IN THE SUPREME COURT OF THE STATE OF NEVADA

In Re: D.O.T. Litigation,

WELLNESS CONNECTION OF NEVADA, LLC,

Appellant,

vs.

CLARK NATURAL MEDICINAL SOLUTIONS, LLC dba NUVEDA; NYE NATURAL MEDICINAL SOLUTIONS, LLC dba NUVEDA; CLARK NMSD, LLC dba NUVEDA; INYO FINE CANNABIS DISPENSARY LLC dba INYO FINE CANNABIS DISPENSARY; DH FLAMINGO INC.; SURTERRA HOLDINGS INC.; TGIG, LLC; NEVADA HOLISTIC MEDICINE, LLC; GBS NEVADA PARTNERS, LLC; FIDELIS HOLDINGS, LLC; GRAVITAS NEVADA, LLC; NEVADA PURE, LLC; MEDIFARM, LLC; MEDIFARM IV LLC; RURAL REMEDIES LLC; THC NEVADA LLC; HERBAL CHOICE INC.; TRYKE COMPANIES SO NV, LLC; NULEAF INCLINE DISPENSARY, LLC; GREEN LEAF FARMS HOLDINGS LLC; GREEN THERAPEUTICS LLC; NEVCANN LLC; RED EARTH LLC; LONE MOUNTAIN PARTNERS, LLC; INTEGRAL ASSOCIATES, LLC dba ESSENCE CANNABIS DISPENSARIES, ESSENCE TROPICANA, LLC, ESSENCE HENDERSON, LLC; THE STATE OF NEVADA DEPARTMENT OF TAXATION; NEVADA ORGANIC

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APPELLANT'S OPENING BRIEF

Docket 85314 Document 2024-11499

REMEDIES, LLC; and GREENMART OF NEVADA NLV LLC,

Respondents.

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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 justices of this Court may evaluate possible disqualification or recusal:

1. Appellant Wellness Connection of Nevada, LLC ("Wellness") is a Nevada limited liability company.

2. L. Christopher Rose, Esq. of Howard & Howard Attorneys PLLC represented Wellness in the district court and has appeared in this Court along with Connor J. Bodin.

3. No publicly traded company has any interest in this appeal.

DATED this 1st day of April, 2024.

HOWARD & HOWARD ATTORNEYS PLLC

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2018 process	The State of Nevada, Department of Taxation's application and license process in 2018 for the award of recreational use marijuana dispensary licenses throughout the State of Nevada
Clark Plaintiffs	Clark Natural Medicinal Solutions, LLC, Nye Natural Medicinal Solutions, LLC, Clark NMSD, LLC, and Inyo Fine Cannabis Dispensary, LLC
DOT	Department of Taxation of the State of Nevada
Plaintiffs	(1) TGIG, LLC, (2) Nevada Holistic Medicine, LLC, (3) GBS Nevada Partners, LLC, (4) Fidelis Holdings, LLC, (5) Gravitas Nevada, LLC, (6) Nevada Pure, LLC, (7) Medifarm, LLC, (8) Medifarm IV, LLC, (9) Rural Remedies, LLC, (10) THC Nevada, LLC, (11) Herbal Choice, Inc., (12) Green Leaf Farms Holdings, LLC, (13) Green Therapeutics LLC, (14) Nevcann, LLC, (15) Red Earth, LLC, (16) Clark Natural Medicinal Solutions, LLC, (17) Nye Natural Medicinal Solutions, LLC, (18) Clark NMSD, LLC, and (19) Inyo Fine Cannabis Dispensary, LLC
Scores and Rankings	Trial Exhibit 84, the DOT's 2018 Retail Marijuana Store Application Scores and Rankings 7 App. 1150-56
TGIG Appeal	NSC Case No. 82014, the TGIG Plaintiffs' appeal to the Nevada Supreme Court of the Phase 1 and Phase 2 judgments, joined by some Plaintiffs
TGIG Plaintiffs	TGIG, LLC, Nevada Holistic Medicine, LLC, GBS Nevada Partners, LLC, Fidelis Holdings, LLC, Gravitas Nevada, LLC, Nevada Pure, LLC, Medifarm, LLC, Medifarm IV, LLC

Trial Transcript	The trial transcript from the Phase 1 (one day) and Phase 2 (one month) trials and hearings in district court, on file in the appendix for the TGIG Appeal, NSC Case No. 82014, Volumes 280-332.
Wellness	Appellant Wellness Connection of Nevada, LLC

JURISDICTIONAL STATEMENT

Wellness appeals from an order denying its motion for attorneys' fees entered August 27, 2021. 12 App. 1823. Notice of entry of the order was August 30, 2021. 12 App. 1835. The order was not yet appealable as there was no final judgment due to the phasing of the various aspects of the district court proceedings, which was separated into three phases. 7 App. 1069-85. The district court certified its judgments as to Phase 1 and Phase 2 (but not Phase 3) as final on August 4, 2022. 12 App. 1862-79. Notice of entry of the order granting certification was given that same day. 12 App. 1880-1900. Wellness timely filed its notice of appeal on September 2, 2022. 13 App. 1965-67.

ROUTING STATEMENT

This matter is presumptively retained by the Nevada Supreme Court under NRAP (a)(9) as this case originated in business court and involves the appeal of an order from a business court judge.

ISSUES PRESENTED ON APPEAL

1) Plaintiffs sought a "do over" of Nevada's 2018 process for recreational marijuana dispensary licenses with no right or standing to do so. They also admitted they had no evidence that Wellness engaged in wrongdoing or that Wellness should not have received a license. At the month-long trial, Plaintiffs presented no evidence and made no arguments against Wellness. Did Plaintiffs have reasonable ground to bring and maintain their claims to strip Wellness of its license?

2) The district court denied Wellness' Motion for Attorneys' Fees under NRS 18.010(2)(b), finding that Plaintiffs had a reasonable basis to bring their claims for judicial review and that Wellness was not the prevailing party. But the district court later awarded Wellness costs, specifically finding that Wellness was the prevailing party. Did the district court err in denying Wellness' Motion for Attorneys' Fees?

STATEMENT OF THE CASE

This is an appeal from the district court's order denying Wellness' motion for attorneys' fees entered after a month-long bench trial before the Honorable Elizabeth G. Gonzalez, District Court Judge of the Eighth Judicial Court (now retired).

INTRODUCTION

This case arises from a group of unsuccessful applicants that sued the State of Nevada, Department of Taxation ("DOT"), to challenge the DOT's 2018 application and license process for issuance of recreational use marijuana dispensary licenses (the "2018 process"). As a result of the 2018 process, which involved 457 applications, the DOT issued 61 additional dispensary licenses throughout the State of Nevada. The Plaintiffs[1] in this matter are a group of 19 marijuana license holders that were upset because their applications did not rank sufficiently high enough in the 2018 process for Plaintiffs to obtain additional licenses. As a result, Plaintiffs decided to sue the DOT claiming that the DOT failed to follow the rules and acted improperly by showing favoritism to certain successful applicants. The TGIG Plaintiffs – a large group of dispensaries with multiple collective locations – lead the charge both in district court and in appealing the adverse judgment against them.

[1] The 19 "Plaintiffs" are defined and listed in the Table of Definitions, which also includes other defined terms.

Plaintiffs initially sued only the DOT; however, much to Wellness' shock and disappointment, Plaintiffs later decided to amend their claims to also sue each successful applicant that received a license in the 2018 process. That included Wellness – a small, privately owned company that operated only one dispensary at one location. Wellness received only one additional license in the 2018 process despite submitting applications for licenses in three jurisdictions.

Among other things, Plaintiffs' claims sought a "do over" of the 2018 process – a complete "start from scratch" with the hope (but with no evidence to support) that their applications would somehow score higher in the rankings the second time around. Stated differently, Plaintiffs sought to strip Wellness and every other successful applicant of their licenses and to throw those licenses back in the pot to be divvied up (hopefully differently) after a second round of reviews and scoring.

