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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual Defendants.	Case No. CV14-01712 Dept. No. 6 **NOTICE OF APPEAL**
BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual, Counterclaimants, vs. LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Counterdefendants.	

Docket 77780 Document 2019-00097

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation, hereby appeal to the Nevada Supreme Court from (1) the Findings of Fact, Conclusions of Law, and Order on Defendants' Motions for Sanctions, entered on March 6, 2018 (Exhibit 1); (2) the Order Denying Plaintiffs' Rule 60(b) Motion for Relief, entered on November 30, 2018 (Exhibit 2); and (3) the Judgment, entered on December 11, 2018 (Exhibit 3). These Plaintiffs also appeal from all other rulings and orders made final and appealable by the foregoing.

DATED this 28th day of December, 2018.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: _____
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
Attorneys for Plaintiffs/Counterdefendants Appellants

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 28th day of December, 2018, I electronically filed the foregoing **NOTICE OF APPEAL** with the Clerk of the Court by using the ECF system which served the following parties electronically:

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I further certify that on the 28th day of December, 2018, I caused to be deposited in the U.S. Mail, first-class postage fully prepaid, a true and correct copy of the foregoing **NOTICE OF APPEAL**, addressed to the following:

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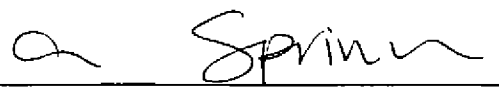

An Employee of Robertson, Johnson, Miller & Williamson

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiff, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual; Defendants. /	CASE NO. CV14-01712 DEPT. 6
BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual; Counterclaimants, vs	

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

~~[PROPOSED]~~ FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). The Willard Plaintiffs are also counter-defendants in this matter.

2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been admitted to practice in Nevada *pro hac vice*, and David O'Mara of the O'Mara Law Firm, P.C., who is serving as local counsel.

3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants").

4. The Motion before this Court is Defendants' Motion for Sanctions, wherein Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170. (Defendants' Motion).

5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion was submitted to this Court on December 18, 2017.

6. This Court, having considered the briefing, and being otherwise fully advised, and GOOD CAUSE APPEARING, hereby finds the following facts and makes the following conclusions of law:

FINDINGS OF FACT

Plaintiffs' Complaint

7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a joint complaint against them. (Complaint).[1]

8. Willard sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. (First Amended Complaint ("FAC")).

9. Willard had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

10. Wooley sought the following damages against Defendants for an alleged breach of the lease between Wooley and BHI: (1) "rental income in the amount of $4,420,244.00 that [Wooley] otherwise would have received," discounted by a rate of 4% as specified in the Wooley Lease to $3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to be proven at trial but which is at least $2,000,000"; (3) property taxes in the amount of $1,500; (4) insurance for $3,840; (5) maintenance costs of $4,000; (6) management costs of $2,500; and (7) security deposit from subtenant for $2,485.00. (FAC).

11. Wooley had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

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[1]All of the referenced documents have been filed with this Court in this case, either as pleadings/ briefings/ motions or as exhibits to the same. References to "Defendants' Motion" are to Defendants' Motion for Sanctions. References to "Willard Motion" or "Wooley Motion" are to the Plaintiffs' respective Motions for Summary Judgment.

Plaintiffs' Initial Disclosures

12. On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to Defendants' Motion for Sanctions).

13. However, while Plaintiffs disclosed anticipated witnesses and documents, they did not provide any computation of their claimed damages, notwithstanding the express requirement to do so set forth in NRCP 16.1(a)(1)(C).

Defendants' February 12, 2015, Letter

14. On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies in their initial disclosures, and informing them that the disclosures did not include the damages computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants' Motion for Sanctions).

15. Defendants advised Plaintiffs that their failure to timely comply would result in Defendants seeking sanctions. *Id.*

16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon receipt of this letter or any time thereafter.

Plaintiffs' Interrogatory Responses

17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23, 2015, Motion to Compel).

18. Defendants had not received any NRCP 16.1 damages disclosures from Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

19. Plaintiffs did not respond, even after Defendants granted them multiple extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to Compel).

20. This Court granted the Motion to Compel, which Plaintiffs failed to oppose. Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

21. Only then did Plaintiffs respond, and, in pertinent part, simply repeated the allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

22. Notably, these Court-ordered responses were the last time Plaintiffs provided anything that even came close to a damages disclosure until October of 2017, and even these did not comply with the requirements of NRCP 16.1.

23. Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order from this Court to do so.

24. Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015 clearly did not deter any of their subsequent conduct in continuing to fail to comply with their discovery obligations and Court orders.

The September 3, 2015, Stipulation and Order to Continue Trial Date

25. On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs' continued failure to comply with discovery obligations and resulting prejudice to Defendants, and noting that Plaintiffs had also yet to comply with the promise they made during a status conference before this Court to provide Defendants with discovery responses to Defendants' outstanding discovery requests in advance of the parties' depositions scheduled to begin on August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).

26. Plaintiffs' failure to comply with discovery obligations necessitated a continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015, Stipulation and Order).

The Parties' May 2, 2016, Stipulation and Order to Continue the Trial Date

27. In March of 2016, Defendants wrote Plaintiffs twice, seeking documentation that Plaintiffs failed to provide, and asking that Plaintiffs comply with their NRCP 26(c) obligations

to supplement their responses as necessary. (Exhibits 8 and 9 to Defendants' Motion for Sanctions).

28. On April 20, 2016, Defendants continued to request the information that they sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents but they had not done so. (Exhibit 10 to Defendants' Motion).

29. Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting that "this is an issue which we have raised on multiple occasions." *Id.*

30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.

31. Defendants also stated that "[y]our clients' failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. Without such documents, we cannot depose several witnesses, and our experts are unable to complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions." *Id.*

32. Due to Plaintiffs continued failure to meet discovery obligations, the parties agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order). This Court signed the Order, adding that "no further continuances will be granted." *Id.*

33. Following the second continuance, trial was scheduled for May 2, 2017, and discovery was set to close on March 2, 2017.

Plaintiffs' Unsuccessful Purported Disclosure of Daniel Gluhaich as a Non-Retained Expert Witness

34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a non-retained expert. (Exhibit 11 to Defendants' Motion).

35. However, while Plaintiffs' disclosure generally referenced the categories as to which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts

and opinions to which the witness is expected to testify," as required by NRCP 16.1(a)(2)(B).[2] *Id.*

36. In fact, Plaintiffs immediately admitted that their disclosure of Mr. Gluhaich was inadequate and did not comply with NRCP 16.1, reiterating in an email to Defendants that Defendants had agreed to "allow Plaintiffs to provide an amended expert witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying…." (Exhibit 12 to Defendants' Motion).

37. However, Plaintiffs did not provide an amended disclosure on December 8 or any time thereafter.

The Parties' December 2016 Correspondence

38. On December 9, 2016, Defendants' counsel wrote that Defendants did not receive the amended disclosure, or dates pursuant to which Defendants could depose Mr. Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that "[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion testimony that plaintiffs intent to present at trial. Please provide that information immediately." *Id.*

39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP 16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley," and asked Defendants' counsel to "forward…to Tim Herbst as [Defendants' counsel saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

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[2]In contrast, Defendants disclosed Michelle Salazar as an expert and served Plaintiffs with Ms. Salazar's report, which included, as required under NRCP 16.1(a)(2)(B) "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

tendering supplemental disclosures in the imminent future that will include the actual spreadsheet." *Id.* Defendants responded to this settlement information expressing concern about Wooley's continued failure to provide NRCP 16.1 damages, and once again demanded NRCP 16.1 damages computations from all Plaintiffs, immediately. (Exhibit 13 to Defendants' Motion).

40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit 14 to Defendants' Motion).

41. Defendants also stated that this conduct was prejudicing Defendants and making it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id.*

42. Next, Defendants expressed their concerns to Wooley that the damages spreadsheet recently provided for settlement purposes only, which Defendants could not share with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs had never before utilized in the case," and prejudiced Defendants in that they were unable to conduct discovery about this new computation of damages or the methodology used to arrive at the purported numbers in the Wooley settlement-only spreadsheet. *Id.*

43. Defendants concluded that "[w]e still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she could provide new opinions about any new damages model. *Id.*

44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to Defendants' Motion). Plaintiffs did not address their failure to provide their damages disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

with NRCP 16.1. *Id.* Rather, Plaintiffs stated that Defendants "are granted an open extension for submitting any expert reports rebutting the opinions of Mr. Gluhaich until [they] have received Plaintiffs' amended disclosure, deposed Mr. Gluhaich, and provided any rebuttal expert(s) with sufficient opportunity to review that material and prepare rebuttal report(s)." *Id.* Plaintiffs also stated that the amended expert witness disclosure would be tendered that day. *Id.*

45. However, Plaintiffs did not provide any amended expert disclosure that day or at any time thereafter.

This Court's January 10, 2017, Hearing

46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard and Wooley personally attended. (January 10, 2017, transcript).

47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims. *Id.*

48. Plaintiffs' counsel also represented to this Court that Wooley's damages disclosures to Defendants were complete and up-to-date. *Id.* This was a misrepresentation, as Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and certainly had not provided any updated disclosures since the court-ordered discovery response in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during the hearing. (January 10, 2017, transcript).

49. Upon orally granting Defendants' motion, this Court also ordered that "the Court enters a case management order that directs the plaintiffs to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damages disclosure." *Id.* at 68.

The February 9, 2017, Stipulation and Order

50. In spite of the rapidly impending trial date (at the time, May 2, 2017) and close of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any damages disclosures or otherwise supplement or update their discovery responses in any way. Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose any expert.

51. On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by stating that "as of the date of this letter, we have less than thirty (30) days to complete discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less than three months until the current trial date." (Exhibit 16 to Defendants' Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply with their obligations, Defendants would not be able to timely complete discovery or submit dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct necessitated yet another continuance of the trial date. *Id.*

52. In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply with expert disclosure requirements. *Id.* Defendants reminded Plaintiffs that Plaintiffs "were indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as demonstrated by [the parties'] December 5, 2016, telephonic conversation." *Id.* However, despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to comply with the Nevada Rules of Civil Procedure more than two months after the deadline, "without any justification whatsoever." *Id.*

53. Defendants further informed Plaintiffs that their "failure to comply with the Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

amended disclosure, is severely prejudicing Defendants." *Id.* With the close of discovery being one month away, "regardless of what Plaintiffs do at this point, this discovery deadline would need to be extended to enable the Defendants to complete discovery and disclose rebuttal experts in the time permitted by the rule, the parties' joint case conference report, and the stipulation and order on file with the Court." *Id.*

54. Defendants also addressed Plaintiffs' continued failure to provide Defendants with an NRCP 16.1 damages computation. *Id.* Defendants stated that it would be "patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of discovery," and it would be impossible for Defendants' expert to opine on any new damages theories under the current discovery deadlines if Plaintiffs were to seek any additional or different types of damages. *Id.*

55. Finally, Defendants requested that Plaintiffs also provide other outstanding discovery, stating that Plaintiffs "have been promising to disclose these documents for more than 10 months, but have yet to do so." *Id.*

56. Based on these issues, Defendants asked for a continuance of the trial date so that Plaintiffs could comply with their obligations such that Defendants could receive time to prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure and the parties' agreements. *Id.*

57. Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties signed a stipulation which contained several express recitals and stipulations regarding Plaintiffs' ongoing failure to comply with discovery obligations.

58. First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that this conduct had been prejudicial to Defendants:

> 4. On December 2, 2016, Plaintiffs disclosed Dan Gluhaich as a non-retained expert. Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding twelve separate subject matters and included Mr. Gluhaich's resume, but did not include "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B).

> 5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.
>
> 6. Following receipt of Plaintiffs' supplemental disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants intend to depose Mr. Gluhaich and retain experts to rebut his opinions.
>
> 10. ...[B]ecause Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants will be unable to complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.

(February 9, 2017, Stipulation and Order).

59. Second, Plaintiffs stipulated that they had not properly provided their NRCP 16.1 damages disclosures:

> 7. On January 10, 2017, the parties appeared in this Court for a hearing on Defendants' Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C), "[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." (January 10, 2017 Hearing Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the hearing that they have not yet provided Defendants with a complete damages disclosure pursuant to NRCP 16.1(a)(1)(C), and the Court ordered Plaintiffs "to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damage disclosure." *Id.* at 68.
>
> 8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have Michelle Salazar supplement her initial expert report to include any opinions about any new or revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to conduct additional fact discovery on any new or revised damages claims or calculations submitted by Plaintiffs.

> 9. Discovery in this matter currently is scheduled to close on March 2, 2017, and dispositive motions must be filed and submitted for decision no later than March 31, 2017.
>
> 10. Because Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report of Michelle Salazar within the time currently allowed for discovery....

Id.

60. Plaintiffs stipulated that this Court should enter an order which, in pertinent part, requires "Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the date of the Order approving this Stipulation." *Id.*

61. Plaintiffs also stipulated to other pertinent deadlines:

> 3. The deadline for Defendants to serve a supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until sixty (60) days before the close of discovery....
>
> 5. The deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26.

Id.

62. The Stipulation also included a certification from counsel that "[u]ndersigned counsel certifies that their respective clients have been advised that a stipulation for continuance is to be submitted on their behalf and that the parties have no objection thereto." *Id.*

63. This Court entered an Order consistent with the stipulation on February 9, 2017. *Id.*

64. However, Plaintiffs did nothing as required by the Stipulation since the entry of this Order or the stipulation of the parties to rectify their failure to meet their outstanding discovery obligations.

65. The parties set a trial date of January 29, 2018, meaning that, per the Stipulation and Order, discovery was set to close on November 15, 2017.

This Court's May 30, 2017, Order

66. On May 30, 2017, this Court entered an Order granting Defendants' motion for partial summary judgment. (Order).

67. In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure." *Id.*

68. Again, Plaintiffs completely ignored the requirements and obligations imposed by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages computations, despite the express requirements of the NRCP and this Court's Orders.

Plaintiffs' Motions for Summary Judgment

69. After three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation or to supplement any damages calculations, and after nearly one year of refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in which they requested brand new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery. (Motions for Summary Judgment).

70. Further, their calculations were based upon opinions of Mr. Gluhaich, an expert witness who was never properly disclosed, and who primarily based his opinions on appraisals that were also never disclosed. *Id.*

71. These Motions were filed with only four weeks remaining in discovery—putting Defendants in the exact same predicament that they were placed in February of 2017—Defendants could not engage in the discovery (fact and expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit 16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

72. Plaintiffs' new damages and new expert opinions were all based upon information that was in Plaintiffs' possession throughout this case, meaning that there was no reason that Plaintiffs could not have timely disclosed a computation of their damages and the documents on which such computations are based.

Willard's Motion

73. In Willard's Motion, Willard sought more than triple the amount of damages (nearly $40 million more) than he sought in the complaint and ostensibly throughout this case.

74. Willard also had a brand new, different basis for his claimed "rent" damages: the liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Willard to provide expert opinion to support his request and meet his burden of proof. (Willard Lease; Willard Motion).

75. Willard also had a brand new claim for diminution in value damages that would also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for Summary Judgment).

