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DISTRICT COURT

CLARK COUNTY, NEVADA

NICHOLAS DIAZ,

Petitioner,

v.

KEITH KIZER, Executive Director for the Athletic Commission of the Department of Business and Industry, State of Nevada; and NEVADA STATE ATHLETIC COMMISSION,

Respondents.

Case No.: A-12-665815-J

Dept.: XXXI

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This is an application for judicial review of the Decision and Order of the Nevada State Athletic Commission (the "NSAC") made in Findings of Fact, Conclusions of Law, and Order Regarding First Amended Complaint dated June 26, 2012 (the "Findings"), suspending Petitioner's license as mixed martial artist for 12 months and fining Petitioner in the amount of $79,500.0 in respect of allegations that Petitioner violated NAC 467.850 and NAC 467.885(3) by:

a) providing a urine sample that tested positive for inactive marijuana metabolites following his participation in a mixed martial arts contest on February 4, 2012; and

b) providing false or misleading information to the NSAC by his answers to questions on his Pre-Fight Medical Questionnaire dated February 3, 2012 (the "Questionnaire").

Fundamentally, Petitioner's position is that:

a) Inactive marijuana metabolites do not constitute a 'prohibited substance' under NAC 467.850 and the NSAC erred in law by treating them as such; and

b) The information Petitioner provided on the Questionnaire was accurate and correct, and the NSAC erred in law by finding a violation of NAC 467.885(3) where the Petitioner had properly and correctly answered the questions the NSAC had elected to include on the Questionnaire. The NSAC further erred by mistakenly conceiving of the allegation as determined by the issue of 'credibility', the findings made in respect of which are clearly erroneous – but which issue does

not even arise given the accuracy of Petitioner's answers given on the Questionnaire.

II.

STATEMENT OF FACTS

A. Factual Background and the Parties' Positions Before the Hearing

The petitioner, Nicholas Diaz, is a professional mixed martial artist.

On or about February 4, 2012, Mr. Diaz participated in a professional mixed martial arts contest at the Mandalay Bay Events Center in Las Vegas, Nevada (the "Contest"). That Contest was conducted under the direction of the NSAC. Before the Contest, Mr. Diaz applied to the NSAC for a license as a mixed martial artist, which the NSAC duly issued and approved pursuant to NAC 467 before the Contest.

On February 8, 2012, the NSAC's Executive Director, Keith Kizer, sent a letter to Mr. Diaz. (Record on Appeal ("ROA"), p.1.) That letter enclosed a complaint filed by the NSAC on that same date (the "Complaint") and Notice of Hearing on Temporary Suspension. (ROA, p. 2.)

The Complaint alleged that the urine sample provided by Mr. Diaz for urinalysis immediately following the Contest reflected a positive result for the presence of marijuana metabolites. The Complaint further alleged that marijuana metabolites are "prohibited by the regulations of the Commission" (Complaint, paras. 6 and 7). The Complaint sought relief including, *inter alia*, a monetary fine and disciplinary action "against Diaz's license pursuant to the parameters defined at NAC 467.885", which includes a potential suspension or revocation of a license.

On March 7, 2012, in response to the Complaint Mr. Diaz filed (i) his reply to the Complaint (the "Reply to Complaint") (ROA, p. 14), (ii) his affidavit sworn March 6, 2012 (ROA p. 21), and (iii) the affidavit of Dr. John Hiatt sworn March 2, 2012 (ROA, p. 33).

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The Reply to Complaint stated in Mr. Diaz's defence that, *inter alia*:

a) Mr. Diaz is an authorized medicinal marijuana patient for treatment of attention deficit hyperactivity disorder ("ADHD");

b) marijuana metabolite is not a prohibited substance under NSAC's regulations;

c) the NSAC and the World Anti-Doping Agency prohibit the consumption of marijuana only "in competition";

d) Mr. Diaz's practice is to discontinue medical marijuana treatment eight days before any fight to eliminate the possibility of any behavioural and psychological effects associated with medicinal marijuana's active ingredient; and

e) Mr. Diaz has committed no violation of the NSAC's regulations.

In Mr. Diaz's affidavit he deposed that, *inter alia*:

a) Mr. Diaz has been approved for the use of medical marijuana to treat ADHD by his physician, Robert E. Sullivan, in California;

b) Mr. Diaz is in full compliance with the registry laws for medical marijuana in California; and

c) Mr. Diaz discontinued use of medical marijuana eight days before the contest which was the subject of the Complaint, consistent with his general practice.

