IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: D.O.T. LITIGATION	
GREEN LEAF FARM HOLDINGS LLC; GREEN THERAPEUTICS LLC; NEVCANN LLC; RED EARTH LLC; AND THC NEVADA LLC, Appellants/Cross-Respondents, v. DEEP ROOTS HARVEST, INC., Respondent/Cross-Appellant and, LONE MOUNTAIN PARTNERS, LLC, Respondent.	**Case No.** 86071 District Court Case No. A787004

APPEAL
From the Eighth Judicial District Court of the State of Nevada
District Court Case No. A-19-787004-B

RESPONDENT / CROSS-APPELLANT DEEP ROOTS HARVEST, INC.'S REPLY BRIEF ON CROSS-APPEAL

RICHARD D. WILLIAMSON, State Bar No. 9932
BRIANA N. COLLINGS, State Bar No. 14694
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
(775) 329-5600
Attorneys for Respondent/Cross-Appellant Deep Roots Harvest, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION[1]

Appellants argue the district court properly declined to award Deep Roots its pre-appearance costs because there are no guiding legal principles demanding such costs be awarded. Appellants, however, have ignored the fundamental notions of fairness which permeate the judicial process and underlie every guiding legal principle. In the underlying litigation, Appellants sought to have the Department of Taxation ("DOT") re-do the application and competition process, which would have required the DOT to revoke Deep Roots' hard-won licenses to sell recreational marijuana in the State of Nevada. This unambiguous attack on Deep Roots' licenses prompted Deep Roots to begin monitoring the threatening litigation and even participate in a pre-appearance mediation in an effort to resolve the matter. Because these efforts were unsuccessful, Appellants then served Deep Roots with a complaint, Deep Roots began preparing its answer, and Deep Roots later appeared in the litigation to successfully defended its licenses.

---

[1] Appellants Green Leaf Farm Holdings LLC, Green Therapeutics LLC, Nevcann, LLC, Red Earth, LLC, and THC Nevada, LLC filed a "Reply Brief" on April 1, 2024. As that brief was not entitled a "Reply Brief on Appeal *and Answering Brief on Cross-Appeal*" (as contemplated by NRAP 28.1(c)(3)) it is not clear that Appellants have even properly challenged Deep Roots' Opening Brief on its cross-appeal. As Appellants' Reply Brief does substantively address Deep Roots' arguments on its cross-appeal, however, Deep Roots believes that a Reply Brief on Cross-Appeal pursuant to NRAP 28.1(c)(4) is appropriate. Accordingly, Deep Roots has concurrently filed a motion to extend the deadline to file this reply.

Deep Roots' pre-appearance work and costs incurred were therefore necessary and reasonable. The district court thus erred in limiting Deep Roots' cost recovery to those incurred after it filed an answer to Appellants' third amended complaint. This court should allow Deep Roots to recover all of its costs.

II. ARGUMENT

Pursuant to NRS 18.110(1), Deep Roots, as the prevailing party, is entitled to all of its "costs [that] have been necessarily incurred ***in the action*** or proceeding." (Emphasis added.) According to NRCP 3, an "action is commenced by filing a complaint with the court." Deep Roots is therefore entitled to all costs incurred after Appellants filed a complaint with the district court. Deep Roots' cost recovery should not be arbitrarily limited to a subsequent appearance in the already-pending action in which it had been named as a defendant.

Indeed, this tracks notions of fundamental fairness because once a party learns of a lawsuit filed against it, that party should retain counsel to best poise itself to defend against the lawsuit. That party, in almost every case, will then begin to incur costs to do so. The alternate view, that pre-appearance costs "are categorically unreasonable," is contrary to public policy. Grossman v. Park Fort Washington Assn., 152 Cal.Rptr.3d 48, 52 (Cal. Ct. App. 2012), as modified (Jan. 15, 2013). For example, such a view is contrary to the rules of conduct governing legal counsel, who must perform research to ensure the party has a viable argument

in the proceeding. See NRCP 11(b)(2). It would be inequitable to require these costs be incurred, but bar the recovery thereof.