76. Default interest was a brand new component of Willard's claimed damages. *Id.*

77. The property-related damages now had a different purported value and amount. *Id.*

78. Willard's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. *Id.*

79. Willard and his purported expert witness relied upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants. *See also* (Exhibit 17 to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1, 2012 through present.")).

Wooley's Motion

80. Wooley sought nearly double the amount of damages that he sought in his complaint and ostensibly throughout this case. (Wooley Motion).

81. Wooley used different bases for his claimed "rent" damages. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Wooley to introduce an expert opinion to meet his burden of proof, which Defendants would be entitled to rebut under Nevada law. (*Id.*; Exhibit 19 to Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley had testified at his deposition that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley was proceeding on an entirely new theory.

82. Default interest was also a brand new component of Wooley's claimed damages. (Wooley Motion).

83. The property-related damages were based in part upon new damages and documents that were not disclosed to Defendants. *Id.*

84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they were entitled to do. *Id.*; (February 9, 2017, Stipulation and Order).

85. Wooley and his purported expert relied upon an appraisal to establish "value" that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP 26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an appraisal performed when he bought the property, but had not produced that to his lawyer)).

Timing of the Motions

86. At this point in discovery, Defendants had obviously only been able to prepare defenses to the claimed bases for damages that Plaintiffs asserted in the Complaint and Interrogatory responses, not Plaintiffs' brand new, previously undisclosed, bases for damages.

87. This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9, 2017, Stipulation and Order).

88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to ignore their discovery obligations. Defendants have been forced to file two motions to compel and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery obligations.

89. Defendants have been required repeatedly to go to extraordinary lengths to attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the NRCP. (Exhibits 20-23 to Defendants' Motion).

90. This Court has also issued several Orders requiring Plaintiffs to meet their discovery obligations, but Plaintiffs have blatantly ignored those Orders.

91. Plaintiffs never submitted their Motions for Summary Judgment by the December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

This Court's December 12, 2017, Hearing

92. On November 15, 2017, Defendants filed, *inter alia*, Defendants' Motion for Sanctions.[3]

93. Therein, Defendants requested that this Court dismiss Plaintiffs' case with prejudice as a sanction for Plaintiffs' discovery violations.

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[3]Defendants had also filed a Motion to Strike/Motion in Limine to Preclude Daniel Gluhaich as an expert witness, and a Motion for Partial Summary Judgment on Plaintiffs' diminution in value claims. This Court has ruled on those Motions in other orders.

94. On December 6, 2017, Plaintiffs' filed a Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions.

95. At the Pre-Trial Status Conference on December 12, 2017, this Court granted Plaintiffs' Request for Extension and directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM.[4] This Court further directed Defendants to reply no later than January 8, 2018, and set the parties' Motions for oral argument on January 12, 2018.

96. This Court also admonished Plaintiffs that "you need to know going into these oppositions, that I'm very seriously considering granting all of it." (December 12, 2017, transcript).

97. This Court also admonished Plaintiffs that "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." *Id.*

98. However, Plaintiffs did not file any opposition to Defendants' Motions by December 18 or any time thereafter, nor did Plaintiffs request any further extension. In fact, this Court and Defendants' counsel have not heard anything from Plaintiffs or their counsel since the December 12, 2017, hearing.

99. Defendants filed a notice of non-opposition to their Motions and request for submission of their Motions on December 18.

CONCLUSIONS OF LAW

Legal standard

100. NRCP 16.1(a)(1)(A)(C) provides that "a party must, without awaiting a discovery request, provide to other parties...[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34

[4]This Court inquired as to why Plaintiffs failed to oppose Defendants' Motions. Mr. Moquin informed this Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained that he is a sole practitioner without access to an IT department.

the documents or other evidentiary matter, not privileged or protected from disclosure, on which such a computation is based, including materials bearing on the nature and extent of injuries suffered...." "The use of the word 'must' means that the rule's requirements are mandatory." *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. ___, ___, 309 P.3d 1017, 1020 (2013) (discussing the NRCP 16.1(a)(1)(D) requirements).

101. Further, "the rule requires a computation supported by documents.... A plaintiff is required to provide its assessment of damages in its initial disclosure in light of the information currently available to it in sufficient detail so as to enable each defendant to understand the contours of its potential exposure and make informed decisions as to settlement and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); *see generally Vanguard Piping*, 129 Nev. at ___, 309 P.3d at 1020 ("Because of the similarity in the language, federal cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive authority."). Indeed, it is the plaintiff's burden to prove damages, *see generally Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof."), and "the plaintiff cannot shift to the defendant the burden of attempting to determine the amount of the plaintiff's damages." 10 Fed. Proc., L. Ed. § 26:44.

102. Also pertinent, NRCP 16.1(a)(2)(B) requires that, with regard to a non-retained expert witness, a party must disclose, *inter alia*, a summary of the facts and opinions to which the witness is expected to testify. References to broad categories as to what the expert will testify are insufficient. *See Jones v. Colorado Cas. Ins. Co.*, 2015 WL 6123125, at *3 (D. Ariz. 2015).

103. Further, NRCP 26(e) requires that:

> A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

> (1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.
>
> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

104. Failure to comply with NRCP 16.1's requirements shall result in sanctions. Pursuant to NRCP 16.1(e)(3):

> If an attorney fails to reasonably comply with **any** provision in [NRCP 16.1], or if an attorney or a party fails to comply with an **order** entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, **shall** impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:
>
> (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);
>
> (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(Emphases added).

105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

106. Further, NRCP 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial...any witness or information not so disclosed." NRCP 37(c)(1) also provides that "[i]n addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C)."

107. Similarly, pursuant to NRCP 41(b), "[f]or failure of the plaintiff to comply with [the Nevada Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."

108. In addition to the rule-based authority discussed herein, the Nevada Supreme Court has also recognized that "the court has inherent power to enter defaults and dismiss actions for abusive litigation practices." *Blanco v. Blanco*, 129 Nev. ___, ___, 311 P.3d 1170, 1174 (2013).

109. The Nevada Supreme Court has also expressly held that "the factual nature of the underlying case is not an appropriate measure to evaluate whether a [case] should be dismissed for violations of court rules and/or orders." *Huckabay Props. v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 433 (2014) (discussing this in the context of dismissing an appeal, and also disapproving of prior case law "to the extent it indicates that a fact-based assessment of the underlying civil action should be made before determining whether to dismiss an appeal on procedural grounds.").

110. Finally, pursuant to DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

Plaintiffs' Conduct Demands Dismissal with Prejudice

111. When considering the issuance of dismissal with prejudice as a sanction, the Nevada Supreme Court has held that "[p]rocedural due process considerations require that such case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order." *Blanco*, 129 Nev. at ___, 311 P.3d at 1174.

112. Further, the Court must consider pertinent factors, including the extent of the offending party's willfulness, whether the non-offending party would be prejudiced by imposition of a lesser sanction, whether dismissal is too severe for the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal should only occur in the most extreme of cases. *Id.*

113. However, district courts are not required to consider every factor, so long as the district court's analysis is thoughtfully performed. *See generally Young v. Johnny Ribeiro Bldg.. Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).

114. Here, the factors readily demonstrate that dismissal with prejudice is warranted, and that there is no due process violation in so doing.

Plaintiffs did not oppose Defendants' motion or any of the points discussed therein.

115. It must be emphasized as a threshold matter that Plaintiffs never opposed Defendants' Motion.

116. Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

117. Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants' Motion.

118. However, separate from this consideration, good cause exists to dismiss this case.

Case-concluding discovery sanctions are just and relate to the claims at issue

119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.

120. Plaintiffs have also completely failed to properly disclose an expert witness, waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert witness to support their Motions for Summary Judgment without complying with the requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.

121. Plaintiffs have also ignored or failed to comply with multiple separate discovery obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and necessitating that the trial and discovery deadlines be extended on three occasions to accommodate for Plaintiffs' continued noncompliance.

122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.

123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general.

Plaintiffs' violations are willful

124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1, Plaintiffs have been on direct notice for three years that they have not complied with NRCP 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra*.

125. This Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017, Order); *see also Perez v. Siragusa*, 2008 WL 2704402, at *4 (E.D.N.Y. July 3, 2008) (dismissal under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed

willful when the court's orders have been clear, when the party has understood them and when the party's noncompliance is not due to factors beyond the party's control.").

126. Plaintiffs acknowledged in two stipulations that they have not complied with NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to comply. *See, e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation and Order; May 2, 2016, Stipulation and Order).

127. Further, Wooley misrepresented to this Court that he had provided complete and up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly, including in open court, that this document provided for settlement negotiations does not equate to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for litigation purposes in any manner. *See, e.g.*, (January 10, 2017, Transcript 62).

128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly evidenced by their eleventh-hour Motions requesting brand-new, different, categories and amounts of damages for double and triple what was originally sought, while such alleged damages were based upon information that has been in Plaintiffs' possession for the entire pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never been previously disclosed.

129. Plaintiffs' failure to properly disclose an expert witness is similarly willful. Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure did not comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants' Motion; Exhibits 14 and to Defendants' Motion).

130. Plaintiffs agreed that they failed to comply with NRCP 16.1(a)(2)(B) and agreed to the entry of a Court order requiring them to properly disclose an expert by March 11, 2017. (February 9, 2017, Stipulation and Order).

131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr. Gluhaich at any time in 2017.

132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their "designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even acknowledging their noncompliance, much less providing justification for it.

133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the Motions demonstrates that the purported facts and opinions that he provided could have been timely disclosed in December of 2016, further demonstrating that there was no justification other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events that occurred in 2015 or earlier)).

134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four weeks left in discovery. (February 9, 2017, Stipulation and Order).

135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was also willful.

136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine the purported "original" fair market value of the property. (Willard Motion at 19). According to Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr. Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

upon, *inter alia*, an appraisal from 2014 to establish the purported "fair rental value" of the property in 2014 for purposes of his newly-sought liquidated damages relief, and the purported "post-breach" value of the property in 2014. *Id.* at 19-20. Mr. Gluhaich averred that "The 2014 Appraisal was issued on February 11, 2014," and he "received [this appraisal] directly from Rob Cashell." (Gluhaich Aff. re: Willard ¶15). Mr. Gluhaich's purported opinions were heavily based on these appraisals. *Id.* ¶9 ("In my opinion, the 2008 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Virginia Property as leased."); ¶16 (relying on the appraisal to opine on the purported "as-is" fair market value); ¶17 (relying upon the appraisal to establish the purported fair market rental value). However, these appraisals were never disclosed to Defendants at any time before the present motion. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition). This is despite the fact that Defendants requested Willard to "produce any and all appraisals for the Property from January 1, 2012, through present," (Exhibit 17 to Defendants' Motion), and that Willard had an obligation to disclose this material pursuant to NRCP 16.1(a)(1)(C) and NRCP 26. Given that Willard freely admits that these appraisals were commissioned prior to the commencement of the case, and were in his possession, this is clearly willful omission.

137. With respect to Wooley, Wooley relies upon an appraisal that the Wooley Plaintiffs commissioned in August 2006. (Wooley Motion at 2). This appraisal is the basis for Gluhaich's opinion as to the "original" fair market value in Wooley's diminution in value claim. (Gluhaich Aff. Re: Wooley ("In my opinion, the 2006 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Highway 50 Property as leased.")). Defendants even asked about the appraisal during Wooley's deposition. (Exhibit 18 to Defendants' Motion at 125 (wherein Wooley stated that he had not given this appraisal to his lawyer)). Yet, this appraisal was never disclosed to Defendants until Wooley filed his Motion, which is a willful omission and is in complete derogation of Wooley's NRCP 16.1 and NRCP 26 obligations.

138. Plaintiffs' strategic decision to wait to disclose both the appraisals and the opinions of Mr. Gluhaich until they filed their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to conduct discovery regarding the appraisals, to conduct an expert deposition of Mr. Gluhaich or to prepare and disclose expert witnesses to rebut the opinions of Mr. Gluhaich.

139. Finally, as noted, this is part of a larger pattern and practice by Plaintiffs to disregard their discovery obligations at every point in this litigation. (Motions to Compel).

140. Indeed, Plaintiffs completely failed to even respond to Defendants' Motion for Sanctions, even when this Court gave them an additional extension and expressly warned them, in open court, that "you need to know going into these oppositions, that I'm very seriously considering granting all of it," and "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." (December 12, 2017, transcript).

Defendants have been prejudiced by Plaintiffs' conduct and would be prejudiced by the imposition of a lesser sanction

141. Plaintiffs' repeated and willful delay in providing necessary information to Defendants has necessarily prejudiced Defendants. *Cf. generally Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) (concluding that "appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their willful and recalcitrant disregard of the judicial process, which presumably prejudiced [the non-offending party"); *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (cited in *Foster* as "upholding the district court's strike order where the defaulting party's 'constant failure to follow [the court's] orders was unexplained and unwarranted'"); *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir.2006) (cited in *Foster* as "holding that, with respect to discovery abuses, '[p]rejudice from unreasonable delay is presumed' and failure to comply with court orders mandating discovery 'is sufficient prejudice'"); *Perez*, 2008 WL 2704402 at *6 ("The behavior exhibited by plaintiffs has prejudiced defendants by delaying the

resolution of the claims and increasing the costs of litigation. The parties have not made any progress with discovery or moved closer to trial readiness. This factor...weighs in favor of dismissing the action.").

142. In fact, this is Plaintiffs' second case against Defendants based on the same set of facts.

143. Plaintiffs attempted to prosecute this case against Defendants in California, which was dismissed for a lack of personal jurisdiction.

144. Defendants are entitled to resolution, not to Plaintiffs languidly holding Defendants in litigation while simultaneously failing to meet their obligations under the NRCP to provide threshold information necessary to defend this case and to comply with the other obligations imposed by the NRCP.

145. Further, Plaintiffs' collective new requests and bases are not harmless additions: they would require Defendants to engage in additional fact discovery, retain direct and rebuttal experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended three times to account for Plaintiffs' continued noncompliance.

Dismissal is not too severe for these discovery abuses, and lesser sanctions are not feasible or fair

146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law.

147. The Plaintiffs have been sanctioned for other discovery violations, (Order Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions have had no effect on Plaintiffs' recalcitrant conduct.

148. For example, in the context of granting Defendants' Motion to Compel Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

149. Not only have Plaintiffs not ever paid these expenses, but it is incontrovertible that this Court's imposition of monetary sanctions on Plaintiffs in 2015 had absolutely no deterrent effect on Plaintiffs' conduct, as Plaintiffs continued to commit discovery violations and continued to violate and ignore this Court's orders well after the issuance of the July 1, 2015, Order, completely undeterred by the imposition of monetary sanctions.

150. Further, Plaintiffs' conduct has already caused three continuances of the trial date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure. (Stipulations and Orders).

151. Given that this Court has already issued lesser sanctions, ordered continuances, and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs' conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs' misconduct.

152. The fact that this Court granted Plaintiffs an additional extension to oppose Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so without any excuse whatsoever further demonstrates that this Court's orders, and any lesser sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the court's warnings in the past, issuing additional warnings would be futile.

153. Nor would a less severe sanction be fair to Defendants, who have been continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued efforts to work with Plaintiffs and provide extensions to Plaintiffs.

