchase and Sale Agreement for Terry’s Ownership Interest in NuVeda and NuVeda-Managed Licenses

42. During the pendency of the District Court Action and Arbitration, on or about April 30, 2018, Terry entered into a “Purchase and Sale Agreement for Terry’s Ownership Interest in NuVeda and NuVeda-Managed Licenses” (the “Terry Purchase Agreement”) with BCP 7 as the Buyer and Padgett as guarantor. Terry Declaration, ¶¶ 50, 51;¹⁰⁰ Complaint, ¶¶ 85, 86;¹⁰¹ Terry Purchase Agreement, Ex. 4.¹⁰²

43. The Terry Purchase Agreement provides, among other things, that Terry agreed to sell the Terry Interest and BCP 7 agreed to purchase the Terry Interest for specified consideration and on specific terms. Complaint, ¶ 87;¹⁰³ Terry Declaration, ¶ 52.¹⁰⁴

44. The total purchase price for BCP 7 to acquire the Terry Interest was

⁹⁶ RA 009

⁹⁷ RA 158

⁹⁸ RA 009

⁹⁹ RA 158

¹⁰⁰ RA 158

¹⁰¹ RA 013

¹⁰² RA 196-201

¹⁰³ RA 013

¹⁰⁴ RA 158

\$1.75 million (the “Purchase Price”), which was “substantially reduced” from fair market value. Complaint, ¶ 88;¹⁰⁵ Terry Declaration, ¶ 53.¹⁰⁶

45. Terry was induced to sign the Terry Purchase Agreement in reliance upon Padgett’s representations that the Purchase Price would be paid. Terry Declaration, ¶ 54.¹⁰⁷

46. The Purchase Price was payable as follows: (i) an initial payment of \$500,000.00 in good and payable U.S. funds to be paid to Terry on or before June 15, 2018 (the “Initial Payment”), and (ii) monthly payments of the \$1.25 million balance due on or before June 15, 2028 with payments due monthly until paid in full (the “Monthly Payments”). Complaint, ¶ 89;¹⁰⁸ Terry Declaration, ¶ 55.¹⁰⁹

47. The Monthly Payments were to be made on or before the first day of the month in an amount not less than the interest accrued on the outstanding balance at an interest rate of 18%. Complaint, ¶ 90;¹¹⁰ Terry Declaration, ¶ 56.¹¹¹

48. The Monthly Payments were to commence May 1, 2018, and the first payment was to have been made no later than May 2, 2018. Complaint, ¶ 91;¹¹² Terry Declaration, ¶ 57.¹¹³

49. The Terry Purchase Agreement further provided that there shall be acceleration of the outstanding balance and any unpaid accrued interest thereon

¹⁰⁵ RA 013
¹⁰⁶ RA 158
¹⁰⁷ RA 158
¹⁰⁸ RA 013
¹⁰⁹ RA 158-159
¹¹⁰ RA 013
¹¹¹ RA 159
¹¹² RA 013
¹¹³ RA 159

upon (1) the sale or transfer of the Terry Interest to a vehicle not owned by BCP 7, or any beneficial rights thereunder, from BCP 7 to a third party (other than CWNV, LLC); or (2) a default of a payment obligations, which shall result from any failure to timely pay the Initial Down Payment or any Monthly Payments on the Balance following notice of failure to Padgett and no cure within 10 business days thereof. Complaint, ¶ 92;¹¹⁴ Terry Declaration, ¶ 58.¹¹⁵

50. Upon execution of the Terry Purchase Agreement and upon receipt of the first Monthly Payment, Terry agreed, among other things, to assign any and all claims and right in the Arbitration and District Court Action to BCP 7. Complaint, ¶ 93;¹¹⁶ Terry Declaration, ¶ 59.¹¹⁷

51. BCP 7 made a partial payment toward the Initial Payment in the sum of \$250,000.00 on or about August 1, 2018. Complaint, ¶ 94;¹¹⁸ Terry Declaration, ¶ 60.¹¹⁹

52. In addition to the partial Initial Payment, BCP 7 made partial interest and extension payments. Complaint, ¶ 94;¹²⁰ Terry Declaration, ¶ 61.¹²¹ Terry disputes that he received the sum of \$757,757.00 from BCP 7 and/or Padgett as represented by NuVeda.