When costs are incurred immediately prior to a party's involvement in a lawsuit and those costs were incurred as part of the attorney's preparation for entering the litigation, those costs can be recovered by that party. Kukreja v. Sec. of Health and Human Svcs., 136 Fed. Cl. 431, 437 (Fed. Cl. 2017) (attorney's fees incurred prior to attorney's formal appearance were awarded); Grossman, 152 Cal. Rptr. 3d at 52 ("when attorney fees and costs expended in prelitigation ADR satisfy the other criteria of reasonableness, those fees and costs may be recovered"); Mattel, Inc. v. MGA Ent., Inc., 801 F. Supp. 2d 950, 956 (C.D. Cal. 2011) (confirming that fees "spent on pre-filing activities may be recoverable if they were 'reasonably expended on the litigation.'"); Dice v. City of Montesano, 128 P.3d 1253, 1262 (Wash. Ct. App. 2006) (holding that "pre-filing preparation . . . is a necessary and legitimate part of a judicial proceeding and, therefore, attorney fees and costs incurred during this process should be considered part of an 'action'" under the cost recovery rules); Dishman v. UNUM Life Ins. Co. of Am., 269 F.3d 974, 987-88 (9th Cir. 2001) (affirming attorneys' fees awarded "for work performed before the filing of the complaint" because they "were for conferences with clients, drafting the complaint and other reasonable efforts directed toward the filing of the litigation.").

Similarly, where a party's property or other rights are threatened by litigation where that party has not been named, the party may recover costs incurred to defend its rights in that litigation. Hasbrouck v. Texaco, Inc., 879 F.2d 632, 638 (9th Cir. 1989) (awarding attorneys' fees incurred to file an amicus curie brief in a matter the party was not named in, but where the outcome would largely affect the party's rights); State of Ariz. v. Maricopa Cty. Med. Soc., 578 F.Supp. 1262, 1268-69 (D. Ariz. 1984) (same).

Thus, while Appellants are correct that there is no clear precedent in Nevada on this issue, the weight of authority across the country—and basic principles of logic and fairness—all weigh in favor of finding that a successful defendant is entitled to recover all costs it has incurred in relation to an action.

Deep Roots' pre-answer costs were reasonable and should be recoverable. Because Deep Roots' licenses were threatened by the litigation, when the previously appearing parties agreed to attend a mediation in October 2019, Deep Roots was invited and did participate in the mediation. At that point, Deep Roots and its license applications had already been scrutinized in the preliminary injunction hearing that Appellants and other plaintiffs sought in 2019. (1 R.App. 29, 43 n.15.) Moreover, Deep Roots' participation in the mediation would have been severely hindered had it not obtained copies of pleadings and conducted certain research prior to attending. (See 6 AA 1467-93; 7 AA 1660; 7 AA 1665; 7

AA 1676-77 (all evidencing pre-October 2019 costs).) Deep Roots thus incurred a variety of costs related to its critical participation which should be recoverable. Moreover, Deep Roots was entitled to incur such costs to properly position itself to defend its valuable licenses, and these costs are recoverable, even though they pre-date Deep Roots formally answering Appellants' complaint against it.

Deep Roots was clearly, at that time, a critical party whose participation in the dispute was recognized by Appellants and the other litigants. These Appellants commenced this "action" on January 4, 2019. (1 AA0001-11.) Therefore, all of Deep Roots' costs incurred after January 4, 2019 should be recoverable against these Appellants in this action.

III. CONCLUSION

The district court erred in limiting Deep Roots to its post-answer costs. Instead, the district court should have awarded Deep Roots its costs incurred after Appellants filed their complaint on January 4, 2019. Accordingly, Deep Roots requests this court reverse the district court's order limiting Deep Roots' costs.

ATTORNEY'S CERTIFICATE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14-point font.

2. 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 proportionally spaced, has a typeface of 14 points or more, and contains 1,056 words OR does not exceed 40 pages.

3. 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 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 18th day of April 2024.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON
By: */s/ Briana N. Collings*
Richard D. Williamson, Esq.
Briana N. Collings, Esq.
Attorneys for Respondent/
Cross-Appellant
Deep Roots Harvest, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, over the age of 18, and not a party within this action.

I further certify that on the 18th day of April, 2024, I electronically filed the foregoing **RESPONDENT / CROSS-APPELLANT DEEP ROOTS HARVEST, INC.'S REPLY BRIEF ON CROSS-APPEAL** with the Clerk of the Court by using the electronic filing system, which served the same on all parties listed on the court's master service list.

/s/ Alexandra Fleming

An Employee of Robertson, Johnson, Miller & Williamson