154. Additionally, it must be noted that the Nevada Supreme Court has noted that "a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

counsel's unexcused conduct, as to do so would offend general agency principles"); *see also, e.g.*, *Link v. Wabash R. Co.*, 370 U.S. 626, 634 n.10 (1962) ("Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant.").

The policy favoring adjudication on the merits does not militate against dismissal

155. Although there is a policy favoring adjudication on the merits, Plaintiffs themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail.

156. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. (Exhibits 24-35 of Defendants' Motion).

157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses.

158. As the Nevada Supreme Court has held, the policy favoring adjudication on the merits "is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and

administration concerns, such as the court's need to manage its large and growing docket." *Huckabay Props v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 432 (2014) (also holding, in the context of a dismissal of an appeal, that "a party cannot rely on the preference for deciding cases on the merits to the exclusion of all other policy considerations, and when an appellant fails to adhere to Nevada's appellate procedure.

159. Again, this is Plaintiffs' second time prosecuting this case against Defendants without undertaking the necessary conduct and requirements imposed by court rules to reach the merits.

Dismissal is required to deter similar abusive conduct

160. The need to deter similar abusive conduct also weighs heavily in favor of dismissal.

161. The discovery rules are in place for a reason, and are mandatory.

162. Compliance with this Court's Orders is also mandatory.

163. Yet, Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure.

164. Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so.

165. If Plaintiffs are permitted to continue prosecuting this case without severe consequences, then this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court orders. *Cf. generally Foster*, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."); *see also Langermann v. Prop. & Cas. Ins. Co.*, 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to

comply with a scheduling order is not harmless, and re-opening discovery after the expiration of the deadlines only encourages cavalier treatment of deadlines").

166. Plaintiffs' disregard for this Court's orders and docket, Nevada law, and Defendants' rights to prepare a defense necessitates dismissal.

Dismissal would not violate Plaintiffs' due process rights

167. There is also no issue of due process deprivation upon dismissal.

168. Plaintiffs' response to Defendants' Motions, including Defendants' Motion for Sanctions, was originally due on December 4, 2017.

169. There is no dispute that Plaintiffs were served with the Motions. (December 12, 2017, transcript).

170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs were given until December 18, 2017, to file Oppositions. *Id.*

171. Defendants were expressly warned that this Court was seriously considering dismissal, and that Plaintiffs' oppositions needed to be "compelling." *Id.*

172. However, Plaintiffs did not file any Opposition by that time or any time thereafter; nor did Plaintiffs request another extension.

173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions, are not being deprived of any due process. *See* DCR 13(3); *Huckabay*, 130 Nev. at ___, 322 P.3d at 436. No evidentiary hearing was needed. *See Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant factors in an evidentiary hearing.").

174. Indeed, this Court held a hearing on December 12, 2017, which was attended by both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that hearing, or otherwise provided any new information, there would be nothing new to discuss at another hearing. *See* DCR 13(3).

ORDER

Defendants' Motion for Sanctions is GRANTED.

Plaintiffs' claims against Defendants are DISMISSED WITH PREJUDICE.

DATED this 6th day of March, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 16th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

BRIAN IRVINE, ESQ.

DAVID O'MARA, ESQ.

BRIAN MOQUIN, ESQ.

JOHN DESMOND, ESQ.

ANJALI WEBSTER, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

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CV14-01712 DC-0990008762D-084
LARRY J. WILLARD, ETAL VS B 33 Pages
District Court 12/28/2018 11:52 AM
Washoe County $25.15
VS YWT0972

EXHIBIT "2"

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Code:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.

_____/

CASE NO. CV14-01712

DEPT. 6

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants[1].

_____/

[1] On April 13, 2018, this Court entered its *Order of Dismissal of Claims of Wooley Plaintiffs with Prejudice*. On the same date, this Court entered its *Order Granting Defendants/ Counterclaimants' Motion to Dismiss Counterclaims*. All counterclaims were dismissed by said Order.

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("*Rule 60(b) Motion*") filed by PLAINTIFFS LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE LARRY JAMES WILLARD TRUST FUND AND OVERLAND DEVELOPMENT CORPORATION, A CALIFORNIA CORPORATION (collectively, "Willard" or the "Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson.[2] By their *Rule 60(b) Motion*, Plaintiffs seek, pursuant to NRCP 60(b), to set aside: (a) this Court's January 4, 2018, *Order Granting Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*; (b) this Court's January 4, 2018, *Order Granting Defendants' Motion for Sanctions*; and (c) this Court's March 6, 2018, *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*.

Thereafter, DEFENDANTS BERRY-HINCKLEY INDUSTRIES ("BHI") AND JERRY HERBST (collectively, "Defendants"), filed their *Opposition to Rule 60(b) Motion for Relief*, by and through their counsel, Dickinson Wright, PLLC.

Plaintiffs then filed their *Reply in Support of the Willard Plaintiffs Rule 60(b) Motion for Relief* and the parties set the matter for hearing.

This Court carefully considered the papers submitted, the arguments of counsel, the entire court file herein, and is fully advised in the premises, and enters its order as follows.

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[2] Plaintiffs' former local counsel was David O'Mara of the O'Mara Law Firm, P.C. Mr. O'Mara filed a *Notice of Withdrawal of Local Counsel ("Notice"), on March 15, 2018*. Brian Moquin remains counsel of record as he has not withdrawn; however, he is not indicated as counsel filing the *Rule 60(b) Motion*.

FINDINGS OF FACT

The Court makes the following Findings of Fact:

Plaintiffs' Complaint

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[3] *Complaint*, generally.

2. By way of their *Complaint* and subsequent *First Amended Complaint,* Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *First Amended Complaint* ("*FAC*"), generally.

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order*.

Plaintiffs' Failure to Comply with the Nevada Rules of Civil Procedure and this Court's Orders

4. Plaintiffs failed to provide a compliant damages disclosure in this action.

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12, and failed to provide damages computations at any time despite numerous demands on both Mr. Moquin and Mr. O'Mara. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54.

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[3] Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.

6. Plaintiffs failed to provide complete and adequate responses to interrogatories requesting information about Plaintiffs' damages in the normal course of discovery.

7. Plaintiffs failed to provide complete and adequate responses to interrogatories in violation of this Court's *Order Granting Defendants' Motion to Compel* and failed to comply with this Court's *Order ("January Hearing Order")* issued after the parties discussed Plaintiffs' failure to provide damages computations at the January 10, 2017 hearing attended by Mr. Moquin, Mr. O'Mara and Mr. Willard. *Sanctions Order* ¶¶ 17-25.

8. The *January Hearing Order* required Plaintiffs to provide damages computations and supporting materials. *Sanctions Order* ¶¶ 46-49, 54, 59-64 and 67-68; *Defendants' Opposition Plaintiffs' Rule 60(b) Motion*, Ex. 2, *Transcript* of January 10, 2017 Hearing at pp. 61-63 and 68; *January Hearing Order.*

9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness as required by NRCP 16.1(a)(2). *Sanctions Order* ¶¶ 34-37.

10. In contravention of this Court's *January Hearing Order*, Plaintiffs failed to provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made multiple requests. *Sanctions Order* ¶¶ 38-45, ¶¶ 50-64.

Plaintiffs' Summary Judgment Motion

11. Pursuant to the February 9, 2017, *Stipulation and Order to Continue Trial*, discovery closed in mid-November, 2017.

12. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed their *Motion for Summary Judgment* asserting they were entitled, as a

matter of law, to more than triple the amount of damages alleged in and requested by their *First Amended Complaint*. *Sanctions Order* ¶¶ 69 and 73.

13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not previously disclosed. The motion was also supported by previously undisclosed expert opinions and documents. *Sanctions Order* ¶¶ 74-79.

14. On November 13, 2017, Defendants filed their Opposition to Plaintiffs' *Motion for Summary Judgment*.

15. Plaintiffs' did not submit the *Motion for Summary Judgment* for decision.

Defendants' *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* and *Motion for Sanctions*

16. On November 14, 2017, Defendants filed their *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("*Motion to Strike*").

17. In the *Motion to Strike*, Defendants maintained this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (a) Plaintiffs failed to adequately disclose Mr. Gluhaich as an expert because they failed to provide "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B); (b) the opinions offered by Mr. Gluhaich in support of Plaintiffs' *Motion for Summary Judgment* were based upon inadmissible hearsay and were based solely on the opinions of others; and (c) Mr. Gluhaich was not qualified to offer the opinions included in his Declaration attached to and filed in support of Plaintiffs' *Motion for Summary Judgment*.

18. On November 15, 2017, Defendants filed their *Motion for Sanctions* ("*Sanctions Motion*").

19. In the *Sanctions Motion*, Defendants argued this Court should sanction Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims with prejudice, or, in the alternative, preclude Plaintiffs from seeking new damages or relying upon their undisclosed expert and appraisals.

20. Defendants agreed to give Plaintiffs' several extensions of time to oppose the *Motion to Strike* and *Sanctions Motion*, but no oppositions were filed.

21. On December 6, 2017, Plaintiffs requested relief from the Court by extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* ¶ 94; *Plaintiffs' Request for a Brief Extension of Time ("Brief Extension Request")*, generally.

22. This Court held a status conference on December 12, 2017, attended by Defendants' counsel and Plaintiffs' counsel, Mr. Moquin and Mr. O'Mara. At the status conference, after observing Mr. Moquin, having significant dialog with Mr. Moquin, and over vehement objection by the Defendants' counsel, this Court granted *Plaintiffs' Brief Extension Request* plus granted more time than that requested. The Court directed Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 2017, at 10:00 am. *Sanctions Order* ¶ 95.

23. Tis Court further directed Defendants to file their reply briefs no later than January 8, 2018. The Court set the parties' outstanding Motions for oral argument on January 12, 2018. *Sanctions Order* ¶ 96.

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24. This Court admonished Plaintiffs, stating "you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it." *Opposition to Rule 60(b) Motion*, Ex. 3, December 12, 2017, *Transcript of Status Conference*, in part.

25. Plaintiffs did not file an opposition or response to the *Motion to Strike* or *Motion for Sanctions* by December 18, 2017 or any time thereafter, nor did Plaintiffs request any further extension.

26. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* on January 4, 2018 ("*Order Granting Motion to Strike*").

27. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion for Sanctions* on January 4, 2018 ("*Order Granting Sanctions*").

28. This Court entered its *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* on March 6, 2018. ("*Sanctions Order*")[4]

Withdrawal of Local Counsel

29. Mr. O'Mara's *Notice of Withdrawal of Local Counsel, ("Notice")* filed March 15, 2018, states, "Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such a response." *Notice*, 1.

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[4] The *Order Granting Sanctions* ordered sanctions and directed Defendants to "submit a Proposed Order granting *Defendants'/Counterclaimants' Motion for Sanctions*, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this *Order* in accordance with WDCR 9." *Order Granting Sanctions, 4*. For purposes of the instant motion, the Court considers the *Order Granting Sanctions* and *Sanctions Order*, as one for purposes of the analysis herein.

30. The *Notice* describes the terms of retention of Mr. O'Mara as, "Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines. Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." *Notice*, 1.

Plaintiffs' *Rule 60(b) Motion*

31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a notice of appearance on behalf of Plaintiffs.

32. On April 18, 2018, Plaintiffs filed the *Rule 60(b) Motion*. In the *Rule 60(b) Motion*. Plaintiffs argue this Court should set aside its *Order Granting the Motion to Strike, Order Granting Sanctions*, and *Sanctions Order*, based upon Mr. Moquin's excusable neglect. Plaintiff's further argue the underlying *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 787 P.2d 777 (1990) because the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for the misconduct of their attorney.

33. Plaintiffs argue their failure to provide the damages computations and adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure and this Court's orders, as well as their failure to file oppositions to the *Motion to Strike* and *Motion for Sanctions* were all due to Mr. Moquin failing "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion*, 1.

34. The *Rule 60(b) Motion* purports to support its arguments primarily through the *Declaration of Larry J. Willard*. *Rule 60(b) Motion*, Ex. 1 ("*Willard Declaration*" and "*WD*" in citations to the record)[5].

35. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. It states Mr. Willard is "**convinced**" Mr. Moquin was dealing with issues and demons beyond his control. *WD* ¶ 66. It further states he "**learned**" that Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work. *WD* ¶ 67. The *Willard Declaration* states Mr. Moquin suffered a "total mental breakdown." *WD* ¶ 68. It states Mr. Moquin **explained** to Mr. Willard he had been diagnosed with bipolar disorder. *WD* ¶ 70. He declares he believes Mr. Moquin's disorder to be "severe and debilitating." *WD* ¶ 73. He states he **now sees** "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case." *WD* ¶ 76. And, Mr. Willard declares he **can now see** how Mr. Moquin's alleged psychological issues affected Plaintiffs' case. *WD* ¶ 87 (emphasis supplied).

36. The *Rule 60(b) Motion* also includes an internet printout purporting to list symptoms of bipolar disorder (*Rule 60(b) Motion*, Ex. 5), and several documents related to alleged spousal abuse by Mr. Moquin, some of which reference Mr. Moquin's alleged bipolar disorder, and which include an Emergency Protective Order from a California proceeding (*Rule 60(b) Motion*, Ex. 6), a Pre-Booking Information Sheet from a California proceeding (*Rule 60(b) Motion*, Ex. 7) and a Request for Domestic Violence Restraining Order, also from a California proceeding (*Rule 60(b) Motion*,

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[5] The *Willard Declaration* includes paragraphs discussing the underlying facts of the action and the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the *Rule 60(b) Motion* and are not considered. *See e.g.*, WD ¶¶ 1-51, 100.

Ex. 8). The documents from the California proceedings are not certified by the clerk of the court.

37. Defendants filed their *Opposition to Rule 60(b) Motion Relief* on May 18, 2018 ("*Opposition*").

38. Plaintiffs filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion* on May 29, 2018 ("*Reply*"). The *Reply* attached eleven (11) new exhibits, including the new *Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief. Reply*, Ex. 1 ("*Reply Willard Declaration*" and "*RWD*" *for citations*). [6] The *Reply's* exhibits include copies of text messages between Mr. Willard and Mr. Moquin (*Reply*, Ex. 2, 4 and 7), copies of emails between Mr. Willard and his counsel (*Reply, Ex.* 3, 6, 8 and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (*Reply*, Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018 (*Reply*, Ex. 9).

39. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *Reply* because: (a) Defendants did not have the opportunity to respond to those exhibits in their *Opposition to the Rule 60(b) Motion*; (b) exhibits contained inadmissible hearsay and/or inadmissible lay opinion testimony; and (c) a number of exhibits were not relevant to this Court's determination of excusable neglect.

40. Defendants' *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply* was fully-briefed and submitted to this Court for decision on June 29,

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[6] The Court disregards the paragraphs included in the *Willard Declaration* and the *Reply Willard Declaration* that can be construed to be stated appeal to the Court's sympathy. *See e.g., WD* ¶ 91 -100; *RWD* ¶ 67

2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply. No sur-reply was filed by Defendants.

41. In its *Sanctions Order*, the Court made the following findings of fact and conclusions of law, among others: First, Plaintiffs failed to provide damages disclosures and failed to properly disclose an expert witness in violation of this Court's express Orders. *Sanctions Order* ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). *Stipulation and Order*, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of this Court. Thereafter, Defendants filed several motions to compel and Plaintiffs' non-compliance forced extension of trial and discovery deadlines on three separate occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants' expenses incurred in filing the *Motion to Compel*.