In Dr. Hiatt's affidavit he deposed, *inter alia*:

a) Mr. Diaz did not test positive for marijuana;

b) testing for inactive metabolites of THC is not a reliable indicator of "current or even recent use"; and

c) presence of inactive metabolite in a post-fight urine sample is consistent with discontinuing medical marijuana use eight days before a fight, which would have no impact on a fighter's performance "in competition".

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On or about March 29, 2012, Mr. Kizer delivered to Mr. Diaz's counsel a revised complaint (the "First Amended Complaint"). (ROA, p. 36.)

The First Amended Complaint made further allegations against Mr. Diaz including, *inter alia*, allegations that Mr. Diaz provided false or misleading information to the NSAC by indicating on a 'Pre-Fight Questionnaire' (i.e. the Questionnaire) that (i) he does not have any serious medical illnesses, (ii) he had not taken or received any prescribed medications in the last two weeks before the Contest, and (iii) he had not taken or received any over the counter medication or products in the last two weeks before the Contest.

On April 11, 2012, Mr. Diaz filed:

a) Petitioner's reply to the First Amended Complaint on behalf of Mr. Diaz (the "Reply to First Amended Complaint") (ROA, p. 54); and

b) Physician's Statements that constituted the requisite written documentation that qualified Petitioner to use medical marijuana pursuant to California Health & Safety Code 11362.5 (ROA, p. 269-271)

In the Reply to First Amended Complaint Mr. Diaz stated, *inter alia*:

a) the First Amended Complaint does not allege any facts supporting that Petitioner violated any NSAC rule;

b) marijuana metabolite is not a drug or injection that has not been approved by the NSAC under NAC 467.850;

c) all answers provided by Mr. Diaz on the Questionnaire were "true and accurate to the best of [Diaz's] ability", and therefore met the standard required by the NSAC;

d) Mr. Diaz does not believe that ADHD is a "serious medical illness";

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e) Mr. Diaz does not believe that medical marijuana is a "prescribed medication" and that this belief is consistent with federal law; and

f) Mr. Diaz does not believe that medical marijuana is an "over the counter" medication.

B. Evidence before the Commission

The First Amended Complaint was heard by the Commission on May 21, 2012.

In connection with the Commission's allegations in the First Amended Complaint the evidence before the Commission included the following:

a) the Affidavit of Dr. John Hiatt, sworn March 2, 2012, in which Dr. Hiatt deposed that (i) Mr. Diaz "did not test positive for marijuana (Delta-9-Tetrahydrocannabinol (THC)" (ROA, p. 33); (ii) a test for Delta-9-THC-Carboxylic Acid, the pharmacologically inactive metabolite of THC, "is not a reliable indicator of current or even recent use" (ROA, p. 33); (iii) "to a reasonable degree of scientific certainty, the presence of 25 ng/mL of inactive metabolite in [Mr. Diaz's] post-fight urine sample [10 ng/mL above the 15 ng/mL cut-off] is consistent with [Mr. Diaz's] protocol of discontinuing medical marijuana use eight (8) days before a fight" (ROA, p. 34); and (iv) an eight day break in usage of marijuana "would ensure that his normal usage would have no impact on [Mr. Diaz's] performance 'in-competition' or create a safety risk" (ROA, p. 34);

b) the Affidavit of Mr. Diaz, in which Mr. Diaz deposed that (i) he has been approved for the use of medical marijuana to treat ADHD by his physician, Robert E. Sullivan, in California; (ii) he is in full compliance with the registry laws for medical marijuana in California; (iii) that he discontinued use of medical

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marijuana eight days before the contest which was the subject of the Complaint, consistent with his general practice. (ROA, p. 21);

c) The 2012 Prohibited List, promulgated by the World Anti-Doping Agency which enumerates as prohibited substances "in-competition" only: "Natural (e.g. cannabis, hashish, marijuana) or synthetic delta 9-tetrahydrocannabinol (THC) and cannabimimetics" and does not include inactive marijuana metabolites as a prohibited substance (ROA, p. 30);

d) Physician's Statements from Dr. Robert E. Sullivan, M.D., dated June 25, 2009 and February 28, 2012, recommending the use of medical cannabis (ROA, pp. 269-70);