53. However, BCP 7 failed to pay the Initial Payment or Monthly

¹¹⁴ RA 013

¹¹⁵ RA 159

¹¹⁶ RA 014

¹¹⁷ RA 159

¹¹⁸ RA 014

¹¹⁹ RA 159

¹²⁰ RA 014

¹²¹ RA 159

Payments in full. Complaint, ¶ 96;¹²² Terry Declaration, ¶ 62.¹²³

54. As a result of BCP 7's failure to pay the Initial Payment or any of the Monthly Payments in full, Terry provided notice of and right to cure this failure to BCP 7 and Padgett. Complaint, ¶ 97;¹²⁴ Terry Declaration, ¶ 63.¹²⁵

55. BCP 7 and Padgett failed to cure the outstanding balance owed following notice of such failure and a right to cure within 10 business days. Complaint, ¶ 98;¹²⁶ Terry Declaration, ¶ 64.¹²⁷

56. As a result of BCP 7's and Padgett's failure to pay the Initial Payment and Monthly Payments in full, including the first Monthly Payment, there has not been a valid transfer of the Terry Interest to BCP 7. Complaint, ¶ 99;¹²⁸ Terry Declaration, ¶ 65.¹²⁹

57. Notwithstanding the fact that the Terry Interest was never properly transferred to BCP 7, in an email dated June 5, 2018 from Padgett to the Arbitrator in the Arbitration, Padgett purported to dismiss "all claims of myself, CWNevada, BCP Holdings 7, LLC and Shane Terry (all right, title, and interest against Bady, Mohajer, and NuVeda and its subsidiaries (Clark NMSD, Clark Natural Medicinal Solutions, and Nye Natural Medicinal Solutions) with prejudice." Complaint, ¶ 100;¹³⁰ Terry Declaration, ¶ 66;¹³¹ Electronic mail from Padgett to Nikki Baker, Ex.

¹²² RA 014

¹²³ RA 159

¹²⁴ RA 014

¹²⁵ RA 159

¹²⁶ RA 014

¹²⁷ RA 159

¹²⁸ RA 014

¹²⁹ RA 159

¹³⁰ RA 014

¹³¹ RA 159-160

5.¹³²

58. Ms. Baker then proceeded to dismiss the arbitration as to BCP Holding 7, LLC. See electronic mail dated October 9, 2018. AAA then confirmed that BCP 7, LLC was dismissed as a party. See letter from AAA dated October 9, 2018.¹³³

59. Not only did CWNevada never make or assert any claims related to the Arbitration, the Padgett email clearly evidences a conspiracy between Padgett, NuVeda, Bady and Mohajer to defraud Terry by having BCP 7 purportedly purchase the Terry Interest, and then immediately attempt to dismiss the claims in the Arbitration without BCP 7 and Padgett paying the agreed consideration. Complaint, ¶ 101;¹³⁴ Terry Declaration, ¶ 67.¹³⁵

III. Argument

A. Legal Standard

1. Standard of Review

NuVeda seeks dismissal or summary judgment of Terry’s claims against NuVeda through an extraordinary writ, and for the first time, dismissal as it relates to undisclosed “affiliates”. To the extent NuVeda seeks dismissal for “failure to state a claim upon which relief can be granted”, the writ must be denied. This Court has long held:

The standard of review for a dismissal under subsection b(5) is rigorous, as the court must construe the pleadings liberally and draw every fair inference in favor of the non moving party.

. . .

¹³² RA 203

¹³³ RA 207

¹³⁴ RA 014

¹³⁵ RA 160

A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact would entitle him or her to relief.

Simpson v. Mars Inc., 113 Nev. 188, 929 P.2d 966 (1997).

In addition, in *Hynds Plumbing & Heating Co. v. Clark County Sch. Dist.*, 94 Nev. 776, 587 P.2d 1331 (1978), this Court held, “[w]hen tested by a subdivision (b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the allegations of the complaint must be accepted as true.” Further, the Nevada Supreme Court clearly stated that: “The appropriate standard for a motion to dismiss based on a failure to state a claim is ‘beyond a doubt’ and not ‘beyond a reasonable doubt.’” *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008).