Plaintiffs' claims against Wellness and their efforts to strip Wellness of its license were groundless and unsupported by any legal or evidentiary basis. Indeed, Plaintiffs *knew* they did not have a basis to sue Wellness – a fact that each Plaintiff confirmed and admitted during NRCP 30(b)(6) witness depositions. Each Plaintiff testified in deposition that it did not have any evidence that the DOT showed any preferential treatment to Wellness, that Wellness' applications were improper or incomplete, or that Wellness engaged in any wrongdoing. Plaintiffs also performed

no discovery regarding their claims. They served Wellness with no document requests, no interrogatories, and took no depositions of any Wellness representative. Despite Plaintiffs' deposition admissions and failure to perform any discovery as to Wellness, Wellness was forced to suffer the time and expense of not only a lengthy discovery process but also a *month-long* trial – a trial where none of the Plaintiffs called Wellness as a witness, none of the Plaintiffs presented any evidence about or against Wellness, and none of the Plaintiffs made any arguments whatsoever about or against Wellness.

The district court ultimately rejected Plaintiffs' efforts to strip Wellness of its license and their quest for a "do over" of the 2018 process failed. But undeterred, a significant number of Plaintiffs appealed the judgment, designated as NSC Case No. 82014 (the "TGIG Appeal"). In the ultimate admission that naming Wellness in this action was wholly unnecessary and without basis, these appealing Plaintiffs did not bother to name Wellness as a party/respondent in the TGIG Appeal. That appeal has concluded, and the Nevada Supreme Court summarily and thoroughly rejected Plaintiffs' claims. The Court found that Plaintiffs had no right to even seek judicial review and did not possess standing to challenge the 2018 process. In short, it is indisputable – and it is now the law of the case – that Plaintiffs never should have filed their claims in the first place much less added Wellness to those claims.

This appeal raises the sole issue of whether the district court erred in denying Wellness' Motion for Attorneys' Fees under NRS 18.010(2)(b), which provides for an award of attorneys' fees if a claim "was brought or maintained without reasonable ground or to harass the prevailing party." The district court, the Honorable Elizabeth G. Gonzalez (now retired), denied Wellness' Motion for Attorneys' Fees, finding that "Plaintiffs' claims were brought with a reasonable basis" because Wellness was sued for purposes of "joinder issues on the Petition for Judicial Review claim." But the district court erred in denying attorneys' fees because there was no basis for judicial review or for naming Wellness as part of judicial review. In fact, Wellness did not seek fees for judicial review claims but for Plaintiffs' other claims for declaratory relief and damages that resulted in the month-long trial and that caused the significant fees incurred – claims that clearly had no legal or factual basis. Notably, the district court (the Honorable Elizabeth G. Gonzalez) denied fees finding that Wellness was not a prevailing party as to judicial review. But after the case was reassigned, the district court (the Honorable Joanna S. Kishner) later awarded Wellness its costs incurred, specifically and correctly finding Wellness to be the prevailing party on *all* claims because Wellness succeeded in defending and retaining its license.

If attorneys' fees are not appropriate in this case under NRS 18.010(2)(b), then it is difficult to imagine any case where fees would be appropriate. Denying

attorneys' fees here certainly does not comport with the legislative mandate that "[t]he court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." *Id*. (emphasis supplied). The Plaintiffs are a large group of 19 cannabis operators that took a wild shot, unsubstantiated by any law or facts, to strip Wellness of the one license it obtained in the 2018 process to secure more licenses for themselves. They sued for a "redo" of the entire process although they had no right to do so, as Plaintiffs should have known and as the Nevada Supreme Court has now made clear.

The Nevada legislature adopted NRS 18.010(2)(b) precisely for situations like this one. To avoid rendering that statute meaningless, and for all the other reasons set forth herein, Wellness should be awarded its attorneys' fees incurred in this matter. This Court should reverse.

STATEMENT OF FACTS

A. The DOT Accepts Applications and Awards Recreational Marijuana Licenses Throughout the State of Nevada.

During the 2016 election, Nevada voters passed the Regulation and Taxation of Marijuana Act (the "Act"), which legalized the purchase, possession, and consumption of recreational marijuana for adults 21 and older. As provided in the statutory scheme, the DOT was to adopt "all regulations necessary or convenient to carry out the provisions" of the Act, including "[p]rocedures for the issuance, renewal, suspension, and revocation of a license to operate a marijuana

establishment" and "[q]ualifications for licensure that are directly and demonstrably related to the operation of a marijuana establishment." Former NRS 453D.200(1).[2]

Additionally, former NRS 453D.210(6) required the DOT to use a fair and impartial application grading process. Former NRS 453D.210(6) specifically stated that "[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."

In July 2018, the DOT issued a Notice of Intent to Accept applications for over 60 recreational marijuana retail store licenses in various jurisdiction throughout the State of Nevada. Plaintiff's Trial Exhibit 1005, 8 App. 1157-90. The application process was highly competitive and the DOT received over 450 applications in total as shown by the DOT's 2018 Retail Marijuana Store Application Scores and Rankings (the "Scores and Rankings"). Joint Trial Exhibit 84, 7 App. 1150-56.

In December 2018, the DOT announced the award of the licenses by issuing the Scores and Rankings. *See id*. The DOT's Scores and Rankings include a numerical ranking and a score for all applicants – a total of 457. *See id*. The number

[2] The Nevada legislature repealed NRS Chapter 453D in 2019 and vested authority to license and regulate the cannabis industry in the Cannabis Compliance Board. *See* Title 56 of the Nevada Revised Statutes, Regulation of Cannabis, NRS Chapters 678A, 678B, 678C, and 678D.

of available licenses in each jurisdiction, and the names of the successful applicants who qualified for those licenses, are highlighted in green in the Scores and Rankings – a total of 61.[3] *See id*.

Wellness submitted three applications in three different jurisdictions. Scores and Rankings, 7 App. 1150, 1152, 1156. It received only one license in the City of Las Vegas, scoring ninth out of a total of 10 available licenses. *Id*. at 1150. Wellness' applications in unincorporated Clark County and in the City of Reno fell short as just barely beyond the ranking requirements to obtain licenses in those jurisdictions. *Id*. at 1152 and 1156. In Clark County, Wellness ranked 11th with only 10 available licenses, and in Reno, Wellness ranked ninth with only six available licenses. *Id.*

B. Unhappy With the Results, Several Disgruntled, Unsuccessful Applicants File Suit Not Only Against the State of Nevada But Also Against Wellness and Other Applicants.

In early 2019, shortly after the DOT announced the results of the 2018 process, numerous unsuccessful applicants filed lawsuits alleging that the denial of their applications was unlawful. 1 App. 1-17, 1 App. 18-166. They raised various legal theories founded on the notion that the DOT engaged in favoritism and corruption

[3] Given the fundamental importance of the Scores and Rankings to Plaintiffs' claims, it was surprising that the appealing Plaintiffs seemingly did not include the Scores and Rankings in the 343 volume appendix to the TGIG Appeal. *See* TGIG Appeal, Plaintiffs' Joint Appendix (listing seven trial exhibits but not the Scores and Rankings, Trial Exhibit 84).

with some of the successful applicants and that some winning applications violated applicable requirements. *See id*.

On March 19, 2019, some of the Plaintiffs, including the TGIG Plaintiffs, brought motions for injunctive relief against the DOT to prevent it from proceeding to finalize licenses awarded in the 2018 process. 5 App. 653-762. The district court granted limited injunctive relief against the DOT but denied the broad sweeping relief the Plaintiffs sought. 5 App. 781-804. Significantly, prior to issuing its limited injunction order, the district court asked the DOT to submit information about the applicants with whom there were no disputes about their applications being complete and in compliance. In response, the DOT identified Wellness as one of those applicants whose applications were fully compliant. Plaintiffs' Trial Exhibit 1302, 8 App. 1191-93. While the limited injunction prohibited the DOT from finalizing the licenses of certain few applicants,[4] Wellness was undisputedly not one of those applicants. Based on the information the DOT supplied to the district court (*see id*.), the district court's injunction order specifically identified Wellness as a compliant applicant in footnote 15 of its injunction order. 5 App. 796.

[4] Although the term "license" is used frequently throughout the district court proceedings and in this Opening Brief, the DOT actually awarded "conditional" certificates/licenses in the 2018 process. The licenses would become "final" only after successful applicants met certain additional conditions and requirements.