e) Mr. Diaz's sworn evidence given orally at the hearing; and

f) Dr. Hiatt's sworn evidence given orally at the hearing, which included the following uncontroverted testimony: (i) marijuana metabolite in the urine can persist "for days weeks or even more than a month after last use" (Transcript, p. 108; ROA p. 299); (ii) Petitioner "did not test positive for parent drug [i.e. marijuana]" and "[t]here was no test performed for parent drug" (Transcript, p. 108; ROA p. 299); (iii) a test could have been performed for the parent drug (Transcript p. 109; ROA p. 299); (iv) the active ingredient in marijuana lasts "from two to maybe even six or eight hours after the last usage" (Transcript, p. 112; ROA p. 300); and (v) Dr. Hiatt would have expected that Petitioner's metabolite levels were higher than they in fact were given Petitioner's regular usage until suspending treatment 8 days before the Contest (Transcript p. 113; ROA p. 300).

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C. The NSAC's Findings of Fact and Conclusions of Law

The Commission delivered its Findings of Fact, Conclusions of Law, and Order Regarding First Amended Complaint, dated June 26, 2012, on June 29, 2012.

The NSAC held that Mr. Diaz had committed two violations of NAC 467 (and a third violation that was parasitic on the first – i.e. that Petitioner had brought "disrepute to unarmed combat" under NAC 467.886).

First, the NSAC held that Mr. Diaz had violated NAC 467.850 on the basis that the test conducted by Quest Diagnostics on Diaz's urine sample from February 4, 2012 was "conclusive" regarding the doping violation of NAC 467.850. (ROA, p. 321)

Second, the NSAC held that Mr. Diaz had violated NAC 467.885(3) by providing false or misleading information to the Commission or a representative of the Commission by his answers to questions on the Questionnaire dated February 3, 2012. (ROA, pp. 321-22)

III.

ERRORS UNDER REVIEW

It is Petitioner's position that:

a) The NSAC's conclusion that Petitioner violated NAC 467.850 was premised on a misinterpretation of NAC 467.850 and, specifically, its error in treating inactive marijuana metabolites as a prohibited substance under NAC 467.850; and

b) The NSAC's conclusion that Petitioner provided false and misleading information was premised on (i) an error of law in finding a violation under NAC 467.885(3) where the information given by Petitioner on the Questionnaire was factually correct; and (ii) credibility findings that were clearly erroneous, arbitrary or capricious.

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IV.

LEGAL ARGUMENT

A. The Applicable Legal Standards

This petition is brought under NRS 233B which provides in relevant part, that the court may set aside an agency's final decision in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:

> ...
> (b) In excess of the statutory authority of the agency;
> (c) Made upon unlawful procedure;
> (d) Affected by other error of law;
> (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (f) Arbitrary or capricious or characterized by abuse of discretion.

See NRS 233B.135(3); See also *State, Dep't of Prisons v. Jackson,* 111 Nev. 770), 72, 895 P.2d 1296, 1297 (1995).

Petitioner's position is that the NSAC has committed errors of law and made erroneous, arbitrary or capricious findings of fact, which once corrected require a reversal of the NSAC's Order.

This court applies de novo review to questions of law, including issues of statutory interpretation. *State, DMV v. Taylor-Caldwell,* 126 Nev. , , 229 P.3d 471, 472 (2010); *State, Dep't of Motor Vehicles v. Terracin,* 125 Nev. 31, 34, 199 P.3d 835, 836-37 (2009).

On questions of fact, the reviewing court is ordinarily limited to determining whether substantial evidence exists in the record to support the administrative agency's decision. *See SIIS v. Swinney,* 103 Nev. 17, 20, 731 P.2d 359, 361 (1987). However, even on that standard mere speculation and belief is insufficient – see, e.g., *Horne v. The State Industrial Insurance System,* 113 Nev. 532; 936 P.2d 839 at 13 and 843 and 109 Nev. at 424-25, 851 P.2d at 425.

The Commission's hearing was under NRS 467.113. Under NAC 467.956, the evidentiary standard for findings of fact pursuant to NRS 467.113(4) is that "the evidence, when considered and compared with that opposed to it, has more convincing force and produces in the minds of the members of the Commission a belief that what is sought to be proved is more likely true than not true". [emphasis added]

This specific evidentiary standard abrogates the general rule that an administrative agency's findings of fact must only be based on "substantial evidence" – i.e. evidence that "a reasonable mind might accept as adequate to support a conclusion" (*State, Employment Security v. Hilton Hotels,* 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)). A more specific evidentiary standard displaces the general default standard. See *Gregory v. Board of Medical Examinders,*110 Nev. 1060, 1078, 881 P.2d 1339, 1352 (1994).