42. Plaintiffs did not oppose the *Sanctions Motion* despite this Court's express admonitions that the Court was "seriously considering" dismissal.

43. If any of the following Conclusions of Law contain or may be construed to contain Findings of Fact, they are incorporated here and shall be treated as appropriately identified and designated.

CONCLUSIONS OF LAW

Based on the Court's Findings of Fact, the Court makes its Conclusions of Law as follows.

1. If any the foregoing Findings of Fact contain or may be construed to contain Conclusions of Law, they are incorporated here and shall be treated as appropriately identified and designated.

Rule 60(b) Standard

2. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an order or final judgment[7] on grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1).

3. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); *see also Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("'[t]he burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence.'") (quoting *Luz v. Lopes*, 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

The Rule 60(b) Motion is not Supported by Competent, Admissible and Substantial Evidence.

4. Plaintiffs' ground asserted to set aside the *Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order*[8] is Mr. Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion*, 1.

5. While this Court "has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Electric*,

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[7] This Court entered its *Order re Request for Entry of Judgment* on June 4, 2018, declining to enter judgment as the Court deemed it appropriate to consider the *Rule 60(b) Motion* on the underlying *Sanctions Order*.

[8] Plaintiffs argue that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion*, 12. This is addressed by the Court hereinafter.

Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), "this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *see also Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (holding a court abuses its discretion when its decision is not supported by substantial evidence; substantial evidence "defined as that which a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).

6. The *Rule 60(b) Motion* purports to provide substantial evidence to support its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain statements and documents that are inadmissible, and in some instances, inadmissible on multiple grounds.

7. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. As set forth in the Findings of Fact, *supra*, Mr. Willard declares he is "convinced" Mr. Moquin was dealing with issues and demons beyond his control (*WD* ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work (WD ¶ 67; *RWD* ¶ 15); Mr. Moquin suffered a "total mental breakdown" (*WD* ¶ 68; *RWD* ¶16); Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder (*WD* ¶ 70; *RWD* ¶ 37); Mr. Willard believes Mr. Moquin's disorder to be "severe and debilitating" (*WD* ¶ 73); Mr. Willard now sees "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on

the case (*WD* ¶ 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[9]

8. The *Willard Declaration* addresses Mr. Moquin's private life, including his personal mental status and the conflict in his marriage.

9. Mr. Willard statements are not all based on his own perceptions.

10. It logically follows, based on the subject matter, Mr. Willard could not have credibly obtained this information by observing it.

11. Mr. Willard lacks personal knowledge to testify to the assertions included in the *Willard Declaration* and the *Reply Willard Declaration* regarding Mr. Moquin's mental disorder, private personal life, and private marital conflicts.

12. It further logically follows, Mr. Willard could only have obtained this information by communication from Mr. Moquin (or Mr. Moquin's wife), although he does not overtly state this.

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[9] The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

***Willlard Declaration* Paragraph**	***Reply Willard Declaration* Paragraph**
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 (Similar - not exact)
89	3
91	67

13. The *Willard Declaration* and *Reply Willard Declaration* include inadmissible hearsay and under NRS 51.035 and 51.065. *See Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010), as modified, (Apr. 27, 2018) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Indus. v. Rice*, 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation).

14. Separate and apart from the challenge to the *Willard Declaration* and the *Reply Willard Declaration* on hearsay grounds, Mr. Willard's statements are also speculative and therefore inadmissible. He does not declare he personally observed Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the case, and, even if he had, he speculates what the mental disorder could cause and caused, offering an internet article to boost his credibility, which is also hearsay with no applicable exception offered.

15. The assertion describing Mr. Moquin's statement to Mr. Willard that Dr. Mar diagnosed Mr. Moquin with bipolar disorder (*WD* ¶ 69; *RWD* ¶35) is inadmissible hearsay with no exception under NRS 51.105(1) because the Mr. Willard's declaration does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health." Instead, Dr. Mar, purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis. The statements were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance.

16. Even if it is construed that Mr. Moquin's report of Dr. Mar's diagnosis constituted Mr. Moquin's statement of then existing mental condition. Mr. Willard's statements are not admissible as contemporaneous statements Mr. Moquin made about his own present physical symptoms or feelings. *See* 2 McCormick on Evid. §273 (7th ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement."). No spontaneous statement of Mr. Moquin, as the declarant, were offered.

17. The *Willard Declaration* and the *Reply Willard Declaration* also contains hearsay within hearsay, which is inadmissible under NRS 51.067.

18. Mr. Willard also purports to declare Mr. Moquin had a complete mental breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest, and how those symptoms may have affected Mr. Moquin's work. *WD* ¶¶ 68, 73-76 and 87-88; *RWD* ¶ 16, 38.

19. These statements are inadmissible as impermissible lay opinion under NRS 50.265. Mr. Willard is not a licensed health care provider qualified to opine on Mr. Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested.

20. Mr. Willard surmises, speculates and draws conclusions. He is not qualified to testify about what medical, physical, or mental condition Mr. Moquin may have, or the effect of that condition on his work. *White v. Com*, 616 S.E.2d 49, 54, 46 Va. App. 123, 134 (2005) ("While lay witnesses may testify to the attitude and demeanor

of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (Citations omitted).

21. Plaintiffs contend Mr. Willard's opinions of how Mr. Moquin's alleged condition might manifest with symptoms and how those symptoms may have affected Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a person's sanity." *Reply*, 2. Plaintiffs cite *Criswell v. State*, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a person's sanity. However, *Criswell* was overruled in 2001. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity defense and statutorily created "guilty, but mentally ill plea" and holding the legislative abolishment of insanity as a complete defense to a criminal offense unconstitutional, among other holdings, including that lay witnesses cannot testify as to "insanity" because the term has a precise and narrow definition under Nevada law).

22. The Court concludes the *Finger* holdings are not applicable here. First, the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not testify that Mr. Moquin was sane or insane; he testified about the diagnosis of bipolar disorder, possible symptoms of bipolar disorder and how those symptoms, if present, might have affected Mr. Moquin's work.

23. The Nevada Revised Statutes (Evidence Code) provides:

> A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and ... [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

NRS 50.275; *Burnside v. State,* 131 Nev. Adv. Op. 40, ___, 352 P.3d 627, 636 (death penalty case detective allowed to testify about cell phone records as lay witness). Further,

> [t]he key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? *See Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir.1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed.R.Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); *State v. Tierney,* 150 N.H. 339, 839 A.2d 38, 46 (2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

Id.

24. While the Nevada Supreme Court and Court of Appeals have not addressed lay witness testimony, such as that contained in the *Willard Declaration* and *Reply Willard Declaration,* regarding bipolar disorder, this has been specifically addressed by the Pennsylvania court and is persuasive here. In the case of *In re Petition for Involuntary Commitment of Joseph R. Barbour,* the Superior Court of Pennsylvania held, "Lay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder." *In re Petition for Involuntary Commitment of Joseph R. Barbour,* 733 A.2d 1286 (PA. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion.*

25. The documents attached as Exhibits 6, 7 and 8 to the *Rule 60(b) Motion*, which purport to detail Mr. Moquin's alleged domestic abuse of his family, and which also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, with regard to bipolar disorder.

26. Exhibits 6, 7 and 8 to the *Rule 60(b) Motion* are not, and cannot be, authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no personal knowledge of their authenticity. He therefore cannot authenticate or identify the documents pursuant to NRS 52.015(1) or NRS 52.025.

27. Exhibits 6, 7 and 8 do not meet the requirements for presumed authenticity under NRS 52.125, as the exhibits are not certified copies of public records.

28. Pursuant to NRS 47.150, a judge or court may take judicial notice, whether requested to or not. Further, a judge or court shall take judicial notice if requested by a party and supplied with the necessary information. NRS 47.150. Here, no party requested this Court to take judicial notice of the California court records contained in the exhibits Exhibit 6 to the *Rule 60(b) Motion* and the *Reply* based on certified copies. The Court exercises its discretion and declines to take judicial notice here.

29. Moreover, even if Exhibits 6, 7 and 8 could be authenticated, the statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder and condition, are inadmissible lay opinion about bipolar disorder and would still be inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

30. A number of *Reply* Exhibits and discussed in *Reply Willard Declaration* also contain inadmissible hearsay.

31. All of the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065.

32. Specifically, Exhibit 2 and 3 to the *Reply*, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in Exhibit 10 are therefore disregarded as inadmissible hearsay.

33. Exhibits attached to the *Reply* also contain communications occurring after this Court issued its *Order Granting Motion to Strike* and its *Order Granting Sanctions.*

34. All of statements in the *Reply Willard Declaration* set forth after Paragraph 37 detail events and communications from late January, 2018 through late May, 2018, all of which occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order. Willard Declaration* ¶¶ 37-67.

35. Exhibits 5, 6, 7, 8, 9, and 10 to the *Reply* contain only communications and descriptions of events that occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order.*

36. Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside.

37. Statements in the *Reply Willard Declaration* after Paragraph 37 and Exhibits 5, 6, 7, 8, 9, and10 to the *Reply* are not relevant to this Court's determination of

whether Plaintiffs have met their burden of proving excusable neglect under NRCP 60(b).

38. Competent and substantial evidence has not been presented to establish *Rule 60(b) Relief.*

Notwithstanding Plaintiff's Lack of Admissible Evidence, Plaintiffs Fail to Meet their Burden under Rule 60(b) to Set Aside the *Sanctions Order* and *Order Granting Motion to Strike.*

39. Under Nevada law, "'clients must be held accountable for the acts and omissions of their attorneys.'" *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 433 (2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The client "'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent.'" *Huckabay Props.*, 130 Nev. at 204, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (rejecting the argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because petitioner voluntarily chose his attorney).

40. In *Huckabay Props.*, the Nevada Supreme Court dismissed an appeal where appellant's counsel failed to file an opening brief following two granted extensions and a court order granting appellants a final extension. *Huckabay Props.*, 130 Nev. 209, 322 P.3d at 437. In *Huckabay Props.*, the appellant was represented by

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two attorneys. In dismissing the appeal, and applicable to civil litigation at the trial court level here, the Court held:

> Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders . . . and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions.

Huckabay Props. v. NC Auto Parts, 130 Nev. at 209, 322 P.3d at 437.

41. In *Huckabay Props.*, however, the court recognized exceptional circumstances providing two possible exceptions "to the general agency rule that the 'sins' of the lawyer are visited upon his client where the lawyer's addictive disorder and abandonment of his legal practice or criminal conduct justified relief for the victimized client." *Id.* at 204 n.4, 322 P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Notably, these exceptions noted by the court in *Huckabay Props.* are not present here, as the facts of *Pasarelli* are readily distinguishable.

42. First, in *Passarelli*, the record included evidence the attorney suffered from a substance abuse disorder that resulted in missed office days and appointments and an inability to function. *Passarelli*, 102 Nev. at 285. Second, the attorney voluntarily

closed his law practice. *Id.* Third, the attorney was placed on disability inactive status by the Nevada Bar. *Id.* Finally, the client in *Passarelli* had only one attorney. *Id.*

43. None of these facts are present in this case. As concluded, *supra*, no competent, reliable and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court. Further, there is no evidence of missed meetings or absences from office due to the claimed conditions. There is no evidence that Mr. Moquin closed his law practice.

44. Mr. Moquin is on active status with the California Bar. *Opposition to Rule 60(b) Motion*, Ex. 5; Attorney Search, *The State Bar of California, http://members.calbar.ca.gov/fal/LicenseeSearch* (last visited Nov. 30, 2018).

45. Pursuant to NRS 47.150, the Court may take judicial notice, whether requested or not. A fact subject to judicial notice must be either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. NRS 47.130. It follows that the State Bar of California provides accurate information regarding licensing of attorneys which cannot be reasonably questioned. The Court takes judicial notice of Mr. Moquin's active status.

46. Applied here, the *Huckabay Props./Passarelli* analysis compels denial of the *Rule 60(b) Motion*. The standard for "excusable neglect" based on activities of a party's attorney requires the attorney be completely unable to respond or appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where attorney failed to attend trial due to psychiatric disorder which caused him to shut down his practice and was placed on disability inactive status by the State Bar of Nevada); *see also Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court

found excusable neglect where respondent lived out of state and suffered a nervous breakdown shortly after retaining out of state counsel, who was unaware and uninformed of the time to appear).

47. Here, Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and expert disclosures were ignored. Further, this Court granted, upon was also ignored.

48. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin had suffered a complete mental breakdown and his personal life was "in shambles." In addition, to the preclusion of evidence discussed, *supra*, the evidence is vague at best regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and are vague in asserting when any of the alleged events took place. Plaintiffs do attach additional exhibits to their *Reply* that offer some information on timing but are inadequate for the Court's determination.

49. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr. Willard and Mr. Moquin from December 2, 2017 through December 6, 2017, in which Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions*. *Reply*, Ex. 2. The text messages reflect Mr. Willard was aware of the initial deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based on the November 15, 2017 filing date and electronic service).

50. Defendants agreed to extensions through 3:00 pm on December 6, 2017 for Plaintiffs to file their oppositions.

51. The Court granted an additional extension through December 18, 2018.

52. Plaintiffs had knowledge of the initial filing deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the delinquent filings (*Reply*, Ex. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Sanctions Order* ¶ 95.

53. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Sanctions Order* ¶ 98.

54. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion*.

55. Plaintiffs started looking for attorneys who might be able to help. *Reply Willard Declaration* ¶ 36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *WD* ¶ 71; *RWD* ¶ 39.

56. Plaintiffs knew timely oppositions were not filed.

57. Plaintiffs chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the *Motion for Sanctions*. Plaintiffs cannot now avoid the consequences of the acts of omissions of their freely selected agent.

58. Plaintiffs voluntarily chose to stop seeking new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons. *Willard Declaration* ¶ 81.

59. Plaintiffs' multiple instances of non-compliance, including the Plaintiffs failure to provide a compliant damages disclosure in this action, is reflected in the court file for this proceeding, occurring well before Mr. Moquin's purported breakdown in

December, 2017 or January, 2018 asserted as preventing him from opposing the motions.

60. Mr. O'Mara was counsel of record and did not report any issues related to Mr. Moquin to this Court until the filing of his *Notice* in March. *Notice, 1.*

61. The Court gave counsel notice of the seriousness of Plaintiffs' violations and expressed it was considering dismissal based on those violations. *Opposition to Rule 60(b) Motion.* Ex. 3, December 12, 2017 Transcript ("you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their attorneys were given notice of the potential consequence of failing to file an opposition to the *Sanctions Motion.*

62. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations.

63. A party "cannot be relieved from a judgment [order] taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney," *Cicerchia*, 77 Nev. at 161.

Plaintiffs Knew of Mr. Moquin's Alleged Condition and Alleged Non-responsiveness prior to the *Sanctions Order* and <u>did Nothing and, therefore, Cannot Establish Excusable Neglect.</u>

64. In the *Willard Declaration* and *Reply Willard Declaration*, Mr. Willard admits he knew Mr. Moquin was having personal financial difficulties and that he borrowed money from friends and family to fund Mr. Moquin's personal expenses. *WD*

¶¶ 63-65; *RWD* ¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to Mr. Moquin and he again borrowed money from a friend to pay for Mr. Moquin's treatment. *WD* ¶¶ 68-71; *RWD* ¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order*, yet continued to allow Mr. Moquin to represent Plaintiffs.

65. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this case from the cases upon which Plaintiffs rely in the *Rule 60(b) Motion*, where the parties were unaware of their attorneys' problems. *See e.g., Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation") (emphasis added); *U.S. v. Cirami*, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner v. Heise*, 2009 WL 1360975 at *2 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of attorney's mental condition until several months after dismissal). Here, Mr. Willard knew of the actions that supported the *Sanctions Order*.

66. Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *Willard Declaration* ¶81. Plaintiffs' knowledge and inaction vitiates excuse for neglect.

67. The *Rule 60(b) Motion* cites authority for the proposition that even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b). However, "client diligence must still be shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a

duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....").

68. Mr. Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility as he admits he was able to borrow money to fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources to retain new attorneys at the time.

69. Plaintiffs have not established by substantial evidence that they exercise diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness.

The *Rule 60(b) Motion* should be Denied because Two Attorneys Represented Plaintiffs had an Obligation to Ensure Compliance with the Nevada Rules of Civil Procedure and this Court's Orders.

70. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

> (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.
> (b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.
> (c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

SCR 42(14). Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

71. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel*. *Motion to Associate Counsel*.

72. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC*.

73. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

74. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosures, (*Opposition to Rule 60(b) Motion*, Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order*.

75. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court representing,

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues.... Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

Brief Extension Request.

76. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

The *Sanctions Order* was Sufficient under Nevada Law

77. Plaintiffs assert that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion* at 12. However, consideration of this factor is discretionary, not mandatory. See *Young v. Johnny Ribeiro*, 106 Nev. at 93 ("The factors a court **may** properly consider include . . . whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney") (emphasis supplied).

78. The Court concludes factors enumerated in *Young v. Johnny Ribeiro Bldg., Inc.* were met by the *Sanctions Order*. Specifically, the Nevada Supreme Court held where a court issues an order of dismissal with prejudice as a discovery sanction a court may consider, among others, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, and the feasibility and fairness of alternative, less severe sanctions. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. at 93. The factors are not mandatory so long as the Court supports the order with "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Id.*

79. While each suggested factor discussion in the *Sanctions Order* was not labeled by factor, the Court addressed the factors it deemed appropriate.

80. In light of the circumstances in this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*. 80.

81. Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment and not an order, as here, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

The *Rule 60(b) Motion* should be Denied.

82. After weighing the credibility and admissibility of the evidence provided in support of the *Rule 60(b) Motion*, substantial evidence has not been presented to establish excusable neglect.

83. Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect so as to justify relief under NRCP 60(b).

ORDER

Based upon the foregoing, Plaintiffs' *Rule 60(b) Motion* is **DENIED**, in its entirety.

DATED this 5th day of November, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 30 day of November, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

RICHARD WILLIAMSON, ESQ.

JONATHAN TEW, ESQ.

BRIAN IRVINE, ESQ.

ANJALI WEBSTER, ESQ.

JOHN DESMOND, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

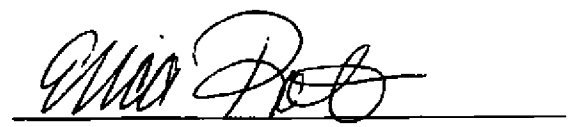

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EXHIBIT "3"

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Jacqueline Bryant
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Transaction # 7018896

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Attorney for Defendants
Berry Hinckley Industries and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual

Defendants.

CASE NO. CV14-01712

DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

~~[PROPOSED]~~ JUDGMENT

This action, having come before this Court, the Honorable Lynne K. Simons presiding, and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice.

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IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are dismissed without prejudice.

DATED this 11th day of December, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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CV14-01712 LARRY J. WILLARD, ETAL VS BE 5 Pages
District Court 12/28/2018 11:53 AM
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FILED
2018 DEC 28 AM 11:53
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CLERK OF THE COURT
BY [signature]
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual Defendants.	Case No. CV14-01712 Dept. No. 6 **CASE APPEAL STATEMENT**
BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual, Counterclaimants, vs. LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Counterdefendants.	

CASE APPEAL STATEMENT

Pursuant to NRAP 3(f), Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation, hereby submit the following case appeal statement:

A. District court case number and caption, showing names of all parties to the proceedings (without using *et al.*): The full case numbers and captions, showing names of all parties, are as follows:

LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6
BERRY-HINCKLEY INDUSTRIES a Nevada corporation; and JERRY HERBST, an individual, Counterclaimants, vs. LARRY J. WILLARD, individually and as Trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation, Counterdefendants.	

B. Name of judge who entered order or judgment being appealed:

Hon. Lynne K. Simons

Robertson, Johnson, Miller & Williamson
50 West Liberty Street, Suite 600
Reno, Nevada 89501

C. Name of each appellant, and name and address of counsel for each appellant:

Appellants are Plaintiff Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Plaintiff Overland Development Corporation

Counsel for Appellants are:

Robert L. Eisenberg (SBN 950)
Lemons, Grundy & Eisenberg
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Richard D. Williamson (SBN 9932)
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775-329-5600
Rich@nvlawyers.com
jon@nvlawyers.com

D. Name of each respondent, and name and address of each respondent's appellate counsel, if known:

Respondents are Defendant Berry-Hinckley Industries and Defendant Jerry Herbst.

Counsel for Respondents are:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
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E. Whether attorneys identified in subparagraph D are not licensed to practice law in Nevada; and if so, whether the district court granted permission to appear under SCR 42 (include copy of district court order granting permission):

All of the attorneys that are currently representing the parties are licensed to practice law in Nevada.

F. Whether appellant was represented by appointed counsel in the district court or on appeal: No appointed counsel; retained counsel only.

G. Whether any appellant was granted leave to proceed *in forma pauperis*: No.

H. Date proceedings were commenced in district court: August 8, 2014.

I. Brief description of nature of the action and result in district court, including type of judgment or order being appealed and relief granted by district court:

This litigation involves the lease and abandonment of commercial property in Reno. The district court issued a discovery sanction consisting of dismissal of plaintiffs' claims. The district court also denied a motion for relief under NRCP 60(b).

J. Whether case was previously subject of appeal or writ proceeding in Nevada Supreme Court or Court of Appeals, and if so, caption and docket number of prior proceeding: None

K. Whether appeal involves child custody or visitation: No

L. Whether appeal involves possibility of settlement: Yes

DATED this 28th day of December, 2018.

ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

By: _____
Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
Attorneys for Plaintiffs/Counterdefendants Appellants

Robertson, Johnson,
Miller & Williamson
50 West Liberty Street,
Suite 600
Reno, Nevada 89501

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Robertson, Johnson, Miller & Williamson, 50 West Liberty Street, Suite 600, Reno, Nevada 89501, over the age of 18, and not a party within this action. I further certify that on the 28th day of December, 2018, I electronically filed the foregoing **CASE APPEAL STATEMENT** with the Clerk of the Court by using the ECF system which served the following parties electronically:

John P. Desmond, Esq.
Brian R. Irvine, Esq.
Anjali D. Webster, Esq.
Dickinson Wright
100 West Liberty Street, Suite 940
Reno, NV 89501
Attorneys for Defendants/Counterclaimants

Robert L. Eisenberg, Esq.
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I further certify that on the 28th day of December, 2018, I caused to be deposited in the U.S. Mail, first-class postage fully prepaid, a true and correct copy of the foregoing **CASE APPEAL STATEMENT**, addressed to the following:

John P. Desmond, Esq.
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An Employee of Robertson, Johnson, Miller & Williamson

SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA
COUNTY OF WASHOE

Case History - CV14-01712

Case Description: LARRY J. WILLARD, ETAL VS BERRY-HINCKLEY, ETAL (D6

Case Number: CV14-01712 Case Type: OTHER CONTRACTS/ACCT/JUDG - Initially Filed On: 8/8/2014

Parties

Party Type & Name	Party Status
JUDG - LYNNE K. SIMONS - D6	Active
PLTF - OVERLAND DEVELOPMENT CORPORATION - @1262966	Active
PLTF - LARRY J WILLARD - @1262965	Active
PLTF - JUDITH A WOOLEY - @1166448	Active
PLTF - LARRY JAMES WILLARD TRUST FUND - @1262967	Active
PLTF - EDWARD C WOOLEY AND JUDITH A WOOLEY REVOCABLE TRUST - @1166449	Active
PLTF - EDWARD C WOOLEY - @1166447	Active
DEFT - JH, INC. - @1135067	Active
DEFT - BERRY-HINCKLEY INDUSTRIES - @14113	Active
DEFT - JERRY HERBST - @1251632	Active
ATTY - Jonathan J. Tew, Esq. - 11874	Active
ATTY - David C. O'Mara, Esq. - 8599	Party ended on: 3/15/2018 12:00:00AM
ATTY - John P. Desmond, Esq. - 5618	Active
ATTY - Richard D. Williamson, Esq. - 9932	Active
ATTY - Brian R. Irvine, Esq. - 7758	Active
ATTY - Kathleen M. Brady, Esq. - 11525	Party ended on: 2/10/2017 12:00:00AM
ATTY - Anjali D. Webster, Esq. - 12515	Active
OATP - Brian P. Moquin, Esq. - A1237	Active

Disposed Hearings

1 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 6/26/2015 at 14:29:00
Extra Event Text: REQUEST FOR SUBMISSION OF DEFENDANTS' MOTION TO COMPEL DISCOVERY RESPONSES - UNOPPOSED, MICHAEL HAS PROPOSE
Event Disposition: S200 - 7/1/2015

2 Department: D6 -- Event: STATUS HEARING -- Scheduled Date & Time: 8/17/2015 at 11:00:00
Extra Event Text: RE: DISCOVERY ISSUES
Event Disposition: D435 - 8/17/2015

3 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 8/17/2015 at 13:48:00
Extra Event Text: DEFENDANTS' SECOND MOTION TO COMPEL DISCOVERY RESPONSES
Event Disposition: S200 - 8/18/2015

4 Department: B -- Event: STATUS CONFERENCE -- Scheduled Date & Time: 8/31/2015 at 10:00:00
Extra Event Text: RE: DISCOVERY
Event Disposition: D855 - 8/31/2015

5 Department: D6 -- Event: TRIAL - NON JURY -- Scheduled Date & Time: 1/11/2016 at 09:00:00
Extra Event Text: NO 1, BENCH, 8 DAYS
Event Disposition: D870 - 9/3/2015

6 Department: D6 -- Event: PRE-TRIAL CONFERENCE -- Scheduled Date & Time: 7/26/2016 at 10:00:00
Extra Event Text: TRIAL: 8/29/16
Event Disposition: D870 - 5/2/2016

7 Department: D6 -- Event: TRIAL - NON JURY -- Scheduled Date & Time: 8/29/2016 at 09:00:00
Extra Event Text: NO 1, 8 DAYS, BENCH
Event Disposition: D870 - 5/2/2016

8 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 9/19/2016 at 10:55:00
Extra Event Text: MOTION FOR PARTIAL SUMMARY JUDGMENT
Event Disposition: S200 - 12/9/2016

9 Department: D6 -- Event: ORAL ARGUMENTS -- Scheduled Date & Time: 1/10/2017 at 09:30:00
Extra Event Text: RE: MOTION FOR PARTIAL SJ
Event Disposition: D425 - 1/10/2017

10 Department: D6 -- Event: PRE-TRIAL CONFERENCE -- Scheduled Date & Time: 3/14/2017 at 13:30:00
Extra Event Text: TRIAL - 5/1/17
Event Disposition: D870 - 2/9/2017

11 Department: D6 -- Event: TRIAL - NON JURY -- Scheduled Date & Time: 5/1/2017 at 09:00:00
Extra Event Text: NO 2, BENCH, 8 DAYS
Event Disposition: D870 - 2/9/2017

12 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 12/8/2017 at 09:20:00
Extra Event Text: MOTION FOR PARTIAL SUMMARY JUDGMENT FILED 11-15--17
Event Disposition: S200 - 12/12/2017

13 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 12/8/2017 at 09:19:00
Extra Event Text: MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH FILED 11-14-17
Event Disposition: S200 - 12/12/2017

14 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 12/8/2017 at 09:20:00
Extra Event Text: MOTION FOR SANCTIONS FILED 11-15-17
Event Disposition: S200 - 12/12/2017

15 Department: D6 -- Event: PRE-TRIAL CONFERENCE -- Scheduled Date & Time: 12/12/2017 at 10:00:00
Extra Event Text: TRIAL - 1/29/18
Event Disposition: D435 - 12/12/2017

16 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 12/18/2017 at 13:22:00
Extra Event Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
Event Disposition: S200 - 1/4/2018

17 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 12/18/2017 at 13:22:00
Extra Event Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR SANCTIONS
Event Disposition: S200 - 1/4/2018

18 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 12/18/2017 at 13:46:00
Extra Event Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIE
Event Disposition: S200 - 1/4/2018

19 Department: D6 -- Event: ORAL ARGUMENTS -- Scheduled Date & Time: 1/12/2018 at 13:00:00
Extra Event Text: (ALL PENDING MOTIONS)
Event Disposition: D845 - 1/4/2018

20 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 1/23/2018 at 07:00:00
Extra Event Text: PROPOSED ORDERS SUBMITTED TO D6
Event Disposition: S200 - 3/6/2018

21 Department: D6 -- Event: TRIAL - NON JURY -- Scheduled Date & Time: 1/29/2018 at 09:00:00
Extra Event Text: NO 2, BENCH, 8 DAYS
Event Disposition: D845 - 1/18/2018

22 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 3/27/2018 at 10:33:00
Extra Event Text: MOTION TO DISMISS COUNTERCLAIMS - PROPOSED ORDER ATTACHED TO NOTICE OF NON-OPPO FILED 3/27
Event Disposition: S200 - 4/13/2018

23 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 3/27/2018 at 15:34:00
Extra Event Text: REQUEST FOR ENTRY OF JUDGMENT FILED 3/09/18 - PROPOSED ORDER ATTACHED TO REQUEST
Event Disposition: S200 - 6/4/2018

24 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 5/31/2018 at 08:46:00
Extra Event Text: REPLY IN SUPPORT OF WILLARD PLAINTIFFS' RULE 60(B) MOTION FOR RELIEF
Event Disposition: S200 - 7/11/2018

25 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 6/6/2018 at 10:24:00
Extra Event Text: REQUEST FOR SUBMISSION OF DEFENDANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS' OPPOSITION TO THE WILLARD PLA
Event Disposition: S200 - 7/11/2018

26 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 6/11/2018 at 11:22:00
Extra Event Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR ATTORNEYS' FEES FILED 4-27-18
Event Disposition: S200 - 7/11/2018

27 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 6/29/2018 at 13:26:00
Extra Event Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY FILED 6-6
Event Disposition: S200 - 9/4/2018

28 Department: D6 -- Event: ORAL ARGUMENTS -- Scheduled Date & Time: 9/4/2018 at 13:30:00
Extra Event Text: PLAINTIFF'S RULE 60(b) MOTION
Event Disposition: D840 - 9/4/2018

29 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 9/4/2018 at 17:00:00
Extra Event Text: PLANTIFF'S RULE 60(B) MOTION TAKEN UNDER ADVISMENT
Event Disposition: S200 - 11/30/2018

30 Department: D6 -- Event: Request for Submission -- Scheduled Date & Time: 12/4/2018 at 16:03:00
Extra Event Text: REQUEST FOR ENTRY OF JUDGMENT
Event Disposition: S200 - 12/11/2018

Actions

Filing Date - Docket Code & Description

1 8/8/2014 - $PLTF - $Addl Plaintiff/Complaint

Additional Text: EDWARD C. WOOLEY AND JUDITH A. WOOLEY REVOCABLE TRUST - Transaction 4554518 - Approved By: MFERNAND : 08-11-2014:08:58:03

2 8/8/2014 - $PLTF - $Addl Plaintiff/Complaint

Additional Text: LARRY JAMES WILLARD TRUST FUND - Transaction 4554518 - Approved By: MFERNAND : 08-11-2014:08:58:03

3 8/8/2014 - $PLTF - $Addl Plaintiff/Complaint

Additional Text: OVERLAND DEVELOPMENT CORPORATION - Transaction 4554518 - Approved By: MFERNAND : 08-11-2014:08:58:03

4 8/8/2014 - $PLTF - $Addl Plaintiff/Complaint

Additional Text: JUDITH A. WOOLEY - Transaction 4554518 - Approved By: MFERNAND : 08-11-2014:08:58:03

5 8/8/2014 - $PLTF - $Addl Plaintiff/Complaint

Additional Text: EDWARD C. WOOLEY - Transaction 4554518 - Approved By: MFERNAND : 08-11-2014:08:58:03

6 8/8/2014 - $1425 - $Complaint - Civil

Additional Text: Transaction 4554518 - Approved By: MFERNAND : 08-11-2014:08:58:03

7 8/11/2014 - PAYRC - **Payment Receipted

Additional Text: A Payment of $410.00 was made on receipt DCDC465428.