Later in 2019, Plaintiffs requested and received permission from the district court to amend their complaints to add Wellness and other successful applicants as defendants in the case. 6 App. 934. They did so with no regard to whether any legal authorities would support any relief against Wellness. Further, Plaintiffs proceeded with their claims against Wellness despite the DOT having already confirmed in the injunction proceedings – and the district court finding – that Wellness' applications complied with NRS 453D.200(6) and the absence of any evidence of wrongdoing on behalf of Wellness. Plaintiffs' Trial Exhibit 1302, 8 App. 1191-93, *and* 5 App. 796, n.15.

When consolidated, the various claims for relief that the Plaintiffs asserted against the DOT, Wellness, and other successful applicants included: (1) violation of procedural due process; (2) violation of substantive due process; (3) violation of equal protection; (4) petition for judicial review; (5) petition for writ of mandamus; (6) petition for writ of prohibition; (7) declaratory relief; and (8) injunctive relief,

among other claims. 6 App. 805-910;[5] 6 App. 911-33;[6] 7 App. 964-1059;[7] 7 App. 1086-1122.[8]

C. Plaintiffs Performed No Discovery As to Wellness and Admitted they Had No Evidence to Support their Claims Against Wellness.

Once Plaintiffs filed suit, they performed no discovery as to Wellness. 12 App. 1820. Plaintiffs did not serve any requests for documents on Wellness, did not serve any interrogatories on Wellness, did not serve any requests for admissions on Wellness, and did not take the deposition of any Wellness representatives. *See id*. In other words, Plaintiffs did nothing to prove or to obtain evidence as to their claims against Wellness or claims relating to the award of Wellness' one license. *See id*.

Plaintiffs chose to do no discovery as to Wellness even though (or perhaps because) Wellness produced portions of its license applications in the 2018 process with its NRCP 16.1 disclosures. *See id*. Those disclosures showed the identities of Wellness' owners, officers, and board members, as required by law. *See id*.

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[5] Operative complaint of the Clark Plaintiffs. As this pleading shows, the Clark Plaintiffs were part of a larger group of plaintiffs in the district court proceedings that dismissed their claims. The Clark Plaintiffs had different counsel at that time.
[6] Operative complaint of the TGIG Plaintiffs.
[7] Operative complaint of THC Nevada, LLC, Herbal Choice, Inc., Green Leaf Farms Holdings, LLC, Green Therapeutics LLC, Nevcann, LLC, Red Earth, LLC. These Plaintiffs also were part of a larger group of plaintiffs in the district court proceedings and previously had different counsel.
[8] Operative complaint of Rural Remedies, LLC.

Furthermore, during discovery, Wellness attended the depositions of each of Plaintiffs' NRCP 30(b)(6) designees. 10 App. 1367, 12 App. 1820. Those depositions confirmed that:

- Plaintiffs had no evidence that Wellness received its license due to any preferential treatment by the DOT,
- Plaintiffs had no evidence that Wellness' applications were improper or incomplete, and
- Plaintiffs had no evidence that Wellness engaged in any wrongdoing, collusion, or improper interference during the 2018 Recreational Marijuana licensing process.

See id.

For example, TGIG, LLC's Rule 30(b)(6) designee, Demetri Kouretas, testified,

> Q. Aside from the preliminary injunction hearing, you don't have any facts to support -- to support the kind of -- that the Department showed Wellness Connection any favoritism; is that correct?
> A. No. I've not reviewed their applications, so I wouldn't make that statement.
> Q. And as you sit here today, do you have any evidence that the Department showed any favoritism towards Wellness Connection?
> A. No, I do not.
> Q. In your second amended complaint, you also allege that there was corruption and/or wrongdoing during the application process specifically with regard to the reviewing, the scoring, and the approval of the applications.

> As you sit here today, what facts do you have to show that Wellness Connection was in any way -- was in any way involved with this alleged corruption?
> A. I don't have any facts. I've not reviewed their application.
> Q. And do you have any evidence to support that Wellness Connection was involved with this alleged corruption?
> A. No, I do not.
> Q. Okay. Do you have any facts or evidence to show that Wellness Connection did anything improper or wrongful to taint the influence of the application process?
> A. No, I do not.
> A. Okay. And you mentioned that you didn't review Wellness Connection's application.
> So do you have any facts or evidence to show that Wellness Connection's application was incomplete or insufficient in some form or manner?
> A. No.

10 App. 1519-24 (Dep. Tr. of TGIG, LLC's 30(b)(6) Demetri Kouretas, 386:8-387:17, Exhibit E to Motion for Attorneys' Fees).

The TGIG Plaintiffs, as well as every other Plaintiff that was deposed, similarly failed to offer any evidence or facts to support any basis for their claims against or for any relief relating to Wellness. 10 App. 1525 to 11 App. 1611. These depositions transcripts are on file with Wellness' appendices of exhibits in support of its Motion for Attorneys' Fees. *See id*. (Dep. Tr. of THC Nevada, LLC's 30(b)(6) Allen Puliz, 159:160:6, Exhibit F to Motion for Attorneys' Fees; Dep. Tr. of GBS Nevada Partners, LLC's 30(b)(6) Michael Viellion, 260:21-263:17, Exhibit G; Dep. Tr. of Serenity Wellness Center, LLC's 30(b)(6) Benjamin Sillitoe, 148:19-149:19, Exhibit H; Dep. Tr. Fidelis Holdings, LLC's 30(b)(6) Jeremy Thompson, 54:11-56:2,

Exhibit I; Dep. Tr. of Gravitas Nevada, Ltd.'s 30(b)(6) Jeremy Thompson, 120:1-121:3, 124:3-25, Exhibit J; Dep. Tr. of Herbal Choice, LLC's 30(b)(6) Norberto Madrigal, 246:21-248:2, 248:10-14, Exhibit K; Dep. Tr. of Inyo Fine Cannabis Dispensary, LLC's 30(b)(6) David Goldwater, 221:24-223:1, Exhibit L; Dep. Tr. of Medifarm, LLC and Medifarm IV, LLC's 30(b)(6) Jeremy Thompson, 58:2-15, 59:20-60:9, Exhibit M; Dep. Tr. of Nevada Holistic Medicine, LLC's 30(b)(6) Scott Sibley, 162:22-163:20, Exhibit O; Dep. Tr. of Nevadapure, LLC's 30(b)(6) David Thomas, 307:25-308:8, 309:21-25, 317:3-7, Exhibit P; Dep. Tr. of Clark Natural Medicinal Solutions, LLC, Clark NMSD, LLC and Nye Natural Medicinal Solutions, LLC's 30(b)(6) Pejman Bady, M.D., 151:11-152:11, Exhibit Q; Dep. Tr. of Rural Remedies, LLC's 30(b)(6) Joseph Ramos, M.D., 194:3-21, Exhibit R).

D. Plaintiffs Failed to Produce Any Arguments or Evidence About Wellness During the Trial, and Wellness Prevails.

Because of the large number of Plaintiffs and the varying claims, the district court segregated the proceedings into three phases:

Phase 1: judicial review claims

Phase 2: damage and declaratory relief claims

Phase 3: certain plaintiffs' claims against an individual DOT employee for alleged violation of 42 U.S.C. § 1983.

7 App. 1069-85. The district court first proceeded with Phase 2, which consisted of a month-long trial that began on July 17, 2020 and stretched approximately one month, ending on August 18, 2020. *See generally* Trial Transcript.[9]

At the month-long Phase 2 trial, it is undisputed that:

- none of the Plaintiffs made any arguments relating to Wellness, its applications to the DOT, its conduct, or the one license it received as part of the 2018 process;
- none of the Plaintiffs called any Wellness representatives as witnesses;
- none of the Plaintiffs presented any evidence about Wellness, its applications to the DOT, its conduct, or its license; and
- there was no mention of any wrongdoing on behalf of Wellness during trial, and no mention of any wrongdoing by the DOT in regard to Wellness or its applications.

See Trial Transcript.