Accordingly, it is open to this Court to review the factual findings made by the NSAC on the basis that the findings should only be upheld if the evidence before the NSAC reasonably satisfies the more stringent "more convincing force" standard.

Regardless, this petition should be resolved in the Petitioner's favor solely on the basis of correcting the errors of law made by the NSAC. Insofar as there may be limited findings of fact that are directly engaged by the issues raised by this petition, such findings cannot withstand review under either the general or the specifically applicable standard as set forth above.

B. The NSAC's conclusion of law that Petitioner used a prohibited substance before or during the Contest is premised upon an error of law

NAC 467.850 provides in relevant part that:

1. The administration of or use of any:
   (a) Alcohol;
   (b) Stimulant; or
   (c) Drug or injection that has not been approved by the Commission, including but not limited to, the drugs or injections listed in subsection 2, in any part of the body, either before or during a contest or exhibition, to or by any unarmed combatant, is prohibited.

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> 2. The following types of drugs, injections or stimulants are prohibited pursuant to subsection 1:
>
> ...
>
> (f) Any drug identified on the most current edition of the Prohibited List published by the World Anti-Doping Agency, which is hereby adopted by reference... [emphasis added]

The NSAC made no finding of fact that Petitioner used any substance that is, in fact, a prohibited substance, and the First Amended Complaint included no allegation that Petitioner used a prohibited substance.

The complaint against Petitioner alleged that (i) Petitioner tested positive for "Marijuana Metabolites, which are prohibited by the regulations of the Commission" (First Amended Complaint, para. 17; ROA p. 38); and (ii) "[b]y testing positive for Marijuana Metabolites, DIAZ has violated NAC 467.850 and 467.886" (First Amended Complaint, para. 22; ROA p. 39).

The NSAC did find, as alleged in the First Amended Complaint, that Petitioner tested positive for marijuana metabolite. Petitioner never took issue with this factual allegation.

However, marijuana metabolite is not a prohibited drug or injection under the NSAC's regulations.

'Inactive marijuana metabolites' are neither an enumerated 'prohibited substance' under NAC 467.850 nor are they incorporated by reference at NAC 467.850(2)(f). Inactive marijuana metabolites are not identified on the most current edition of the Prohibited List published by the World Anti-Doping Agency ("WADA"). (See ROA, pp. 29-30.)

WADA's Prohibited List does include some metabolites on the Prohibited List (e.g. "testosterone and their metabolites and isomers" [emphasis added]). However, marijuana's inactive metabolites are not included on that List. (ROA, p. 25)

Furthermore, inactive marijuana metabolites are not "administered" or "used" (NAC 467.850(1)) and inactive marijuana metabolites are not a "drug or injection" (NAC 467.850(1)(c)).

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The NSAC has not, by regulation, elected to adopt a rule that would deem a positive test for inactive metabolites of substances which are *permitted* to be used outside of competition (e.g. marijuana) to constitute a positive test for a prohibited substance itself. The NSAC may wish to, in the future, adopt a rule similar to Rule 2.1.2 of WADA's Code:

> 2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in the *Athlete's* A *Sample* where the *Athlete* waives analysis of the B *Sample* and the B *Sample* is not analyzed; or, where the Athlete's B *Sample* is analyzed and the analysis of the *Athlete's* B *Sample* confirms the presence of the *Prohibited Substance* or its *Metabolites* or *Markers* found in the *Athlete's* A *Sample*. (ROA, p. 142) [underscoring added]

However, though the NSAC elected to adopt WADA's Prohibited List it has not yet adopted Rule 2.1.2 of WADA's Code. No such deeming provision exists at present under the NSAC's regulations.

The NSAC made no finding of fact – and could have made no finding of fact – that Petitioner tested positive for "Natural (e.g. cannabis, hashish, marijuana) or synthetic delta 9-tetrahydrocannabinol (THC) and cannabimimetics", as prohibited in competition under WADA's Prohibited List (and incorporated by the NSAC by regulation). The only finding of fact was that the relevant urinalysis reflected "a Positive result for the presence of Marijuana Metabolites" (Findings, para. 11; ROA, p. 309). The NSAC erred in law in treating that positive result as a positive result for a prohibited substance.