8 8/11/2014 - 4090 - ** Summons Issued

Additional Text: X3

9 9/5/2014 - 1005 - Acceptance of Service

Additional Text: ACCEPTANCE OF SERVICE OF SUMMONS AND COMPLAINT ON BEHALF OF DEFTS, BERRY-HINCKLEY INDUSTRIES, JERRY HERBST, AND JH, INC - Transaction 4594499 - Approved By: ADEGAYNE : 09-05-2014:16:46:20

10 9/5/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4594520 - Approved By: NOREVIEW : 09-05-2014:16:47:29

11 10/6/2014 - 1130 - Answer ...

Additional Text: DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT - Transaction 4638541 - Approved By: YVILORIA : 10-06-2014:1 5:04:52

12 10/6/2014 - $1560 - $Def 1st Appearance - CV

Additional Text: BERRY HINCKLEY INDUSTRIES - Transaction 4638541 - Approved By: YVILORIA : 10-06-2014:15:04:52

13 10/6/2014 - $DEFT - $Addl Def/Answer - Prty/Appear

Additional Text: JERRY HERBST - Transaction 4638541 - Approved By: YVILORIA : 10-06-2014:15:04:52

14 10/6/2014 - 2155 - Mtn Partial Dismissal ...

Additional Text: MOTION TO PARTIALLY DISMISS PLAINTIFF'S COMPLAINT - Transaction 4638582 - Approved By: ASMITH : 10-06-201 4:15:19:30

15 10/6/2014 - PAYRC - **Payment Receipted

Additional Text: A Payment of $243.00 was made on receipt DCDC473125.

16 10/6/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4638911 - Approved By: NOREVIEW : 10-06-2014:15:05:49

17 10/6/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4638981 - Approved By: NOREVIEW : 10-06-2014:15:20:28

18 10/6/2014 - 3975 - Statement ...

Additional Text: DEFENDANTS' NEVADA RULE OF CIVIL PROCEDURE 7.1 DISCLOSURE STATEMENT - Transaction 4639344 - Approved By: MCHOLICO : 10-07-2014:08:46:06

19 10/7/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4639781 - Approved By: NOREVIEW : 10-07-2014:08:46:58

20 10/28/2014 - 2490 - Motion ...

Additional Text: MOTION TO ASSOCIATE COUNSEL - Transaction 4672894 - Approved By: YLLOYD : 10-29-2014:10:48:19

21 10/29/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4673457 - Approved By: NOREVIEW : 10-29-2014:10:49:16

22 10/29/2014 - 2610 - Notice ...

Additional Text: DEFT'S NOTICE OF NON-OPPOSITION TO PLAINTIFFS' MOTION TO ASSOCIATE COUNSEL - Transaction 4674760 - Approved By: YLLOYD : 10-30-2014:10:29:56

23 10/30/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4675503 - Approved By: NOREVIEW : 10-30-2014:10:30:41

24 11/3/2014 - A190 - Exempt from Arb (over $50,000)

Additional Text: Transaction 4679022 - Approved By: NMASON : 11-03-2014:15:33:29

25 11/3/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4679128 - Approved By: NOREVIEW : 11-03-2014:15:34:32

26 11/10/2014 - 3696 - Pre-Trial Order

Additional Text: Transaction 4689820 - Approved By: NOREVIEW : 11-10-2014:15:33:00

27 11/10/2014 - 1250E - Application for Setting eFile

Additional Text: TRIAL - 1/11/16 - Transaction 4689820 - Approved By: NOREVIEW : 11-10-2014:15:33:00

28 11/10/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4689825 - Approved By: NOREVIEW : 11-10-2014:15:33:59

29 11/13/2014 - 2673 - Ord Admit to Practice PerSCR42

Additional Text: BRIAN P. MOQUIN, ESQ. - Transaction 4693280 - Approved By: NOREVIEW : 11-13-2014:09:50:52

30 11/13/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4693285 - Approved By: NOREVIEW : 11-13-2014:09:51:38

31 11/19/2014 - 2540 - Notice of Entry of Ord

Additional Text: Transaction 4703771 - Approved By: NOREVIEW : 11-19-2014:16:23:04

32 11/19/2014 - NEF - Proof of Electronic Service

Additional Text: Transaction 4703780 - Approved By: NOREVIEW : 11-19-2014:16:25:59

33 1/21/2015 - 1090 - Amended Complaint

Additional Text: Transaction 4782758 - Approved By: YLLOYD : 01-22-2015:09:05:39

34 1/22/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4783171 - Approved By: NOREVIEW : 01-22-2015:09:06:37

35 1/23/2015 - 1360 - Certificate of Service

Additional Text: Transaction 4787093 - Approved By: YLLOYD : 01-26-2015:09:25:25

36 1/26/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4787443 - Approved By: NOREVIEW : 01-26-2015:09:26:20

37 2/2/2015 - 1140 - Answer to Amended Complaint

Additional Text: DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT - Transaction 4799508 - Approved By: MCHOLICO : 02-02-2015:16:58:17

38 2/2/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4799673 - Approved By: NOREVIEW : 02-02-2015:16:59:09

39 2/4/2015 - 1835 - Joint Case Conference Report

Additional Text: Transaction 4803603 - Approved By: MCHOLICO : 02-04-2015:16:57:00

40 2/4/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4803731 - Approved By: NOREVIEW : 02-04-2015:16:57:58

41 4/13/2015 - IMG - **Entered/Imaged on Wrong Case

Additional Text: 04-13-2015:13:48:16

42 4/13/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4903899 - Approved By: NOREVIEW : 04-13-2015:13:49:15

43 4/13/2015 - 3980 - Stip and Order...

Additional Text: TO AMEND DEFENDANTS ANSWER PURSUANT TO NRCP 15(a) - Transaction 4904023 - Approved By: NOREVIEW : 04-13-2015:14:18:07

44 4/13/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4904031 - Approved By: NOREVIEW : 04-13-2015:14:18:57

45 4/21/2015 - 1085 - Amended Answer

Additional Text: DEFENDANTS' AMENDED ANSWER TO PLAINTIFFS' AMENDED COMPLAINT AND COUNTERCLAIM - Transaction 4916942 - Approved By: CSULEZIC : 04-22-2015:09:00:25

46 4/22/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4917536 - Approved By: NOREVIEW : 04-22-2015:09:01:26

47 4/23/2015 - 1650 - Errata...

Additional Text: Transaction 4920285 - Approved By: YLLOYD : 04-23-2015:13:13:29

48 4/23/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4920643 - Approved By: NOREVIEW : 04-23-2015:13:14:20

49 5/27/2015 - 1145 - Answer to Counterclaim-Civil

Additional Text: PLAINTIFFS LARRY J. WILLARD AND OVERLAND DEVELOPMENT CORPORATION'S ANSWER TO DEFENDANT'S COUNTERCLAIM - Transaction 4971207 - Approved By: YVILORIA : 05-27-2015:14:17:34

50 5/27/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 4971317 - Approved By: NOREVIEW : 05-27-2015:14:18:34

51 6/17/2015 - 2610 - Notice ...

Additional Text: NOTICE OF CHANGE OF LAW FIRM AFFILIATION - Transaction 5004813 - Approved By: MCHOLICO : 06-17-2015:14:09:31

52 6/17/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5005081 - Approved By: NOREVIEW : 06-17-2015:14:10:34

53 6/17/2015 - 3373 - Other ...

Additional Text: COMISSION AND AUTHORITY FOR ISSUANCE OF A SUBPOENA DUCES TECUM - Transaction 5005238 - Approved By: BRAMIREZ : 06-17-2015:14:50:51

54 6/17/2015 - 1030 - Affidavit in Support...

Additional Text: AFFIDAVIT OF BRIAN R IRVINE IN SUPPORT OF APPLICATION FOR ISSUANCE OF A COMMISSION TO SERVE SUBPOENA DUCES TECUM OUT OF STATE - Transaction 5005238 - Approved By: BRAMIREZ : 06-17-2015:14:50:51

55 6/17/2015 - 1270 - Application ...

Additional Text: APPLICATION FOR ISSUANCE OF COMMISSION TO SERVE OUT OF STATE SUBPOENA DUCES TECUM - Transaction 5005238 - Approved By: BRAMIREZ : 06-17-2015:14:50:51

56 6/17/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5005242 - Approved By: NOREVIEW : 06-17-2015:14:51:54

57 6/18/2015 - 1270 - Application ...

Additional Text: APPLICATION FOR ISSUANCE OF COMMISSION TO SERVE OUT OF STATE SUBPOENA DUCES TECUM

58 6/18/2015 - 1417 - Comm/Take Out/State Depo

No additional text exists for this entry.

59 6/18/2015 - 1030 - Affidavit in Support...

Additional Text: AFFIDAVIT OF BRIAN R. IRVINE IN SUPPORT OF APPLICATION FOR ISSUANCE OF A COMMISSION TO SERVE SUBPOENA DUCES TECUM OUT OF STATE

60 6/23/2015 - 2270 - Mtn to Compel...

Additional Text: DEFENDANTS' MOTION TO COMPEL DISCOVERY RESPONSES - Transaction 5013490 - Approved By: MCHOLICO : 06-23-2015:16:22:19

61 6/23/2015 - 1670 - Ex-Parte Mtn...

Additional Text: DEFENDANTS' EX PARTE MOTION FOR AN ORDER SHORTENING TIME - Transaction 5013506 - Approved By: MCHOLICO : 06-23-2015:16:31:02

62 6/23/2015 - 2520 - Notice of Appearance

Additional Text: ANJALI D. WEBSTER, ESQ FOR BERRY HINCKLEY IND. & JERRY HERBST - Transaction 5013655 - Approved By: CSULEZIC : 06-23-2015:16:46:47

63 6/23/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5013929 - Approved By: NOREVIEW : 06-23-2015:16:24:03

64 6/23/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5013982 - Approved By: NOREVIEW : 06-23-2015:16:32:00

65 6/23/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5014062 - Approved By: NOREVIEW : 06-23-2015:16:50:18

66 6/24/2015 - 3245 - Ord Shortening Time

Additional Text: Transaction 5014294 - Approved By: NOREVIEW : 06-24-2015:08:14:51

67 6/24/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5014298 - Approved By: NOREVIEW : 06-24-2015:08:15:51

68 6/24/2015 - 2540 - Notice of Entry of Ord

Additional Text: Transaction 5014829 - Approved By: NOREVIEW : 06-24-2015:10:19:12

69 6/24/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5014833 - Approved By: NOREVIEW : 06-24-2015:10:20:14

70 6/26/2015 - 2610 - Notice ...

Additional Text: NOTICE OF NON-OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DISCOVERY RESPONSES - Transaction 5019676 - Approved By: YVILORIA : 06-26-2015:14:11:11

71 6/26/2015 - 3860 - Request for Submission

Additional Text: Transaction 5019704 - Approved By: YVILORIA : 06-26-2015:14:28:09
DOCUMENT TITLE: REQUEST FOR SUBMISSION OF DEFENDANTS' MOTION TO COMPEL DISCOVERY RESPONSES
PARTY SUBMITTING: JOHN P. DESMON
DATE SUBMITTED: JUNE 26, 2015
SUBMITTED BY: YVILORIA
DATE RECEIVED JUDGE OFFICE:

72 6/26/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5020106 - Approved By: NOREVIEW : 06-26-2015:14:12:09

73 6/26/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5020165 - Approved By: NOREVIEW : 06-26-2015:14:29:52

74 6/30/2015 - 1005 - Acceptance of Service

Additional Text: ACCEPTANCE OF SERVICE FOR DANIEL GLUHAICH - Transaction 5023355 - Approved By: YVILORIA : 06-30-2015:11:05:41

75 6/30/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5023756 - Approved By: NOREVIEW : 06-30-2015:11:08:21

76 7/1/2015 - S200 - Request for Submission Complet

Additional Text: order

77 7/1/2015 - 3060 - Ord Granting Mtn ...

Additional Text: TO COMPEL DISCOVERY RESPONSES - Transaction 5026316 - Approved By: NOREVIEW : 07-01-2015:11:06:30

78 7/1/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5026318 - Approved By: NOREVIEW : 07-01-2015:11:07:28

79 7/1/2015 - 2540 - Notice of Entry of Ord

Additional Text: Notice of Entry of Order Granting Defendents' Motion to Compel Discovery Responses - Transaction 5026791 - Approved By: NOREVIEW : 07-01-2015:13:36:34

80 7/1/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5026802 - Approved By: NOREVIEW : 07-01-2015:13:37:39

81 7/2/2015 - 3725 - Proof ...

Additional Text: RETURNED PROOF OF SERVICE - Transaction 5028916 - Approved By: YVILORIA : 07-02-2015:13:44:54

82 7/2/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5029075 - Approved By: NOREVIEW : 07-02-2015:13:45:57

83 7/10/2015 - 2610 - Notice ...

Additional Text: NOTICE OF DEPOSITION OF DANIEL GLUHAICH - Transaction 5039738 - Approved By: PMSEWELL : 07-10-2015:11:14:57

84 7/10/2015 - 1030 - Affidavit in Support...

Additional Text: AFFIDAVIT OF BRIAN R. IRVINE IN SUPPORT OF APPLICATION FOR ISSUANCE OF A COMMISSION TO SERVE SUBPOENA OUT OF STATE - Transaction 5039738 - Approved By: PMSEWELL : 07-10-2015:11:14:57

85 7/10/2015 - 1270 - Application ...