The district court weighed Plaintiffs' arguments and evidence and ultimately found that Plaintiffs were entitled to no relief against Wellness and no relief that

[9] Due to the voluminous nature and length of the month-long trial transcript for the Phase 2 trial, and because the transcript is already on file with this Court as part of the appendix for the TGIG Appeal, NSC Case No. 82014, Wellness has filed a motion requesting that the Court take judicial notice of the trial transcript on file in the TGIG Appeal, Volumes 280-332. In this brief, Wellness refers to that transcript as the "Trial Transcript." As a note, Wellness refers to the Trial Transcript only generally in this brief, not to any specific pages or days of testimony.

affected Wellness. 8 App. 1194-1223. The district court found that the DOT improperly adjusted the mandatory background check standard with a standard to do background checks only of owners of five percent or greater of each applicant. *See id*. at 1222. The district court therefore converted the preliminary injunctive relief into a permanent injunction, enjoining the DOT from granting final approval to any applicant "who did not provide the identification of each prospective owner, officer and board member as required by NRS 453D.200(6)." *Id.* But that did not affect Wellness. In the end, Plaintiffs were unsuccessful in their bid to overturn the 2018 process and to redistribute Wellness' license. 8 App. 1194-1223. Indeed, the district court's Findings of Fact and Conclusions of Law and Permanent Injunction (against the DOT) do not mention or award any relief against Wellness or any relief that affected Wellness and its one license. *See id*.

The Phase 1 hearing for judicial review claims took place on September 8, 2020. 8 App. 1224. Unlike the Phase 2 trial, the Phase 1 hearing for judicial review took just a few hours in one day. *See* Trial Transcript, Phase 1. Plaintiffs likewise presented no arguments or evidence against Wellness and requested no relief that affected Wellness' one license. *See id*. The district court denied judicial review, awarding no relief to the Plaintiffs. 8 App. 1224-35.

E. The District Court Denies Wellness' Motion for Attorneys' Fees, Finding it Was Not A Prevailing Party.

On September 25, 2020, Wellness filed its first memorandum of costs. 9 App. 1284-1347. The district court denied Wellness' costs at that time only because it found that an award of costs was premature as a final judgment had not yet been entered since Phase 3 of the trial had not taken place. 12 App. 1850-61. The district court stated that the denial was without prejudice to seek costs at the time of entry of the final judgment.[10] *See id*.

On October 13, 2020, Wellness also filed its Motion for Attorneys' Fees. 9 App. 1348 to 11 App. 1611. The district court denied Wellness's motion. 12 App. 1823-34. The district court found that Plaintiffs had a reasonable basis to join Wellness to their claims for judicial review, *i.e*., the Phase 1 claims (*see id*.) – claims that were decided in just a few hours and that resulted in no relief against Wellness. 8 App. 1224-35, *and* Trial Transcript, Phase 1. The district court made no findings of any kind that it was reasonable to join Wellness for the Phase 2 damage, writ, and declaratory relief claims – *i.e.*, the month-long trial that generated the attorneys' fees Wellness incurred. 12 App. 1823-34.

More specifically, the district court stated as follows:

> Plaintiffs' claims were brought with a reasonable basis. Other applicants, like Wellness Connection of Nevada, LLC, were joined as a

[10] Costs are not at issue in this appeal because later, after entry of final judgment, the district court granted Wellness costs. 13 App. 2025-42.

> result of motion practice brought related to joinder issues on the Petition for Judicial Review claim. Wellness Connection of Nevada, LLC does not satisfy the analysis for a prevailing party under these circumstances.

Id. at 1824 (emphasis supplied).[11]

Yet, the order that granted Plaintiffs leave to amend did not mention anything about amending only petitions for judicial review. 6 App. 934. Plaintiffs received leave to broadly amend their complaints as a whole, which is what they did. *See supra,* at 9-10.

Furthermore, it is notable that Wellness did not seek attorneys' fees for the judicial review claims (Phase 1), which was a hearing of just a few hours. 10 App. 1367. Quite the opposite, Wellness sought attorneys' fees for the Phase 2 claims for damages and declaratory relief that – very unlike the Phase 1 claims for judicial review – required extensive discovery, extensive motion practice, and a month-long trial that Wellness was forced to endure in both time and expense. *See* Trial Transcript, *and* Court Docket, 14 App. 2065-2213. Again, the district court made no findings that Plaintiffs' Phase 2 claims were brought or maintained with a reasonable basis. 12 App. 1824.

[11] The district court decided Wellness' Motion for Attorneys' Fees in chambers, with no oral argument. 12 App. 1822-23. The findings in the district court's order mirror the findings from its minute order.

F. Several Plaintiffs Appealed the Adverse Judgments in Phase 1 and Phase 2 But Did Not Name Wellness in the Appeal, Conceding that There was No Basis or Need for their Claims Against Wellness.

On October 20, 2020, the TGIG Plaintiffs filed their notice of appeal of the Judgments rendered against them in Phase 1 and Phase 2. 12 App. 1718-67. Other Plaintiffs joined the appeal or filed their own notices of appeal. 12 App. 1795-97, *and* 12 App. 1798-1800. Despite those Plaintiffs having named Wellness in their claims in the district court, the appealing Plaintiffs chose not to name Wellness as a respondent in the TGIG Appeal, instead naming only the DOT as a respondent. 12 App. 1769. Thus, Wellness was not a party to the TGIG Appeal – a fatal admission that Plaintiffs had no basis or need for naming Wellness in this matter in the first place.

On August 4, 2022, the district court certified the Phase 1 and Phase 2 judgments as final under NRCP 54 so that the appeal could proceed given that Phase 3 of the district court proceedings (which did not include Wellness or any of the Plaintiffs) had not yet taken place. 12 App. 1862-79.

G. The District Court Awards Wellness its Costs, Finding Wellness Was A Prevailing Party in the Action.

On August 9, 2022, Wellness filed a new, updated memorandum of costs. 13 App. 1901-64. On February 4, 2023, the district court (Judge Joanna S. Kishner) entered its order awarding Wellness costs against the Plaintiffs, denying motions to

retax, and specifically finding that Wellness is the "prevailing party." 13 App. 2025-42, *and specifically* 2028. The district court stated:

> Wellness Connection is a prevailing party as against the TGIG Plaintiffs and the Joinder Plaintiffs. Wellness Connection prevailed on all claims and defenses to retain its licenses, which the Plaintiffs variously sought to revoke or impair through their requested forms of relief and arguments. Wellness Connection did not lose its license and its license was not affected by the Court's injunction against the so-called Five-Percent Rule or by any other rulings of the Court. Wellness Connection's license was not lost or impaired by the litigation. Wellness prevailed on all issues against all Plaintiffs and this makes Wellness Connection a prevailing party. See Golightly & Vannah, PLLC v. TJ Allen, LLC, 132 Nev. 416, 422, 373 P.3d 103, 107 (2016).

Id. (emphasis supplied).

H. The Nevada Supreme Court Issues its Order of Affirmance, Ruling that Plaintiffs Had No Right or Standing to File their Claims.

On September 8, 2023, the Nevada Supreme Court issued its Order of Affirmance in the TGIG Appeal. *See* Addendum A, attached hereto. In a brief, five-page order, the Nevada Supreme Court disposed of Plaintiffs' claims, finding that Plaintiffs "[had] no right to judicial review and lack[ed] standing to assert a challenge to DOT's license application process . . . ." *Id*. at 2.

As to judicial review, the Nevada Supreme Court found that Plaintiffs had no such right because they had no right to a hearing on the denial of their license applications and the applicable statutes and regulations provided no right to an appeal or judicial review. *See id*. at 3. On the remaining claims for declaratory or writ relief and damages, the Court found that Plaintiffs could not establish "any of

the necessary elements of standing." *Id*. at 4. Moreover, the Court found that Plaintiffs could not prove that the DOT's alleged misconduct caused their failure to obtain a license or that it would be redressed by the relief sought. *See id*. at 5. The Court affirmed the district court's orders and judgments. *See id*.

This appeal follows regarding Wellness' attorneys' fees.