In further error, the NSAC concluded that a violation of NAC 467.850 had occurred without any finding of fact that Mr. Diaz "administered" or "used" marijuana metabolite. There is good reason for the NSAC's failure to have made such a finding – it is unclear how conceivably an inactive metabolite could be "administered" or "used". Metabolites are produced by the human body; they are neither "administered" nor "used". However, even if marijuana metabolite constituted a 'prohibited substance' (and it clearly does not), the NSAC erred in law

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by finding a violation of 467.850 in the absence of any finding that Mr. Diaz administered or used that metabolite in connection with the Contest.

C. The NSAC's Conclusion that Petitioner provided misleading information to the NSAC was premised upon errors of law and factual findings unsupported by evidence

The NSAC made separate errors in connection with its findings in respect of each of the three statements in issue, upon which its conclusion that Diaz violated NAC 467.885(3) depends (Findings, paras. 61 and 106; ROA p. 315-16 and 322). Those errors resulted in a conclusion that Diaz violated NAC 467.885 that is entirely premised on an error of law.

Put broadly, the NSAC (i) entirely ignored the plain and evident meanings of the questions set out on the Questionnaire (ROA p. 76) the answers to which, as given by Petitioner, were true and correct; and (ii) instead made erroneous credibility findings which (a) were insufficiently grounded in the evidence and which, in any event, (b) were ultimately irrelevant to the issue of an alleged violation of NAC 467.885(3) given the plain and evident meaning of the questions themselves.

Because the answers provided by Petitioner were true and correct, credibility is not even an issue that properly arises. In finding a violation of NAC 467.885(3) on the basis of "credibility" in such circumstances (as confirmed in the Findings, para. 60; ROA p. 315) the NSAC's conclusion is premised on an error of law, is clearly erroneous in view of the evidence on the record, and is arbitrary or capricious in the circumstances.

1. The NSAC committed an error of law in finding a violation of NAC 467.885(3) on the basis of a "credibility" finding despite that the answers given by Petitioner on the Questionnaire were true and correct

As set forth in further detail below, all of the answers provided by Petitioner on the Questionnaire were truthful and correct under the plain and obvious meanings of the terms used

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in the Questionnaire (none of which were defined by the NSAC). No rule violation can properly be found on the basis of the Petitioner's provision of accurate information to the NSAC in response to the NSAC's questions.

The NSAC may wish now, on an after-the-fact basis, that it had drafted the Questionnaire differently. However, given the document as drafted and presented to Petitioner on February 3, 2012, it is outrageous to discipline Petitioner for giving the accurate and correct answers he forthrightly provided.

a. NSAC's Conclusion that Petitioner provided false or misleading information in answering 'no' to the question "Have you taken/received any prescribed medications in the last two weeks?" is premised on an error of law

The term "prescribed medication" is not defined on the Questionnaire. However, both at law and as a matter of ordinary meaning, medical marijuana is not a prescription medication. Under California law, a physician may "recommend" (not "prescribe") medical marijuana. See California Health & Safety Code 11362.5(b)(1)(A). Nothing under California state law permits a doctor to "prescribe" medical marijuana. Likewise, under Nevada law, a prescription is "an order....directly from a physician...to a pharmacist" (NRS 453.128). Physicians do not order pharmacists to dispense medical marijuana either in California or in Nevada (or, indeed, anywhere in the United States).

It is not possible to provide false or misleading information by answering a question correctly – as Petitioner did by correctly stating that he had not used a prescribed medication in the two weeks preceding the Contest.

The NSAC's conclusion is therefore premised on its misconception that medical marijuana is a "prescription medication" which constitutes an error of law – or a finding that is

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clearly erroneous or arbitrary and capricious given the absence of evidence that Petitioner used any prescription medication in the two weeks before the Contest.

b. The NSAC's Conclusion that Petitioner provided false or misleading information in answering 'no' to the question "Have you taken/received any over the counter medication/products in the last two weeks?" is premised on an error of law

In drafting the Questionnaire, the NSAC elected not to include a definition for the expression "over the counter medication/products". In the absence of any specific technical definition given, the plain and obvious meaning of the expression refers to products and medications typically sold or dispensed at a retail store or pharmacy, such as products pharmacists commonly stock on shelves to treat symptoms for pain relief, allergies, cold/flue, etc. The NSAC provided no interpretive guidance to suggest any other definition.

Medical marijuana is not such an over the counter medication/product. Retail stores and pharmacies do not stock medical marijuana on their shelves. The NSAC made no finding that medical marijuana constituted an "over the counter medication/product".