In the alternative, although NuVeda has never presented a statement of undisputed facts, NuVeda seeks summary judgment on Terry’s claims for relief against NuVeda. Should this Court treat NuVeda’s writ as one for summary judgment, before granting a motion for summary judgment, NRCP 56 requires there be no genuine issue of material fact. *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005).

While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to “do more than simply show that there is some metaphysical doubt” as to the operative facts in order to avoid summary judgment being entered in the moving party’s favor. The nonmoving party “must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.” *Id.*

NuVeda admits there are issues of fact which prevent summary judgment on

the issue of contract rescission. Writ, p. 11. Moreover, NuVeda acknowledges that a party must rescind a contract within a reasonable time, and what constitutes a reasonable time depends upon the facts of a particular case to be determined by the trier of fact. Writ, p. 11. Terry has more than established issues of material fact concerning the rescission of the Terry Purchase Agreement, and thus, his entitlement to the Terry Interest.

2. The NuVeda Operating Agreement

The NuVeda Operating Agreement provides in part:

11.3 Arbitration Arbitration proceedings shall be conducted under the Rules of Commercial Arbitration of the AAA (the “Rules”).

To the extent any provisions of the Rules conflict with any provision of this Section, the provisions of this section shall control.

The arbitrator shall have all powers of law and equity, which it can lawfully assume, necessary to resolve the issues in dispute including, without limiting the generality of the foregoing, making awards of compensatory damages, issuing both prohibitory and mandatory orders in the nature of injunctions and compelling the production of documents and witnesses for presentation at the arbitration hearings on the merits of the case...The statutory, case law and common law of the State of Nevada shall govern in interpreting their respective rights, obligations and liabilities arising out of or related to the transactions provided for or contemplated by this Agreement, including without limitation, the validity, construction and performance of all or any portion of this Agreement, and the applicable remedy for any liability established thereunder, and the amount or method of computation of damages which may be awarded, but such governing law shall not include the law pertaining to conflicts or choice of laws of Nevada; provided however, that should the parties refer a dispute arising out of or in connection with an ancillary agreement or an agreement between some or all of

the Members which specifically references this Article, then the statutory, case law and common law of the State whose law governs such agreement (except the law pertaining to conflicts or choice of law) shall govern in interpreting the respective rights, obligations and liabilities of the parties arising out of or related to the transactions provided for or contemplated by such agreement, including without limitation, the validity,

construction and performance of all or any portion of such agreement, and the applicable remedy for any liability established thereunder, and the amount or method of computation of damages which may be awarded.

Any action or proceeding subsequent to any award rendered by the arbitrator in the Member Dispute, including but not limited to, any action to confirm, vacate, modify, challenge or enforce the arbitrator's decision or award shall be filed in a court of competent jurisdiction in the same county where the arbitration of the Member dispute was conducted, and Nevada law shall apply in any such subsequent action or proceeding. (emphasis added).

See NuVeda Operating Agreement, pp. 18-19.¹³⁶

As set forth above, AAA no longer has jurisdiction over the Arbitration and that matter was closed on March 20, 2019. Moreover, the NuVeda Operating Agreement specifically provides that any post Arbitration proceedings be filed with this Court. Thus, the district court is the proper place to bring Terry's claim for rescission and declaratory relief regarding the Terry Interest.

B. The Terry Purchase Agreement should be rescinded for fraud in the inducement and failure of consideration.

Although Terry's claim for rescission is only against BCP 7 and Padgett, NuVeda inexplicably raises it and acknowledges that there are issues of fact which prevent summary judgment on the issue of rescission of the Terry Purchase

¹³⁶ RA 189-190

Agreement. “Rescission is an equitable remedy which totally abrogates a contract, and which seeks to place the parties in the position they occupied prior to executing the contract.” *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993). A party to a contract may seek rescission of that contract based upon fraud in the inducement or a failure of consideration. *Awada v. Shuffle Master, Inc.* 123 Nev. 613, 621, 173 P.2d 707, 713 (2007); *Sprouse v. Wentz*, 105 Nev. 597, 601, 781 P.2d 1136, ____ (1989). To establish fraud in the inducement of a contract, a party must prove that the other party made a false representation that was material to the transaction. *Awada*, 123 Nev. at 621. To establish a failure of consideration, a party must demonstrate he failed to receive his bargained for consideration. *Sprouse*, 105 Nev. at 601.