SUMMARY OF ARGUMENT

Plaintiffs are disgruntled marijuana license applicants that wanted to prevent Wellness, a successful applicant, from finalizing and enjoying the benefits of the license it received in the 2018 application and license process. Plaintiffs instead wanted to redo the entire 2018 process and redistribute the licenses that had been previously awarded to the successful applicants like Wellness. Plaintiffs filed their claims against Wellness although they presented no proof and no arguments that Wellness engaged in any wrongdoing, that Wellness should not have received a license, or that any of the Plaintiffs would have received a license if they were successful in their quest for a "do over." In these circumstances, Wellness is entitled to attorneys' fees under NRS 18.010(2)(b) for several reasons.

First, the Nevada legislature specifically directed courts to construe NRS 18.010(2)(b) liberally in favor of awarding fees in all appropriate situations. Here, Plaintiffs had no reasonable ground to bring or maintain their claims against Wellness merely because they were disappointed marijuana license applicants. They

had no right to even seek (much less obtain) judicial review and no standing to challenge the 2018 process. Plaintiffs knew or should have known that based on long-standing Nevada case law.

Second, Plaintiffs had no evidentiary basis for naming Wellness in this matter. Plaintiffs admitted during depositions that they had no proof that Wellness received any favoritism in the 2018 process, no evidence Wellness engaged in any wrongdoing, and no evidence that Wellness should not have received a license. At trial, Plaintiffs likewise presented no evidence relating to and made no arguments against Wellness.

Third, the fact that Plaintiffs did not have a reasonable basis to bring or maintain their claims is not merely argument; it is the law of the case and now governs this matter. The Nevada Supreme Court ruled against Plaintiffs in the TGIG Appeal, finding they had no right to seek judicial review or standing to challenge the 2018 process. The appealing Plaintiffs have now admitted that they had no basis for or need to name Wellness in these proceedings because they did not bother to name Wellness as a respondent in the TGIG Appeal.

Fourth, based on the record, it appears the Clark Plaintiffs did not file an opposition to Wellness' Motion for Attorneys' Fees nor did they join any other Plaintiffs' opposition. Thus, the Motion for Attorneys' Fees should be granted as to the Clark Plaintiffs for this additional reason.

Fifth, Wellness' attorneys' fees were reasonable.

Sixth, the district court's findings that Plaintiffs brought their claims with a reasonable basis because of their claims for judicial review is erroneous as a matter of law, for reasons set forth above and in the Order of Affirmance rejecting the TGIG Appeal. Furthermore, Wellness did not incur or seek any attorneys' fees regarding the claims for judicial review (Phase 1), but only as to the claims for damages and declaratory relief (Phase 2), which resulted in the lengthy discovery process, extensive motion practice, and a month-long trial.

Seventh, the district court's finding that Wellness was not a prevailing party was erroneous because Wellness is the prevailing party. Plaintiffs did not prevail on any claims against Wellness, did not obtain any relief against Wellness, and did not obtain relief that affected Wellness' license. Wellness was able to maintain its license despite Plaintiffs' efforts otherwise.

Lastly, the district court's finding that Wellness was not a prevailing party was contradictory because later, when awarding Wellness its costs, the district court specifically found that Wellness is the prevailing party in this matter.

Accordingly, the Court should reverse.

ARGUMENT

Standard of review for Sections I, II: Generally, the Nevada Supreme Court reviews decisions awarding or denying attorneys' fees for an abuse of discretion.

See Pardee Homes of Nevada v. Wolfram, 135 Nev. 173, 176, 444 P.3d 423, 425-26 (2019). But when the attorney fees' issue involves questions of law – as it does here – the standard of review is de novo. *Id. See also, 145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n*, 136 Nev. 115, 460 P.3d 455, 457 (2020) ("[W]hen [an] attorney fees matter implicates questions of law, the proper review is de novo.") (*quoting Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057,1063 (2006)).

I. WELLNESS IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES PURSUANT TO NRS 18.010(2)(b).

A. The Nevada Legislature Has Directed that Attorneys' Fees Be Awarded Liberally Under NRS 18.010(2)(b) for Claims Brought or Maintained Without Reasonable Ground or to Harass.

NRS 18.010(2)(b) provides for an award of attorneys' fees if a claim "was brought or maintained without reasonable ground or to harass the prevailing party." Unique to this statute is a strong, legislative declaration of its purpose and direction that the statute be construed liberally in favor of awarding fees. The statute specifically states,

> The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

NRS 18.010(2)(b) (emphasis supplied).

"In assessing a motion for attorney's fees under NRS 18.010(2)(b), the trial court must determine whether the plaintiff had reasonable grounds for its claims." *Bergmann v. Boyce*, 109 Nev. 670, 675, 856 P.2d 560, 563 (1993) (reversing denial of attorneys' fees under NRS 18.010(2)(b) where evidence showed claims were groundless) (superseded by statute on other grounds). "Such an analysis depends upon the actual circumstances of the case rather than a hypothetical set of facts favoring plaintiff's averments," such as surviving a motion to dismiss. *Id*. (*citing Fountain v. Mojo*, 687 P.2d 496, 501 (Colo. Ct. App. 1984) (stating that claims are groundless if the "complaint contains allegations sufficient to survive a motion to dismiss for failure to state a claim, but which are not supported by any credible evidence at trial")).

The Nevada Supreme Court has long required that fees be awarded under NRS 18.010(2)(b) when a claim is groundless, brought to harass, asserted in bad faith, or based on false premises. *See Capanna v. Orth*, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018) (affirming attorneys' fees where no credible evidence supported liability defense, stating "a claim is frivolous or groundless if there is no credible evidence to support it"); *Cain v. Price*, 134 Nev. 193, 199, 415 P.3d 25, 31 (2018) (affirming attorneys' fees where action had no reasonable grounds); *Foster v. Dingwall*, 126 Nev. 56, 72, 227 P.3d 1042, 1053 (2010) (affirming fees due to

"claims and defenses [that] were not based in law or fact and as such were frivolous and asserted in bad faith"); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006) (affirming award of attorneys' fees against party that pursued a groundless claim); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993) (reversing denial of fees under NRS 18.010(2)(b) where claims were groundless).

The facts and circumstances of this case overwhelming show that Wellness is entitled to an award of attorneys' fees.

B. Plaintiffs Brought and Maintained Suit Against Wellness Without Reasonable Ground, Either Legally or Factually, Justifying An Award of Attorneys' Fees.

Plaintiffs' conduct fits squarely within the provisions of NRS 18.010(2)(b); as such, the district court should have granted Wellness' Motion for Attorneys' Fees. Plaintiffs had no reasonable ground for their claims against Wellness, either legally or factually.

1. Plaintiffs Had No Legal Basis to Seek Judicial Review or to Bring Their Other Claims for Damages or Declaratory Relief.

Plaintiffs did not have legal grounds to bring or maintain these proceedings against any party, but especially not against Wellness. None of Plaintiffs' allegations or claims demonstrated a legal basis for obtaining relief against Wellness – including causing Wellness to lose its license as part of a "do over" of the 2018 process. And

the lack of any legal basis for Plaintiffs' claims is not mere argument. It is a conclusive fact and finding as shown by the Neveda Supreme Court's Order of Affirmance rejecting the TGIG Appeal. *See* Order of Affirmance in the TGIG Appeal, Addendum A, attached hereto.

a. Plaintiffs Never Had A Right to Assert Claims for Judicial Review and Should Have Known that Based on Long-Standing Case Law from the Nevada Supreme Court.

As shown in this Court's Order of Affirmance in the TGIG Appeal, not only were Plaintiffs properly denied judicial review, but this Court found that *Plaintiffs did not even have a right to seek judicial review in the first place*. In its Order of Affirmance, this Court quoted NRS 233B.127(1), which states, "[t]he provisions of NRS 233B.121 to 233B.150 [for judicial review], inclusive, do not apply to the grant, denial or renewal of a license unless notice and opportunity for hearing are required by law to be provided to the applicant before the grant, denial or renewal of the license." NRS 233B.127(1) (emphasis supplied).[12]

In support of its above ruling, the Nevada Supreme Court cited *State Dep't of Health & Hum. Servs. v. Samantha Inc*., 133 Nev. 809, 407 P.3d 327 (2017), another

[12] This aligns with NRS 233B.130(1), which grants the right to judicial review only in a "contested case." A "[c]ontested case" is defined as "a proceeding, including but not restricted to rate making and licensing, in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed." NRS 233B.032.

case that involved a disappointed applicant whose application for a medical marijuana license did not rank sufficiently high enough to obtain a license. This Court issued the *Samantha* opinion well before Plaintiffs filed their current lawsuit. Further, *Samantha* references two other cases where the Nevada Supreme Court held that judicial review is not available in proceedings that do not require notice and an opportunity to be heard. One of those decisions is almost 25 years old and the other is over 40 years old.[13] In fact, the district court acknowledged *Samantha* in its findings denying judicial review. 8 App. 1232 n.16.