Further, the NSAC made no finding that Petitioner had used any such over the counter medication in the two weeks preceding the Contest in any event. There was no evidence before the NSAC to permit it to find that Petitioner had done so. Accordingly, because the NSAC's conclusion of a rule violation depended on finding that Petitioner had in fact used over the counter medication/products (such that his answer was false or misleading), it is a conclusion made on the basis of no evidence. Insofar as the NSAC's conclusion was premised solely on 'credibility' issues, the NSAC has committed an error of law. It is only if the information given by Petitioner is substantively incorrect that credibility can even arise as an issue.

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c. The NSAC's Conclusion that Petitioner provided false or misleading information in answering 'no' to the question "Do you have any serious medical illnesses, conditions?" is premised on an error of law

Petitioner's answer to the question was correct and truthful. His answer could only be viewed as 'false or misleading' under a bizarre interpretation of the question under which the undefined expression at issue (i) implicitly imports a definition from an out-of-state Health & Safety regulation; and (ii) has an unexpectedly broad scope having nothing to do with a fighter's physical condition.

The NSAC provided no interpretive guidance as to the intended definition of 'serious medical illnesses, conditions' on the Questionnaire. In absence of any such interpretive guidance, the obvious meaning of the term – given the context in which the question was asked – was to refer to potentially incapacitating, life-threatening physical conditions or illnesses, or conditions that could affect the physical safety of an athlete's imminent competition in high-level athletic competition. ADHD is not a serious medical condition because it is not incapacitating and does not relate to physical safety in any event. *See generally Perry v. Jaguar of Troy,* 353 F.3d 510 (6th Cir. 2003); see also NRS 687B.450 (medical conditions "serious" if they are life threatening).

This interpretation of the expression "serious medical illnesses, conditions" is confirmed by the purpose of the Questionnaire, per the NSAC's Findings, which is to preserve and protect the health and safety of the fighter rather than to fish for information about a fighter's personal long-term psychological issues (Findings, para. 53; ROA p. 314):

> The purpose of the Questionnaire in part is to determine whether the contestant has taken any substances that may affect his performance. Disclosure of the absolute truth on the Questionnaire is essential for the health and safety of the fighter. It is vital to find out what chemicals the contestant has in his body in case he is injured or unconscious so the Commission's ringside physicians and/or Emergency Medical Technicians will know what they are working with, and not administer something that may interact with drugs already in the contestant's body. [emphasis added]

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However, in its Findings, the NSAC does not even purport to make a finding as to the meaning of "serious medical illnesses, conditions" on the Questionnaire. Instead, the NSAC simply found that "Diaz knew he had a serious medical condition" without any analysis of the meaning of that expression on the Questionnaire, and in doing so fell into error.

Moreover, the NSAC's finding that "Diaz knew he had a serious medical condition" (Findings, paras. 27 and 59) conflates:

a) whether Diaz knew that he had been diagnosed with a medical condition that, in Dr. Sullivan's opinion, satisfied the California regulatory definition of 'serious condition' in respect of Petitioner, as a prerequisite for the recommendation of medical marijuana under California law (California Health & Safety Code 11362.7(12) (ROA p. 47)); with

b) whether Diaz believed that ADHD is a "serious medical illness or condition" that could affect his safety in high-level athletic competition the following day.

Even if Diaz was aware of the intricacies of the California Health & Safety Code, Diaz provided true and accurate information to the NSAC, because he had no condition that related to his physical health and safety in connection with the pending Contest.

Furthermore, even if California's regulation does dictate the meaning of the expression on Nevada's Questionnaire (an admittedly bizarre proposition that the NSAC appears to have endorsed), ADHD is not even expressly included as a "serious medical condition" under California Health & Safety Code 11362.7. It is a condition that can be deemed a "serious medical condition" where, *inter alia*, a physician judges that "If [the condition is] not alleviated, may cause serious harm to the patient's safety or physical or mental health" (California Health & Safety Code 11362.7(12)(B)). As a matter of law, the answer to the question "Is ADHD a 'serious medical condition' under California law?", the correct answer is 'no' – but it may be

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deemed to constitute one in certain circumstances relating to a patient's mental health in certain circumstances. But the Questionnaire did not purport to ask the contestant for any information about his mental health, as opposed to his physical health.