Additional Text: APPLICATION FOR ISSUANCE OF COMMISSION TO SERVE OUT OF STATE SUBPOENA - Transaction 5039738 - Approved By: PMSEWELL : 07-10-2015:11:14:57

86 7/10/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5039742 - Approved By: NOREVIEW : 07-10-2015:11:15:53

87 7/23/2015 - 1005 - Acceptance of Service

Additional Text: ACCEPTANCE OF SERVICE FOR DANIEL GLUHAICH - Transaction 5060473 - Approved By: YVILORIA : 07-24-2015:09:15:29

88 7/24/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5060803 - Approved By: NOREVIEW : 07-24-2015:09:16:24

89 7/24/2015 - 2490 - Motion ...

Additional Text: MOTION FOR CONTEMPT PURSUANT TO NRCP 45(e) AND MOTION FOR SANCTIONS AGAINST PLAINTIFFS' COUNSEL PURSUANT TO NRCP 37 - Transaction 5062411 - Approved By: MCHOLICO : 07-27-2015:09:20:48

90 7/24/2015 - 1670 - Ex-Parte Mtn...

Additional Text: DEFENDANTS' EX PARTE MOTION FOR AN ORDER SHORTENING TIME - Transaction 5062424 - Approved By: MCHOLICO : 07-27-2015:09:37:07

91 7/27/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5062618 - Approved By: NOREVIEW : 07-27-2015:09:21:38

92 7/27/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5062697 - Approved By: NOREVIEW : 07-27-2015:09:38:09

93 7/28/2015 - 3245 - Ord Shortening Time

Additional Text: Transaction 5065501 - Approved By: NOREVIEW : 07-28-2015:11:36:06

94 7/28/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5065510 - Approved By: NOREVIEW : 07-28-2015:11:37:16

95 7/28/2015 - 2540 - Notice of Entry of Ord

Additional Text: ORDER SHORTENING TIME ON DEFENDANTS' MOTION FOR CONTEMPT - Transaction 5066050 - Approved By: NOREVIEW : 07-28-2015:14:21:21

96 7/28/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5066057 - Approved By: NOREVIEW : 07-28-2015:14:22:46

97 8/7/2015 - 2270 - Mtn to Compel...

Additional Text: DEFENDANTS' SECOND MOTION TO COMPEL DISCOVERY RESPONSES - Transaction 5084135 - Approved By: CSULEZIC : 08-07-2015:16:17:01

98 8/7/2015 - 1670 - Ex-Parte Mtn...

Additional Text: DEFENDANTS' EX PARTE MOTION FOR AN ORDER SHORTENING TIME - Transaction 5084148 - Approved By: CSULEZIC : 08-07-2015:16:21:37

99 8/7/2015 - 3870 - Request

Additional Text: EMERGENCY REQUEST FOR STATUS CONFERENCE - Transaction 5084160 - Approved By: CSULEZIC : 08-07-2015:16 :25:16

100 8/7/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5084332 - Approved By: NOREVIEW : 08-07-2015:16:18:02

101 8/7/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5084356 - Approved By: NOREVIEW : 08-07-2015:16:22:25

102 8/7/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5084369 - Approved By: NOREVIEW : 08-07-2015:16:26:03

103 8/11/2015 - 3245 - Ord Shortening Time

Additional Text: Transaction 5088563 - Approved By: NOREVIEW : 08-11-2015:15:22:38

104 8/11/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5088569 - Approved By: NOREVIEW : 08-11-2015:15:23:39

105 8/11/2015 - 2540 - Notice of Entry of Ord

Additional Text: ORDER SHORTENING TIME ON DEFENDANTS' SECOND MOTION TO COMPEL DISCOVERY RESPONSES - Transaction 5088869 - Approved By: NOREVIEW : 08-11-2015:16:27:10

106 8/11/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5088888 - Approved By: NOREVIEW : 08-11-2015:16:31:19

107 8/12/2015 - 3242 - Ord Setting Hearing

Additional Text: Transaction 5089844 - Approved By: NOREVIEW : 08-12-2015:11:20:20

108 8/12/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5089849 - Approved By: NOREVIEW : 08-12-2015:11:21:09

109 8/17/2015 - 3860 - Request for Submission

Additional Text: Transaction 5096449 - Approved By: YLLOYD : 08-17-2015:13:48:20
DOCUMENT TITLE: DEFENDANTS' SECOND MOTION TO COMPEL DISCOVERY RESPONSES (NO PAPER ORDER)
PARTY SUBMITTING: BRIAN IRVINE ESQ
DATE SUBMITTED: 8/17/15
SUBMITTED BY: YLLOYD
DATE RECEIVED JUDGE OFFICE:

110 8/17/2015 - 3105 - Ord Granting ...

Additional Text: Order Granting Defendant's Second Motion to Compel Discovery Responses - Transaction 5096818 - Approved By: NOREVIEW : 08-17-2015:12:19:57

111 8/17/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5096819 - Approved By: NOREVIEW : 08-17-2015:12:20:47

112 8/17/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5097014 - Approved By: NOREVIEW : 08-17-2015:13:49:20

113 8/18/2015 - S200 - Request for Submission Complet

Additional Text: order

114 9/3/2015 - MIN - ***Minutes

Additional Text: Status Hearing re: Discovery Issues - Transaction 5125808 - Approved By: NOREVIEW : 09-03-2015:10:32:40

115 9/3/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5125811 - Approved By: NOREVIEW : 09-03-2015:10:33:42

116 9/3/2015 - 4045 - Stipulation to Continuance

Additional Text: STIPULATION AND ORDER TO CONTINUE TRIAL (FIRST REQUEST) - Transaction 5126559 - Approved By: TBRITTON : 09-03-2015:14:11:20

117 9/3/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5126780 - Approved By: NOREVIEW : 09-03-2015:14:14:02

118 9/3/2015 - 4030 - Stip & Ord Continue Trial

Additional Text: Transaction 5127223 - Approved By: NOREVIEW : 09-03-2015:15:34:46

119 9/3/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5127225 - Approved By: NOREVIEW : 09-03-2015:15:35:49

120 9/18/2015 - 1250 - Application for Setting

Additional Text: 7/26/16 (PTC) - 8/29/16 (TRIAL) - Transaction 5148698 - Approved By: CSULEZIC : 09-18-2015:15:36:20

121 9/18/2015 - NEF - Proof of Electronic Service

Additional Text: Transaction 5148919 - Approved By: NOREVIEW : 09-18-2015:15:37:20

122 3/14/2016 - 3980 - Stip and Order...

Additional Text: TO AMEND EXPERT DISCLOSURE DEADLINE - Transaction 5415641 - Approved By: NOREVIEW : 03-14-2016:14:36:14

123 3/14/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5415644 - Approved By: NOREVIEW : 03-14-2016:14:37:12

124 5/2/2016 - 4030 - Stip & Ord Continue Trial

Additional Text: Transaction 5493313 - Approved By: NOREVIEW : 05-02-2016:11:05:40

125 5/2/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5493317 - Approved By: NOREVIEW : 05-02-2016:11:06:38

126 5/9/2016 - 1250E - Application for Setting eFile

Additional Text: Transaction 5506807 - Approved By: NOREVIEW : 05-09-2016:16:44:27

127 5/9/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5506809 - Approved By: NOREVIEW : 05-09-2016:16:45:16

128 6/22/2016 - 1320 - Case Conference Report

Additional Text: AMENDED JOINT RULE 16.1 CASE CONFERENCE REPORT - Transaction 5575415 - Approved By: RKWATKIN : 06-22-2016:16:35:54

129 6/22/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5575550 - Approved By: NOREVIEW : 06-22-2016:16:37:08

130 8/1/2016 - 2490 - Motion ...

Additional Text: DEFENDANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 5636441 - Approved By: BRAMIREZ : 08-01-2016:16:18:11

131 8/1/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5636797 - Approved By: NOREVIEW : 08-01-2016:16:19:06

132 8/1/2016 - $2160 - $Mtn Partial Sum Judgment

Additional Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 5636821 - Approved By: CSULEZIC : 08-02-2016:09:07:09

133 8/2/2016 - PAYRC - **Payment Receipted

Additional Text: A Payment of $200.00 was made on receipt DCDC548267.

134 8/2/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5637206 - Approved By: NOREVIEW : 08-02-2016:09:10:13

135 8/16/2016 - 3060 - Ord Granting Mtn ...

Additional Text: ORDER GRANTING MOTION TO EXCEED PAGE LIMIT - Transaction 5660710 - Approved By: NOREVIEW : 08-16-2016:11:58:17

136 8/16/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5660712 - Approved By: NOREVIEW : 08-16-2016:11:59:08

137 8/30/2016 - 2650 - Opposition to ...

Additional Text: PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 5685608 - Approved By: TBRITTON : 08-31-2016:11:07:54

138 8/30/2016 - 1075 - Affidavit ...

Additional Text: AFFIDAVIT OF BRIAN P. MOQUIN - Transaction 5685608 - Approved By: TBRITTON : 08-31-2016:11:07:54

139 8/30/2016 - 1046 - Affidavit of Plaintiff

Additional Text: AFFIDAVIT OF EDWARD C. WOOLEY - Transaction 5685608 - Approved By: TBRITTON : 08-31-2016:11:07:54

140 8/30/2016 - 1046 - Affidavit of Plaintiff

Additional Text: AFFIDAVIT OF LARRY J. WILLARD - Transaction 5685608 - Approved By: TBRITTON : 08-31-2016:11:07:54

141 8/31/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5686337 - Approved By: NOREVIEW : 08-31-2016:11:09:26

142 9/16/2016 - 2490 - Motion ...

Additional Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION TO EXCEED PAGE LIMIT ON REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 5712301 - Approved By: YLLOYD : 09-16-2016:16:36:36

143 9/16/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5712779 - Approved By: NOREVIEW : 09-16-2016:16:37:39

144 9/16/2016 - 3795 - Reply...

Additional Text: DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 5712853 - Approved By: YVILORIA : 09-19-2016:08:59:36

145 9/19/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5713129 - Approved By: NOREVIEW : 09-19-2016:09:00:52

146 9/19/2016 - 3860 - Request for Submission

Additional Text: MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 5713181 - Approved By: CSULEZIC : 09-19-2016:10:06:50
PARTY SUBMITTING: BRIAN IRVINE ESQ
DATE SUBMITTED: 9/19/16
SUBMITTED BY: CS
DATE RECEIVED JUDGE OFFICE:

147 9/19/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5713382 - Approved By: NOREVIEW : 09-19-2016:10:07:48

148 9/20/2016 - 3105 - Ord Granting ...

Additional Text: MOTION TO EXCEED PAGE LIMIT ON REPLY & ORDER FOR COURTESY COPIES - Transaction 5717232 - Approved By: NOREVIEW : 09-20-2016:16:05:56

149 9/20/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5717243 - Approved By: NOREVIEW : 09-20-2016:16:07:14

150 12/2/2016 - 1610 - Disclosure of Expert Witness

Additional Text: DEFENDANTS' DISCLOSURE OF EXPERT WITNESS MICHELLE SALAZAR - Transaction 5834869 - Approved By: YVILORIA : 12-05-2016:08:47:13

151 12/5/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5835126 - Approved By: NOREVIEW : 12-05-2016:08:48:11

152 12/5/2016 - 1368 - Certificate ...

Additional Text: AMENDED CERTIFICATE OF SERVICE - Transaction 5835833 - Approved By: PMSEWELL : 12-05-2016:11:50:59

153 12/5/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5835928 - Approved By: NOREVIEW : 12-05-2016:11:52:16

154 12/9/2016 - 3242 - Ord Setting Hearing

Additional Text: Transaction 5846456 - Approved By: NOREVIEW : 12-09-2016:14:51:10

155 12/9/2016 - S200 - Request for Submission Complet

Additional Text: ORDER

156 12/9/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5846469 - Approved By: NOREVIEW : 12-09-2016:14:52:30

157 12/14/2016 - 1250 - Application for Setting

Additional Text: DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - JANUARY 10, 2017 AT 9:30 AM - Transaction 5853591 - Approved By: TBRITTON : 12-14-2016:13:34:24

158 12/14/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5853762 - Approved By: NOREVIEW : 12-14-2016:13:35:07

159 12/20/2016 - 4105 - Supplemental ...

Additional Text: SUPPLEMENT TO DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 5863245 - Approved By: CSULEZIC : 12-20-2016:11:23:38

160 12/20/2016 - NEF - Proof of Electronic Service

Additional Text: Transaction 5863359 - Approved By: NOREVIEW : 12-20-2016:11:26:30

161 1/16/2017 - 4185 - Transcript

Additional Text: 1/10/17 - Hearing on Motion for Partial Summary Judgment - Transaction 5898584 - Approved By: NOREVIEW : 01-16-2017:15:25:36

162 1/16/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5898585 - Approved By: NOREVIEW : 01-16-2017:15:26:26

163 1/30/2017 - 2630 - Objection to ...

Additional Text: PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS - Transaction 5923951 - Approved By: YVILORIA : 01-30-2017:15:07:08

164 1/30/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5924139 - Approved By: NOREVIEW : 01-30-2017:15:08:04

165 1/31/2017 - MIN - ***Minutes

Additional Text: Oral Arguments 1/10/17 - Transaction 5926360 - Approved By: NOREVIEW : 01-31-2017:14:21:22

166 1/31/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5926384 - Approved By: NOREVIEW : 01-31-2017:14:23:01

167 2/2/2017 - 3880 - Response...

Additional Text: DEFENDANTS/COUNTERCLAIMANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS - Transaction 5931033 - Approved By: TBRITTON : 02-02-2017:13:27:12

168 2/2/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5931052 - Approved By: NOREVIEW : 02-02-2017:13:28:11

169 2/9/2017 - 4030 - Stip & Ord Continue Trial

Additional Text: Transaction 5943531 - Approved By: NOREVIEW : 02-09-2017:13:14:43

170 2/9/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5943534 - Approved By: NOREVIEW : 02-09-2017:13:15:43

171 2/9/2017 - 2610 - Notice ...

Additional Text: NOTICE OF DISASSOCIATION OF COUNSEL AND REQUEST TO BE REMOVED FROM ELECTRONIC NOTICING ON THIS MATTER - Transaction 5944914 - Approved By: YVILORIA : 02-10-2017:08:07:24

172 2/10/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5944986 - Approved By: NOREVIEW : 02-10-2017:08:08:27

173 2/16/2017 - 1250E - Application for Setting eFile

Additional Text: Transaction 5954691 - Approved By: NOREVIEW : 02-16-2017:12:39:34

174 2/16/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 5954693 - Approved By: NOREVIEW : 02-16-2017:12:40:26

175 5/30/2017 - 3105 - Ord Granting ...