Based on this case law, Plaintiffs should have been well aware that there was no basis for their claim for judicial review. It also shows that the district court erred in concluding that Plaintiffs had a valid or reasonable basis for naming Wellness in this matter due to their claims for judicial review.

b. Plaintiffs' Remaining Claims for Damages and Declaratory Relief Likewise Had No Legal Basis.

Plaintiffs' remaining claims likewise had no reasonable basis in law or fact. In a nutshell, all allegations boiled down to each of the Plaintiffs seeking to take Wellness' license away and to redistribute it to Plaintiffs. For example, the TGIG

[13] *See Citizens For Honest & Responsible Gov't v. Sec'y of State*, 116 Nev. 939, 951–52, 11 P.3d 121, 129 (2000) (judicial review not available), and *Priv. Investigator's Licensing Bd. v. Atherley*, 98 Nev. 514, 515, 654 P.2d 1019, 1020 (1982) (stating "the Board's denial was not the result of a 'contested case,' and judicial review under the Administrative Procedure Act was not available.").

Plaintiffs alleged in their claim for declaratory relief that Wellness' license should be taken away and given to them. More specifically, the declaratory relief claim alleged:

> 107. Defendant Applicants [including Wellness] received conditional recreational retail marijuana establishment licenses issued by the Department [DOT].
> 108. Plaintiffs contend that they are entitled to the same conditional licenses, which contention would/could deprive Defendant Applicants of their conditional licenses.
> 109. Plaintiffs request a declaratory judgment to determine their rights, status, or other legal relations under the applicable statutes and regulations with respect to this dispute brought by Plaintiffs. A declaratory judgment will eliminate any dispute over the conditional recreational marijuana establishment licenses issued by the Department.

6 App. 931 (emphasis supplied). The TGIG Plaintiffs also alleged in their petition for writ of mandamus:

> 102. The Department [DOT] acted arbitrarily and capriciously in the denial by performing and/or failing to perform the acts set forth *supra*, and because, *inter alia*:
> . . .
>
> b. The Board denied Plaintiffs' Applications in order to approve the Applications of other competing applicants without regard to the merit of Plaintiffs' Applications and the lack of merit of the Applications of other competing applicants.

Id. at 930 (emphasis supplied).

Plaintiffs THC Nevada, LLC, Herbal Choice, Inc., Green Leaf Farms Holdings, LLC, Green Therapeutics LLC, Nevcann, LLC, and Red Earth, LLC, alleged a claim for declaratory relief, in relevant part, as follows:

> 139. Plaintiffs contend that:
>
> a. Each and every Application submitted by Plaintiffs was full and complete as defined by NRS 453D.210 and NAC 453D.268 . . .
> b. Some or all of the Applications submitted by the Successful Applicants [Wellness] were not full and complete as defined by NRS 453D.210 and NAC 453D.268 . . .
> c. Some or all of the Applications submitted by the Successful Applicants also omitted statutorily required information outlined in NRS 453D.200 and NRS 453D.210;
> . . .
>
> 143. Accordingly, Plaintiffs request a declaratory judgment from this Court that: . . . (4) several of the Successful Applicants [Wellness] had incomplete or deficient applications, making the grant of a conditional license to them void . . . .

7 App. 983, 985 (emphasis supplied). They also alleged a claim for writ of mandamus that mimicked the TGIG Plaintiffs' allegations (quoted above) that the DOT acted arbitrarily and capriciously in denying their applications, in granting Wellness' application, and alleging that they are entitled to a writ of mandamus ordering the DOT to approve their applications instead. *Id*. at 986-87 (¶¶ 153-54).

In its claim for declaratory relief, Rural Remedies alleged:

> 76. Plaintiff also seeks a declaration from this Court that the DOT must revoke the conditional licenses of those applicants whose applications are not in compliance with Nevada law.
> 77. Plaintiff also seeks a declaration from this Court that the DOT must issue Plaintiff conditional licenses for the operation of a recreational marijuana establishments [sic] applied for.

7 App. 1112 (emphasis supplied).

Finally, the Clark Plaintiffs made the following allegations:

> 255. Upon information and belief, the Department's ranking and scoring process was corrupted and the applications of the Successful Applicants [including Wellness] were not fairly and accurately scored in comparison to the Plaintiffs/Petitioners' applications.
> 256. Upon information and belief, the Department improperly allocated licenses and improperly favored certain applicants to the detriment of the Plaintiffs/Petitioners.
> . . .
>
> 286. The Plaintiffs/Petitioners therefore petition this Court to issue a writ of mandamus to the Department compelling it to issue a new Notice for recreational Dispensary license applications and to conduct the scoring and ranking of such applications in accordance with Nevada law and the Approved Regulations.
> . . .
>
> 290. Plaintiffs/Petitioners therefore petition the Court to issue a writ of prohibition which prohibits the Department from issuing and/or recognizing any new recreational Dispensary licenses (conditional or final) for applicants who submitted a license application [including Wellness] . . . .

6 App. 850, 857-58 (emphasis supplied).

Not only did Plaintiffs have no standing to challenge the 2018 process, but they also had no proof (nor did they attempt to prove) that Wellness should not have received its license and that the license instead should have been awarded to any of the Plaintiffs. Wellness received one license for the jurisdiction of the City of Las Vegas, ranking ninth out of the top 10 successful applicants. *See* Scores and Rankings, 7 App. 1150. But Plaintiffs' applications did not even come close to ranking in the top 10 as required to obtain a license for that jurisdiction. Out of 103

total applications for the City of Las Vegas licenses, Plaintiffs' applications ranked as follows:

- TGIG, LLC = 19
- Nevada Holistic Medicine, LLC = 55
- GBS Nevada Partners, LLC = 47
- Fidelis Holdings, LLC = no ranking
- Gravitas Nevada, LLC = no ranking
- Nevada Pure, LLC = 65
- Medifarm, LLC = no ranking
- Medifarm IV, LLC = 54
- THC Nevada = 58
- Herbal Choice, Inc. = 85
- Red Earth, LLC = 25
- Nevcann, LLC = 79
- Green Therapeutics, LLC = 35
- Green Leaf Farm Holdings, LLC = 81
- Rural Remedies, LLC = 100
- Clark NMSD, LLC = 50
- Clark Natural Med. Solutions, LLC = 27
- Nye Natural Med. Solutions, LLC = 28

- Inyo Fine Cannabis Dispensary, LLC = 31

See Scores and Rankings, 7 App. 1150-51.

Not once throughout the month-long trial or throughout this case did any of the Plaintiffs present evidence, try to prove, *or even argue* that they should have ranked in the top 10 instead of Wellness. *See* Trial Transcript. Not once did they attempt to prove or argue that Wellness should not have ranked in the top 10 and obtained a license. *See id*. That is the very definition of a claim that "was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b). *See also Capanna*, 134 Nev. at 895, 432 P.3d at 734 (stating that "a claim is frivolous or groundless if there is no credible evidence to support it"); *Foster*, 126 Nev. at 72, 227 P.3d at 1053 (stating that "claims and defenses [that] were not based in law or fact and as such were frivolous and asserted in bad faith").

2. Plaintiffs Had No Evidentiary Basis for Any of Their Claims Against Wellness.

In addition to lacking a legal basis for any of their claims against Wellness, Plaintiffs had no factual or evidentiary basis for their claims. That Plaintiffs' claims against Wellness had no reasonable ground is not mere argument – Plaintiffs admitted as much during their depositions and failed to even attempt to provide any evidence against Wellness at trial.