It would be open to the NSAC to draft and implement a revised Questionnaire that expressly sought information about contestants' mental health and any psychological conditions that may have been diagnosed. It is unclear what legitimate purpose or objective would be accomplished by such a revision. However, the Questionnaire simply does not ask for such information. In concluding that Petitioner had provided false or misleading information to the Commission where Petitioner had correctly advised the Commission he had no serious medical condition, the NSAC committed an error of law.

2. The NSAC's credibility findings are clearly erroneous or arbitrary/capricious

Because the information provided by Petitioner on the Questionnaire was true and correct, credibility issues do not arise. It is not possible to violate NAC 467.885(3) by providing correct information to the Commission. But even if one or more of the answers given on the Questionnaire was factually mistaken, the Commission's finding that Petitioner was not credible is without sufficient basis in the evidence to satisfy either the general or specific standard referred to in Part IV(A), above.

The NSAC's credibility finding was a necessary (but not sufficient) condition for the finding of a rule violation. A finding that Petitioner wilfully sought to mislead the Commission is a precondition for finding a violation of NAC 467.885(3). The Questionnaire requires only that a licensee provide responses to the "best of [his] knowledge". Misrepresentation requires one to have communicated information knowing its falsity. *See Barmettler v. Reno Air, Inc.,* 114 Nev. 441, 956 P.2d 1382 (1998). Absent a credibility finding that Petitioner *intentionally* provided false answers on the Questionnaire, no 885(3) violation could be found.

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The four reasons for the NSAC's credibility finding are set out at paragraph 60 of the Findings. None of those reasons individually or taken together support a finding that Petitioner was not credible as to his *bona fides* in completing the Questionnaire or suggest that Petitioner was trying to intentionally provide false information to the NSAC in filling out the Questionnaire.

The first reason cited by the NSAC is that they cannot "discern the difference" between the answers Petitioner gave to the state of California in January of 2011 on California's questionnaire and the answers given on the Questionnaire; while each questionnaire asked the same questions, Petitioner "provided diametrically opposite responses to those questions" (Findings, para. 60(a)).

The NSAC failed to notice an obvious and striking difference between the two questionnaires. While the NSAC's Questionnaire asks only about any use of "prescribed" and "over the counter medications/products", California's questionnaire (ROA, p. 81) asks if there has been use of:

> Any medication or drug either over the counter or prescribed. [emphasis added]

Nothing in the NSAC's form enquires about the use of a "drug". Even though medical marijuana is neither a prescription medication nor an over the counter medication, it is indeed a "drug". It is unremarkable that a layperson would confirm the use of "drugs" (on California's form) while properly and correctly concluding that marijuana is neither a "prescription medication" or an "over the counter medication/product" (on the Questionnaire). In fact, the disclosure on California's form bolsters Petitioner's credibility rather than diminishes it, as it shows Petitioner's willingness to disclose his medical marijuana treatment when a question reasonably deemed to seek such information is asked.

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Furthermore, Petitioner provided testimony responsive to this issue during the hearing. Petitioner explained that at the time he filled out the California form he "was under the understanding then that it was a prescription drug" but had since learned more about the medical marijuana regulatory regime in California – i.e. that medical marijuana was not a prescription medication. (Transcript of Proceedings, pp. 120-121; ROA, p. 302)

The second reason cited by the NSAC is that because Petitioner had "performed research" to find out how to receive a physician's recommendation for medical marijuana, that fact "would lead a reasonable person to know that he had to prove up [sic] a serious medical condition" (Findings, para. 60(b), ROA p. 315) But the issue is whether Petitioner believed he had a "serious medical condition" within the meaning of the term on the Questionnaire – not whether ADHD may constitute a "serious medical condition" under California state law. In his evidence at the Hearing, Petitioner was clear that he did not accept that ADHD was a "serious medical condition" in any event, and certainly not for the purpose of the Questionnaire:

> A. Yeah, but I wasn't signing that to – to say that I have a serious medical condition. I wasn't like going to accept the fact that I had a serious medical condition. (Transcript, p. 67, lines 22-25; ROA p. 289)
>
> ...
>
> A. I just never considered myself to have a serious medical condition. (Transcript, p. 78 lines 21-22; ROA p. 292)
>
> ...
>
> A. I didn't – as far as I knew, I didn't – I wasn't agreeing that I had a serious medical condition as far as I knew. (Transcript, p. 79, lines 17-19; ROA p. 292).
>
> ...
>
> Q. What type of things, Mr. Diaz, do you believe in filling out this form 24 hours before the fight would constitute a serious medical condition?
>
> A. Like a broken leg or, you know, a serious medical condition, like just an injury preventing you from fighting.
>
> Q. So do you view your persistent condition of ADHD as being a serious medical condition?