When a contract has been partially performed, and one of the parties defaults, the other has a choice of remedies. He may rescind or affirm the contract, *but he cannot do both*. If he rescinds, he must return whatever of value he received under it and he may recover back whatever he has paid. He cannot at the same time affirm the contract by retaining its benefits and rescind it by repudiating its burdens. *Bergstrom*, 109 Nev. at 577, citing 5 Arthur Linton Corbin, CORBIN on Contracts § 1114 (1964) (emphasis in original). “Further, there can be no partial rescission; a contract is either valid or void *in toto*.’ *Bergstrom*, 109 Nev. at 577. quoting, *Holden v. Dubois*, 665 P.2d 1175 (Okla. 1983). “Because a rescinded contract is void ab initio, following a lawful rescission the ‘injured’ party is precluded from recovering damages for breach just as though the contract had never been entered into by the parties.” *Bergstrom*, 109 Nev. at 577-78. Upon rescission, the parties should be

returned as closely as possible to their respective positions prior to entering into the contract. *Bergstrom*, 109 Nev. at 578.

Here, the facts are not in dispute that Padgett fraudulently induced Terry to sign the Terry Purchase Agreement and after submitting the dismissal in the Arbitration, Padgett failed to pay the agreed consideration. In these circumstances, where Terry was fraudulently induced to sign the Terry Purchase Agreement and where he did not receive his bargained for consideration, rescission is proper. It follows that if Terry is successful on this claim for rescission, then he will also be successful on his claim for declaratory relief finding he is the rightful owner of the Terry Interest.

C. Terry's Claims for Relief in the action below are distinctly different from those in the Arbitration.

As set forth above, NuVeda acknowledges that the District Court Action and related Arbitration was an attempt “to stop the potential joint venture between [CWNevada] and NuVeda.” Writ, p. 6. “[F]or claim preclusion to apply the following factors must be met: (1) the same parties or their privies are involved in both cases, (2) a valid final judgment has been entered, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.” *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1056-1057, 194 P.3d 709, ____ (2008). The Complaint filed in this action below, and Terry's claims therein generally involve his efforts to rightfully regain his interest in NuVeda after entering the Terry Purchase Agreement. None of Terry's claims in the action below involve an effort to stop the joint venture between CWNevada and NuVeda. In fact,

Terry's claim for rescission, and the related claim for declaratory relief could not have been a part of the District Court Action or Arbitration as those claims did not even exist at that time. Moreover, it was only necessary to seek to set aside the dismissal in the arbitration because the district court initially directed Terry back to AAA to request relief from the arbitrator. Because the Arbitration is closed and AAA no longer has jurisdiction, it is appropriate that the district court hear all issues related to Terry's claims for relief.

Regardless, NuVeda seeks to have Terry's claims for relief in the action below, unrelated to those in the Arbitration, dismissed against NuVeda only. Certain dates are relevant to the analysis. Although AAA dismissed BCP 7 as a party on October 9, 2018, the AAA matter was not closed until March 20, 2019. Again, during a time when he represented Terry, Mr. Stipp filed the Stipp Complaint less than three (3) months later on June 7, 2019 but did not include a claim for rescission of the Terry Purchase Agreement or seek to set aside the dismissal in the Arbitration. Now, NuVeda seeks to use that neglect against Terry.

As set forth above, a rescinded contract is void ab initio. It logically follows that if the Terry Purchase Agreement is void, then the dismissal entered in the Arbitration, based solely on the electronic mail proffered by Mr. Padgett, is equally void. Upon rescission, the Terry Interest should be returned to Terry. While Terry does not believe it is necessary to set aside a dismissal in the Arbitration that is unrelated to his current claims for relief, to the extent it is, the analysis is properly under NRCP 60(b)(4).