Each Rule 30(b)(6) representative for Plaintiffs admitted they have no evidence against Wellness, no evidence that the DOT showed improper favoritism

toward Wellness, no evidence that Wellness engaged in any wrongdoing, and no evidence Wellness should not have received its license. *See supra*, Statement of Facts, Section(C). Plaintiffs likewise conducted no discovery of any kind whatsoever as to Wellness, its applications, or any claims pertaining to Wellness. *See id*. At trial, no Plaintiffs called Wellness representatives as witnesses, presented any evidence about Wellness, or made any arguments against Wellness. *See* Trial Transcript.

Aside from failing to produce evidence of any wrongdoing pertaining to Wellness either during discovery or during trial, Plaintiffs chose to name Wellness as a defendant even though they had already been notified and the district court had already ruled that Wellness' applications were complete and that Wellness disclosed all of its owners, officers, and board members in its applications as required. More specifically, following the preliminary injunction proceedings, the DOT affirmed that Wellness did not violate NRS 453D.200(6). Plaintiffs' Trial Exhibit 1302, 8 App. 1191-93. The district court included this as a specific finding in footnote 15 of its injunction order, finding Wellness to be compliant and excluding Wellness – who was not even a party to the litigation at the time – from the scope of the temporary injunction entered against the DOT. 5 App. 796. Therefore, *Plaintiffs knew* Wellness was not in violation of any regulations even before they decided to name Wellness as a defendant.

3. Plaintiffs Filed Suit to Seek Approval of their Applications Over Successful Applicants But Submitted Only Highly Redacted Versions of Their Applications that Did Not Allow for Court Review.

Given that the entire point of Plaintiffs' claims was to seek approval of their applications over Wellness' application, it was shocking that Plaintiffs refused to present their complete applications to the district court. They instead only produced highly redacted versions that did not allow the Court to review (much less decide) the contested issues. This further shows that Plaintiffs did not bring or maintain their claims with reasonable ground.

The district court specifically found that Plaintiffs' redacted applications, which they chose to redact, prevented the district court from reviewing and deciding the completeness of their applications. The district court found:

> FN 8 - The Court recognizes the importance of utilizing a stipulated protective order for discovery purpose . . . The use of a protective order does not relieve a party of proffering evidence sufficient for the Court to make a determination on the merits related to the claims at issue.
>
> FN 9 - The Record filed by the State utilized the versions of the submitted applications which had been redacted by the applicants as part of the stipulated protective order in this matter. . . . The redacted applications submitted by Plaintiffs limits the Court's ability to discern information related to this Phase.
>
> FN – 14 - As the Plaintiffs (with the exception of THC) have not provided their unredacted applications, the Court cannot make a determination with respect to completeness [of Plaintiffs' applications] of this area.

> 37. The Record is limited and Plaintiffs themselves redacted their own applications at issue.

8 App. 1224-35 (emphasis supplied).

The fact that Plaintiffs filed suit to seek approval of their applications but then provided only redacted versions of their applications to conceal them from the district court (and from Wellness and other defendants) speaks volumes. That is the very essence of claims brought and maintained without reasonable ground.

Not surprisingly, the district court found that Plaintiffs presented no evidence that their applications were analyzed or ranked in violation of any regulations or that they were reviewed arbitrarily, stating:

> 26. The Plaintiffs have not identified by a preponderance of the evidence any specific instance with respect to their respective applications that the procedure used by the DoT for analyzing, evaluating, and ranking the applications was done in violation of the applicable regulations or in an arbitrary or capricious manner.
>
> * * *
>
> 39. Plaintiffs do not cite to any evidence in the Record that supports their substantive arguments.
>
> 40. The Plaintiffs have not met their burden of establishing that the DoT's decisions granting and denying the applications for conditional licenses: (1) violated constitutional and/or statutory provisions; (2) exceeded the DOT's statutory authority; (3) were based upon unlawful procedure; (4) were clearly erroneous based upon the Record; (5) were arbitrary and capricious; or (6)
> generally constituted an abuse of discretion.

Id. (emphasis supplied).

A plaintiff cannot file suit over its denied application and claim that it should have been approved, on the one hand, and yet conceal its application from the district court by redacting the application in full, on the other hand. That is not bringing and maintaining a claim with reasonable ground. This conduct further justifies the attorneys' fees Wellness seeks here.

C. The Law of the Case is that Plaintiffs Had No Basis to Seek Judicial Review or to Bring Their Other Claims Based On the Court's Order of Affirmance in the TGIG Appeal.

"The doctrine of the law of the case provides that the law or ruling of a first appeal must be followed in all subsequent proceedings, both in the lower court and on any later appeal." *Hsu v. County of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007); *see also Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) ("The law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same.").

Here, the fact that Plaintiffs had no reasonable basis for their claims against Wellness is not mere argument or conjecture. The Nevada Supreme Court's Order of Affirmance in the TGIG Appeal shows as much. The Court summarily disposed of Plaintiff's claims, never reaching the merits, finding that Plaintiffs "[had] no right to judicial review and lack[ed] standing to assert a challenge to DOT's license application process . . . ." Order of Affirmance, at 2, Addendum A, attached hereto. With no basis to seek either judicial review or to challenge the 2018 process,

Plaintiffs cannot argue now, against the law of the case, that they had a reasonable basis to bring or maintain their claims.

One of the most compelling aspects about the TGIG Appeal is that the appealing Plaintiffs chose not to name Wellness as a respondent in the appeal. They made that choice even though they saw fit to name Wellness as a party to the district court proceedings and to drag Wellness through months of discovery, motion practice, and a month-long trial. If Wellness were truly a necessary party in the district court proceedings, Plaintiffs would have been *required* to name Wellness as a respondent in the TGIG Appeal in order to obtain complete (or any) relief. The fact that Plaintiffs chose not to name Wellness in the TGIG Appeal constitutes a fatal admission that Plaintiffs never had a basis for or need to bring Wellness into these proceedings in the first place.

D. The Clark Plaintiffs Did Not Oppose Wellness' Motion for Attorneys' Fees, Which Justifies Fees Against Those Plaintiffs.

Based on the district court docket, the Clark Plaintiffs did not file an opposition to Wellness' Motion for Attorneys' Fees. 14 App. 2171-73. They also did not join any other Plaintiffs' opposition. *See id*. Since Wellness filed its Motion for Attorneys' Fees on October 13, 2020, any opposition would have been due within 14 days. *See* EDCR 2.20(e) ("Within 14 days after the service of the motion . . . the opposing party must serve and file written notice of nonopposition or opposition . . . Failure of the opposing party to serve and file written opposition may be construed

as an admission that the motion and/or joinder is meritorious and a consent to granting the same.") (emphasis supplied). Given the Clark Plaintiffs' failure to oppose the Motion, Wellness should recover fees against the Clark Plaintiffs on this additional basis. *See Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc*., 124 Nev. 272, 277–78, 182 P.3d 764, 768 (2008) (affirming district court order awarding attorneys' fees as unopposed under EDCR 2.20(b) where non-moving party failed to file a timely opposition). Thus, the Court should reverse.

E. Plaintiffs' Suit Unjustifiably Caused Wellness to Incur Substantial Attorneys' Fees, Which Were Reasonably Incurred Under *Brunzell*.

Plaintiffs' decision to sue Wellness and to drag it through protracted, expensive discovery and litigation in an unjustified effort to strip Wellness of its license resulted in great harm to Wellness. It forced Wellness to unnecessarily incur attorneys' fees and costs, increased Wellness' costs of doing business, and harmed the legal system by overburdening it with unnecessary claims that should not have been filed. This is the precise harm that the Nevada legislature intended to address in adopting NRS 18.010(2)(b).

Indeed, as the Nevada legislature made clear, it has directed that attorneys' fees be awarded "in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public."

NRS 18.010(2)(b). Such was the case here. There was no ground whatsoever for Plaintiffs' claims against Wellness.

Wellness incurred $426,393.20 in attorneys' fees as of the date it filed its motion for attorneys' fees.[14] 10 App. 1367. Wellness' motion included the appropriate analysis showing the reasonableness of the attorneys' fees incurred pursuant to the factors set forth in *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969) (affirming award of attorney's fees, stating that the value placed on services by counsel is within the sound discretion of the trier of fact). 9 App. 1357-60. Court's normally make findings in support of the ultimate determination as to the reasonableness of attorney's fees. *See Shuette v. Beazer Homes Holdings Corp*., 121 Nev. 837, 865, 124 P.3d 530, 549 (2005).