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A. No, I don't. (Transcript, p. 85 lines 5-13; ROA p. 293).

The nature of the "research" Petitioner had performed is immaterial given Petitioner's justified belief that ADHD is not a 'serious medical condition' in the context of the Questionnaire – even if he was aware that that his physician had determined that his ADHD constituted a "serious medical condition" under California law for the purpose of obtaining a physician's recommendation for medical marijuana. In addition, nothing required Petitioner to adopt his physician's judgment as to whether he in fact had a "serious medical condition", and his evidence was clear that he disagreed with that characterization as a general proposition in any event.

The third reason cited by the NSAC is that Petitioner's story "changed across time" as Petitioner "initially asserted that he was legal to use Marijuana in Nevada, but he had to withdraw that contention" (Findings, para. 60(c); ROA p. 315). In fact Petitioner never deposed in any affidavit or in his testimony under oath that he "was legal to use marijuana in Nevada" and he never "had to withdraw that contention" as the issue was entirely immaterial. The NSAC is referring only to a paragraph in the Petitioner's Reply to the Complaint, which was subsequently superseded by the Reply to the First Amended Complaint. Furthermore, it was never relevant or material whether Petitioner was licensed to use medical marijuana in Nevada (as opposed to licensed to do so in California) – as the uncontroverted evidence before the NSAC at the hearing was that Petitioner had stopped using medical marijuana well before travelling from his home in California to Nevada for the February 4, 2011 Contest. (Transcript, p. 54 lines 4-7; ROA 286)

The fourth and final reason cited by the NSAC is that Petitioner supposedly "initially responded 'yes' to his attorney's question "about whether his Marijuana use was pursuant to prescription" and then Petitioner "stuttered and said that it was not really a prescription"

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(Findings, para. 60(d), ROA p. 315). This issue is ultimately immaterial. Whether a doctor "prescribes" medical marijuana is a question of law rather than a question to be answered in evidence. Regardless, in fact Petitioner answered the question as follows:

> A. Yeah, it's a prescription – or, no, it's not a prescription – I believe you need a physician's statement. (Transcript, p. 84, lines 22-23)

That answer is wholly insufficient to ground a finding that Petitioner, a layperson in the process of a lengthy and technical examination, was trying to mislead the Commission in his testimony and on the answers given on the Questionnaire.

The preceding four 'reasons' are the only bases given by the NSAC for finding that Petitioner filled out the Questionnaire with the intention to deceive the Commission (which is necessary for finding a violation of NAC 467.885(3)).

Because Petitioner's answers on the Questionnaire were correct, the NSAC's credibility finding is insufficient for finding a rule violation. To this day, Petitioner's position is that all of the answers given on the Questionnaire were entirely accurate and responsive to the questions asked. However, even if the issue of the alleged 885(3) violation were to turn on credibility (if this court were to conclude that one or more of Petitioner's answers given were mistaken), the NSAC's 'four reasons' do not constitute evidence that a reasonable mind would accept as adequate to support the conclusion that Petitioner was not credible and provided his answers on the Questionnaire with the intent to mislead. Likewise, the 'four reasons' should not produce in a reasonable mind a belief that it is more likely true than not true that Petitioner was not credible and forthright in his answers. Neither the general substantial evidence standard nor the specific 'convincing force' standard is met.

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V.

CONCLUSION

For the foregoing reasons, Mr. Diaz requests that the Court grant the relief sought in the within Petition and enter its order reversing and setting aside the Decision and Order of the Nevada State Athletic Commission made in the Findings of Fact, Conclusions of Law, and Order Regarding First Amended Complaint dated June 26, 2012.

DATED this 26th day of September, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Memorandum of Points and Authorities, 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 memorandum complied with Nevada Rules of Appellate Procedure 28, which requires every assertion in the memorandum regarding matters in the record to be supported by a reference to the page 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 memorandum is not in conformity with the requirements of the Nevada Rules of Appellate Procedure 28.

DATED this 26th day of September, 2012.

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CERTIFICATE OF SERVICE

I declare that I am an employee of the Goodman Law Group and on this 26th day of September, 2012, I served a copy of the foregoing Memorandum of Points & Authorities in the United States First Class Mail to the following addresses:

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