NRCP 60(b) provides in part:

(b) *Grounds for Relief from a Final Judgment, Order, or Proceeding.* On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Rule 60(b)(4) allows a court to set aside a judgment, in this case the AAA dismissal, when it is void. *LN Mgmt. LLC Services 440 Sarment v. Wells Fargo Bank, N.A.*, 2018 Nev. App. Unpub. LEXIS 768 (Nev. App. 2018). This rule, which is a remedial in nature, is to be construed liberally to relieve the harshness of rigid form by applying the flexibility of discretion. *La-Tex Partnership v. Deters*, 111 Nev. 471, 893 P.2d 361 (1995).

Importantly, as it concerns NuVeda's Writ, the six (6) months timing requirement under NRCP 60(c)(1) does not apply to void judgments. In *Teriano v. Nev. State Bank (In re Harrison Living Trust)*, 121 Nev. 217, 112 P.3d 1058 (2005), this Court recognized that judgments, once found to be void, should generally be set aside. This Court further recognized that NRCP 60(b) specifically provides that motions to challenge orders as void must be made within a reasonable time. Whether a motion to a Rule 60(b)(4) motion is brought within a reasonable time is

a matter addressed to the trial court's sound discretion. *Id.* At 1062. Therefore, under the circumstances of this case, where the dismissal in the Arbitration was submitted as a result of a void agreement, such dismissal should be set aside if necessary. At the very least, the writ must be denied and the issue of whether a request to set aside the dismissal left to the sound discretion of the trial court.

D. Terry's claim for Declaratory Relief is properly before the district court.

Article XI of the NuVeda Operating Agreement concerns dispute resolution among NuVeda's members and provides in part:

11.1 Disputes Among Members. The Members agree that in the event of any dispute or disagreement solely between or among any of them arising out of, relating to or in connection with this Agreement or the Company or its organization, formation, business or management ("Member Dispute"), the Members shall use their best efforts to resolve any dispute arising out of or in connection with this Agreement by good-faith negotiation and mutual agreement. The Members shall meet at a mutually convenient time and place to attempt to resolve any such dispute.

However, in the event that the Members are unable to resolve any Member Dispute, such parties shall first attempt to settle such dispute through a non-binding mediation proceeding. In the event any party to such mediation proceeding is not satisfied with the results thereof, then any unresolved disputes shall be finally settled in accordance with an arbitration proceeding. In no event shall the results of any mediation proceeding be admissible in any arbitration or judicial proceeding.

See NuVeda Operating Agreement, p. 18.¹³⁷

The First Claim for Relief includes a claim for relief by Terry against all

¹³⁷ RA 189

Defendants for Declaratory Relief that (i) the Terry Purchase Agreement is null and void resulting from a fraud in the inducement and for a complete failure of consideration, (ii) the Terry Interest was never transferred to BCP 7 or any other entity, (iii) Plaintiff Terry is the sole and only owner of the Terry Interest. In addition to being against NuVeda and its members, it is also against Padgett and BCP 7. As a result, it is not solely among the Members of NuVeda and by its express terms, the dispute resolution clause in the NuVeda Operating Agreement requiring mediation and/or arbitration does not apply to this claim for relief. Thus, Terry's claims, specifically including his claim for declaratory relief, are properly before the district court.

IV. Conclusion

Based on the foregoing, Shane Terry, Plaintiff below and the real party in interest respectfully requests that NuVeda's writ be denied and that he be allowed to proceed with all of his claims for relief in the action below.

DATED this 21st day of July 2021.

MUSHKIN & COPPEDGE

/s/L. Joe Coppedge

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CERTIFICATE OF COMPLIANCE

1. 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:

2. ☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font; or

3. ☐ This brief has been prepared in a monospaced typeface using *[state name and version of word-processing program]* with *[state number of characters per inch and name of type style]*.

4. 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 either:

☒ Proportionately spaced, has a typeface of 14 points or more, and contains 6,549 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

☐ Does not exceed _____ pages.

5. 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

where the 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 of the Nevada Rules of Appellate Procedure.

DATED this 21st day of July, 2021.

MUSHKIN & COPPEDGE

/s/L. Joe Coppedge

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I certify that on this 21st day of July, 2020, I served a true and correct copy of the foregoing **Answer to Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus** as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;
- ☐ via hand-delivery to the addressee listed below;
- ☐ via facsimile;
- ☐ by transmitting via email to the email address set forth below.

/s/Karen L. Foley
An Employee of
Mushkin & Coppedge