In this case, the district court did not reach the *Brunzell* analysis as to the reasonableness of the amount of fees incurred since it denied an award of fees. However, as shown above, the circumstances of this case make clear that this action was brought and maintained without reasonable ground. Therefore, Wellness should receive an award of attorneys' fees.

[14] This amount, divided between the 19 Plaintiffs, amounts to only $22,441.75 per Plaintiff.

II. THE DISTIRCT COURT ERRED IN DETERMINING THAT PLAINTIFFS HAD A REASONABLE BASIS FOR THEIR CLAIMS AND IN DENYING FEES.

Based the facts, law, and circumstances set forth above, the district court erred as a matter of law in denying fees. The district court denied fees on the following basis:

> Plaintiffs' claims were brought with a reasonable basis. Other applicants, like Wellness Connection of Nevada, LLC, were joined as a result of motion practice brought related to joinder issues on the Petition for Judicial Review claim. Wellness Connection of Nevada, LLC does not satisfy the analysis for a prevailing party under these circumstances.

12 App. 1824 (emphasis supplied). The Court erred in making these findings and in denying fees for several reasons, any of one of which justify reversing. Each is addressed below.

A. Plaintiffs' Claims Were Not Brought or Maintained With A Reasonable Basis.

First, the district court's finding that "Plaintiffs' claims were brought with a reasonable basis" is erroneous as a matter of law. As set forth above – and as the Nevada Supreme Court has held – Plaintiffs had no right to seek judicial review against the DOT and no standing to challenge the DOT's 2018 process. Thus, this suit never should have been filed against the DOT in the first place. If Plaintiffs had no right to assert claims against the DOT, then it is doubly so that they had no basis for bringing any claims against Wellness to strip Wellness of its license. In bringing their claims to strip Wellness' license, they forced Wellness to incur substantial

attorneys' fees resulting from months of discovery and depositions, motion practice, and a month-long trial. Plaintiffs' claims were not brought or maintained with any reasonable ground. *See supra*, Section I(A)-(B).

B. Plaintiffs' Claims for Judicial Review Were Improper, and Wellness Does Not Seek Attorneys' Fees Relating to Judicial Review.

Second, the finding that Plaintiffs had a reasonable basis to join Wellness for purposes of judicial review, in addition to being erroneous, also overlooks that Wellness is not seeking any attorneys' fees relating to the judicial review claims in Phase 1. 10 App. 1367. Wellness is only seeking attorneys' fees relating to the Phase 2 claims. *See id*. The Phase 2 claims, which involved months of discovery, extensive motion practice, and a month-long trial, is what caused Wellness to incur its substantial attorneys' fees. 10 App. 1367, *and* 1372-1518. The district court did not find that any of the Plaintiffs had a reasonable basis for bringing any of those Phase 2 claims against Wellness. 12 App. 1824. Even if it had, that finding would have been erroneous as a matter of law for the reasons set forth above. *See supra*, Section I(A)-(D).

C. The Finding that Wellness Was Not A "Prevailing Party" Is Erroneous Since it Prevailed As to All Claims and All Relief.

Third, the district court's finding that Wellness was not a "prevailing party" is erroneous as a matter of law because Wellness was clearly the prevailing party. None of the Plaintiffs (a) prevailed on any claims against Wellness, (b) obtained any relief

against Wellness; or (c) obtained any relief that affected Wellness or the license it obtained in the 2018 process. That is the very definition of a prevailing party. The Nevada Supreme Court has stated that "[a] party prevails 'if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit.'" *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (*quoting Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)).

Wellness succeeded on all of the claims and issues alleged in this case, avoiding an adverse judgment and avoiding any adverse relief. In short, Plaintiffs' efforts to strip Wellness of its license failed. That makes Wellness the prevailing party. The district court erred in concluding that Wellness did not prevail.

D. The Finding that Wellness Was Not A Prevailing Party Also Contradicts the District Court's Later Finding in Awarding Costs that Wellness Is A Prevailing Party.

Fourth, finding that Wellness was not a prevailing party is also contradictory because the district court later found Wellness to be the prevailing party and awarded Wellness its costs. As background, in 2020, the district court (Judge Elizabeth G. Gonzalez) found that Wellness' first memorandum of costs was premature and needed to be brought later after entry of final judgment. 12 App. 1850-52. More specifically, in retaxing costs in 2020, the district court stated:

> 1. The award of costs is premature under NRS 18.110 as there is not a final judgement in this matter.
> 2. Final judgment will be issued following completion of Phase 3 scheduled for a jury trial on June 28, 2021.

> 3. This decision is without prejudice to seek recovery costs [sic] at the time of the final judgment.

Id. at 1851 (emphasis supplied). It is significant that if Wellness had not been a prevailing party, the district court could have simply denied the request for costs instead of preserving Wellness' right to seek costs later after the entry of final judgment.

Later in February 2023, after entry of the final judgment, the district court (Judge Joanna S. Kishner) awarded Wellness costs against the Plaintiffs, denied motions to retax, and specifically found that Wellness is the "prevailing party." 13 App. 2028. The district court stated:

> Wellness Connection is a prevailing party as against the TGIG Plaintiffs and the Joinder Plaintiffs. Wellness Connection prevailed on all claims and defenses to retain its licenses, which the Plaintiffs variously sought to revoke or impair through their requested forms of relief and arguments. Wellness Connection did not lose its license and its license was not affected by the Court's injunction against the so-called Five-Percent Rule or by any other rulings of the Court. Wellness Connection's license was not lost or impaired by the litigation. Wellness prevailed on all issues against all Plaintiffs and this makes Wellness Connection a prevailing party. See Golightly & Vannah, PLLC v. TJ Allen, LLC, 132 Nev. 416, 422, 373 P.3d 103, 107 (2016).
>
> The Court finds that the way in which Wellness Connection was named as a defendant in this action, and the manner in which the various Plaintiffs' cases were consolidated and tried, do not preclude Wellness Connection from being considered a prevailing party against any Plaintiff.
>
> This was a special proceeding in which declaratory relief was sought in addition to other claims, and the value of the property, i.e., the licenses

> at stake and Plaintiffs' alleged damages and purported loss of market share exceeded $2,500. See NRS 18.020.

Id. (emphasis supplied).

Wellness cannot be the prevailing party for purposes of receiving an award of costs but somehow not qualify as the prevailing party for purposes of seeking attorneys' fees. In the end, Wellness' Motion for Attorneys' Fees should have been granted and the district court erred in denying fees under NRS 18.010(2)(b). This Court should reverse.

CONCLUSION

Plaintiffs are 19 marijuana dispensaries/licensees that sued Wellness along with the DOT because Plaintiffs were upset that they did not obtain dispensary licenses in the 2018 process. They therefore decided to file suit challenging the process and seeking to strip Wellness of the one license it was rightfully awarded in the 2018 process. Plaintiffs undisputedly had no right, legal basis, or evidentiary basis to bring their claims against Wellness; yet they dragged Wellness through an expensive discovery process and a month-long trial in their quest for a "do over" of the 2018 process and redistribution of licenses. And they did so with no proof they would have scored better or obtained a license the second time around.

If ever there were a case where attorneys' fees are warranted under NRS 18.010(2)(b), this is it. The Nevada legislature intended for courts to "liberally construe [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate

situations." NRS 18.010(2)(b). Because Plaintiffs brought and maintained their claims against Wellness without reasonable ground, either legally or factually, the district court erred in denying Wellness' Motion for Attorneys' Fees. This Court should therefore reverse.

DATED this 1st day of April, 2024.

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CERTIFICATE OF COMPLIANCE PURSUANT TO NRAP 28.2 AND 32

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 365 Word in 14 font size and Times New Roman font face.

I further certify that this Brief complies with the 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 contains 10,664 words.

Finally, I hereby certify that I have read this 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 compiles 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 of appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 1st day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April 2024, I caused a true and correct copy of the **APPELLANT'S OPENING BRIEF** to be electronically filed and served with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system.

/s/ Kelly McGee
An employee of Howard & Howard Attorneys PLLC