Additional Text: PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS - Transaction 6123806 - Approved By: NOREVIEW : 05-30-2017:16:42:21

176 5/30/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6123812 - Approved By: NOREVIEW : 05-30-2017:16:43:22

177 5/31/2017 - 2540 - Notice of Entry of Ord

Additional Text: Transaction 6124745 - Approved By: NOREVIEW : 05-31-2017:11:10:55

178 5/31/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6124752 - Approved By: NOREVIEW : 05-31-2017:11:11:55

179 10/17/2017 - 1520 - Declaration

Additional Text: Affidavit of Brian P. Moquin - Transaction 6351933 - Approved By: CSULEZIC : 10-18-2017:09:35:48

180 10/17/2017 - 1520 - Declaration

Additional Text: Affidavit of Daniel Gluhaich - Transaction 6351933 - Approved By: CSULEZIC : 10-18-2017:09:35:48

181 10/17/2017 - 1520 - Declaration

Additional Text: Affidavit of Edward C. Wooley - Transaction 6351933 - Approved By: CSULEZIC : 10-18-2017:09:35:48

182 10/17/2017 - $2200 - $Mtn for Summary Judgment

Additional Text: DFX: INDEX OF EXHIBITS IS MARKED AS EXHIBIT ONE INSTEAD OF ATTACHED TO THE MOTION - MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS EDWARD C. WOOLEY AND JUDITH A. WOOLEY - Transaction 6351933 - Approved By: CSULEZIC : 10-18-2017:09:35:48

183 10/18/2017 - PAYRC - **Payment Receipted

Additional Text: A Payment of $200.00 was made on receipt DCDC589507.

184 10/18/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6352252 - Approved By: NOREVIEW : 10-18-2017:09:37:52

185 10/18/2017 - 1520 - Declaration

Additional Text: Affidavit of Brian P. Moquin - Transaction 6353981 - Approved By: CSULEZIC : 10-18-2017:16:18:43

186 10/18/2017 - 1520 - Declaration

Additional Text: Affidavit of Daniel Gluhaich - Transaction 6353981 - Approved By: CSULEZIC : 10-18-2017:16:18:43

187 10/18/2017 - 1520 - Declaration

Additional Text: Affidavit of Larry J. Willard - Transaction 6353981 - Approved By: CSULEZIC : 10-18-2017:16:18:43

188 10/18/2017 - $2200 - $Mtn for Summary Judgment

Additional Text: MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS LARRY J. WILLARD AND OVERLAND DEVELOPMENT CORPORATION - Transaction 6353981 - Approved By: CSULEZIC : 10-18-2017:16:18:43

189 10/18/2017 - PAYRC - **Payment Receipted

Additional Text: A Payment of $200.00 was made on receipt DCDC589603.

190 10/18/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6354049 - Approved By: NOREVIEW : 10-18-2017:16:19:50

191 10/25/2017 - COC - Evidence Chain of Custody Form

No additional text exists for this entry.

192 11/13/2017 - 2490 - Motion ...

Additional Text: DEFENDANTS'/COUNTERCLAIMANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS'/COUNTERCLAIMANTS' OPPOSITION TO LARRY J. WILLARD AND OVERLAND DEVELOPMENT CORPORATIONS' MOTION FOR SUMMARY JUDGMENT - Transaction 6391047 - Approved By: CSULEZIC : 11-13-2017:13:14:15

193 11/13/2017 - 2490 - Motion ...

Additional Text: DEFENDANTS'/COUNTERCLAIMANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS'/COUNTERCLAIMANTS' OPPOSITION TO EDWARD C. WOOLEY AND JUDITH A. WOOLEYS' MOTION FOR SUMMARY JUDGMENT - Transaction 6391080 - Approved By: CSULEZIC : 11-13-2017:13:24:51

194 11/13/2017 - 2645 - Opposition to Mtn ...

Additional Text: DEFENDANTS'/COUNTERCLAIMANTS' OPPOSITION TO EDWARD C. WOOLEY AND JUDITH A. WOOLEYS' MOTION FOR SUMMARY JUDGMENT - Transaction 6391524 - Approved By: BVIRREY : 11-13-2017:14:15:42

195 11/13/2017 - 2645 - Opposition to Mtn ...

Additional Text: DEFENDANTS'/COUNTERCLAIMANTS' OPPOSITION TO LARRY WILLARD AND OVERLAND DEVELOPMENT CORPORATION'S MOTION FOR SUMMARY JUDGMENT - Transaction 6391650 - Approved By: BVIRREY : 11-13-2017:14:20:27

196 11/13/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6391676 - Approved By: NOREVIEW : 11-13-2017:13:15:15

197 11/13/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6391740 - Approved By: NOREVIEW : 11-13-2017:13:25:48

198 11/13/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6391999 - Approved By: NOREVIEW : 11-13-2017:14:18:32

199 11/13/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6392044 - Approved By: NOREVIEW : 11-13-2017:14:22:46

200 11/14/2017 - 2490 - Motion ...

Additional Text: DEFENDANTS'/COUNTERCLAIMANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS'/COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF D. GLUHAICH - Transaction 6393437 - Approved By: PMSEWELL : 11-14-2017:11:33:30

201 11/14/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6393683 - Approved By: NOREVIEW : 11-14-2017:11:34:33

202 11/14/2017 - 2475 - Mtn to Strike...

Additional Text: DEFENDANTS'/COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL. GLUHAICH - Transaction 6394696 - Approved By: PMSEWELL : 11-14-2017:16:33:26

203 11/14/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6394868 - Approved By: NOREVIEW : 11-14-2017:16:34:30

204 11/15/2017 - $2160 - $Mtn Partial Sum Judgment

Additional Text: DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 6395866 - Approved By: PMSEWELL : 11-1 5-2017:13:23:11

205 11/15/2017 - PAYRC - **Payment Receipted

Additional Text: A Payment of $200.00 was made on receipt DCDC592564.

206 11/15/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6396015 - Approved By: NOREVIEW : 11-15-2017:13:24:25

207 11/15/2017 - 2490 - Motion ...

Additional Text: DEFENDANTS'/COUNTERCLAIMANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS'/COUNTERCLAIMANTS' MOTION FOR SANCTIONS - Transaction 6397062 - Approved By: PMSEWELL : 11-16-2017:08:37:10

208 11/15/2017 - 2185 - Mtn for Sanctions

Additional Text: DEFENDANTS'/COUNTERCLAIMANTS' MOTION FOR SANCTIONS - Transaction 6397083 - Approved By: PMSEWELL : 11-16-2017:08:44:30

209 11/16/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6397241 - Approved By: NOREVIEW : 11-16-2017:08:38:11

210 11/16/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6397290 - Approved By: NOREVIEW : 11-16-2017:08:46:14

211 12/6/2017 - 2075 - Mtn for Extension of Time

Additional Text: PLTF'S REQUEST FOR A BRIEF EXTENSION OF TIME TO RESPOND TO DEFTS' THREE PENDING MOTIONS, AND TO EXTEND THE DEADLINE FOR SUBMISSION OF DISPOSITIVE MOTIONS - Transaction 6426442 - Approved By: SWILLIAM : 12-06-2017:1 5:21:41

212 12/6/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6426533 - Approved By: NOREVIEW : 12-06-2017:15:22:42

213 12/7/2017 - 2610 - Notice ...

Additional Text: NOTICE OF NON-OPPOSITION TO DEFENDANTS'/COUNTERCLAIMANTS MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 6429596 - Approved By: PMSEWELL : 12-08-2017:08:45:16

214 12/7/2017 - 2610 - Notice ...

Additional Text: NOTICE OF NON-OPPOSITION TO DEFENDANTS'/COUNTERCLAIMANTS MOTION FOR SANCTIONS - Transaction 6429615 - Approved By: PMSEWELL : 12-08-2017:09:14:54

215 12/7/2017 - 2610 - Notice ...

Additional Text: NOTICE OF NON-OPPOSITION TO DEFENDANTS'/COUNTERCLAIMANTS MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH - Transaction 6429645 - Approved By: YVILORIA : 12-08-2017:08:34:57

216 12/7/2017 - 3860 - Request for Submission

Additional Text: Transaction 6429670 - Approved By: YVILORIA : 12-08-2017:08:42:59
DOCUMENT TITLE: MOTION FOR PARTIAL SUMMARY JUDGMENT FILED 11-15--17
PARTY SUBMITTING: BRIAN R. IRVINE ESQ
DATE SUBMITTED: DEC 8, 2017
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:

217 12/7/2017 - 3860 - Request for Submission

Additional Text: Transaction 6429683 - Approved By: YVILORIA : 12-08-2017:08:44:11
DOCUMENT TITLE: MOTION FOR SANCTIONS FILED 11-15-17 -
PARTY SUBMITTING: BRIAN R IRVINE ESQ
DATE SUBMITTED: DEC 8, 2017
SUBMITTED BY: YVILORIA
DATE RECEIVED JUDGE OFFICE:

218 12/7/2017 - 3860 - Request for Submission

Additional Text: Transaction 6429701 - Approved By: YVILORIA : 12-08-2017:08:45:30
DOCUMENT TITLE: MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH FILED 11-14-17
PARTY SUBMITTING: BRIAN R. IRVINE ESQ
DATE SUBMITTED: DEC 8, 2017
SUBMITTED BY: YVILORIA
DATE RECEIVED JUDGE OFFICE:

219 12/8/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6429874 - Approved By: NOREVIEW : 12-08-2017:08:35:56

220 12/8/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6429886 - Approved By: NOREVIEW : 12-08-2017:08:43:59

221 12/8/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6429889 - Approved By: NOREVIEW : 12-08-2017:08:45:08

222 12/8/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6429893 - Approved By: NOREVIEW : 12-08-2017:08:46:18

223 12/8/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6429895 - Approved By: NOREVIEW : 12-08-2017:08:46:27

224 12/8/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6429948 - Approved By: NOREVIEW : 12-08-2017:09:16:17

225 12/12/2017 - S200 - Request for Submission Complet

Additional Text: PLAINTIFF SHALL RESPOND NO LATER THAN 12/18/17; DEFENDANT SHALL REPLY NO LATER THAN 1/8/18; ORAL ARGUMENTS SET FOR 1/12/18 AT 1:00 P.M.

226 12/12/2017 - S200 - Request for Submission Complet

Additional Text: PLAINTIFF SHALL RESPOND NO LATER THAN 12/18/17; DEFENDANT SHALL REPLY NO LATER THAN 1/8/18; ORAL ARGUMENTS SET FOR 1/12/18 AT 1:00 P.M.

227 12/12/2017 - S200 - Request for Submission Complet

Additional Text: PLAINTIFF SHALL RESPOND NO LATER THAN 12/18/17; DEFENDANT SHALL REPLY NO LATER THAN 1/8/18; ORAL ARGUMENTS SET FOR 1/12/18 AT 1:00 P.M.

228 12/14/2017 - 4185 - Transcript

Additional Text: 121217.hearing - Transaction 6440497 - Approved By: NOREVIEW : 12-14-2017:19:02:37

229 12/14/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6440498 - Approved By: NOREVIEW : 12-14-2017:19:03:36

230 12/18/2017 - 2610 - Notice ...

Additional Text: NOTICE OF NON-OPPOSITION TO DEFENDANTS'/COUNTERCLAIMANTS MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 6443150 - Approved By: YVILORIA : 12-18-2017:13:09:06

231 12/18/2017 - 2610 - Notice ...

Additional Text: NOTICE OF NON-OPPOSITION TO DEFENDANTS'/COUNTERCLAIMANTS MOTION FOR SANCTIONS - Transaction 6443159 - Approved By: YVILORIA : 12-18-2017:13:09:20

232 12/18/2017 - 2610 - Notice ...

Additional Text: NOTICE OF NON-OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH - Transaction 6443172 - Approved By: YVILORIA : 12-18-2017:13:14:14

233 12/18/2017 - 3860 - Request for Submission

Additional Text: - Transaction 6443177 - Approved By: YVILORIA : 12-18-2017:13:15:42
DOCUMENT TITLE: DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
PARTY SUBMITTING: BRIAN R IRVINE ESQ
DATE SUBMITTED: DEC 18, 2017
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:

234 12/18/2017 - 3860 - Request for Submission

Additional Text: Transaction 6443180 - Approved By: YVILORIA : 12-18-2017:13:19:02
DOCUMENT TITLE: DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR SANCTIONS
PARTY SUBMITTING: BRIAN R IRVINE ESQ
DATE SUBMITTED: DEC 18, 2017
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:

235 12/18/2017 - 3860 - Request for Submission

Additional Text: Transaction 6443182 - Approved By: YVILORIA : 12-18-2017:13:29:09
DOCUMENT TITLE: DEFENDANTS/COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH
PARTY SUBMITTING: BRIAN R IRVINE ESQ
DATE SUBMITTED: DEC 18, 2017
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:

236 12/18/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6443364 - Approved By: NOREVIEW : 12-18-2017:13:10:02

237 12/18/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6443366 - Approved By: NOREVIEW : 12-18-2017:13:10:21

238 12/18/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6443378 - Approved By: NOREVIEW : 12-18-2017:13:15:11

239 12/18/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6443382 - Approved By: NOREVIEW : 12-18-2017:13:16:41

240 12/18/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6443387 - Approved By: NOREVIEW : 12-18-2017:13:20:01

241 12/18/2017 - NEF - Proof of Electronic Service

Additional Text: Transaction 6443418 - Approved By: NOREVIEW : 12-18-2017:13:29:52

242 1/4/2018 - 3060 - Ord Granting Mtn ...

Additional Text: DEFENDANTS/COUNTERCLAIMANTS MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH - Transaction 6466778 - Approved By: NOREVIEW : 01-04-2018:16:54:34

243 1/4/2018 - S200 - Request for Submission Complet

Additional Text: ORDER

244 1/4/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6466789 - Approved By: NOREVIEW : 01-04-2018:16:55:44

245 1/4/2018 - S200 - Request for Submission Complet

Additional Text: ORDER

246 1/4/2018 - S200 - Request for Submission Complet

Additional Text: ORDER

247 1/4/2018 - 3060 - Ord Granting Mtn ...

Additional Text: DEFENDANTS/COUNTERCLAIMANTS MOTION FOR SANCTIONS - Transaction 6466861 - Approved By: NOREVIEW : 01-04-2018:17:32:10

248 1/4/2018 - 3105 - Ord Granting ...

Additional Text: DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT - Transaction 6466867 - Approved By: NOREVIEW : 01-04-2018:17:33:20

249 1/4/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6466866 - Approved By: NOREVIEW : 01-04-2018:17:33:19

250 1/4/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6466870 - Approved By: NOREVIEW : 01-04-2018:17:34:16

251 1/5/2018 - 2540 - Notice of Entry of Ord

Additional Text: Notice of Entry of Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich - Transaction 6468337 - Approved By: NOREVIEW : 01-05-2018:13:39:54

252 1/5/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6468341 - Approved By: NOREVIEW : 01-05-2018:13:40:49

253 1/5/2018 - 2540 - Notice of Entry of Ord

Additional Text: Notice of Entry of Order Granting Defendants' Motion for Partial Summary Judgment - Transaction 6468348 - Approved By: NOREVIEW : 01-05-2018:13:44:00

254 1/5/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6468351 - Approved By: NOREVIEW : 01-05-2018:13:44:59

255 1/5/2018 - 2540 - Notice of Entry of Ord

Additional Text: Notice of Entry of Order Granting Defendants'/Counterclaimants' Motion for Sanctions - Transaction 6468357 - Approved By: NOREVIEW : 01-05-2018:13:46:53

256 1/5/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6468366 - Approved By: NOREVIEW : 01-05-2018:13:49:38

257 3/6/2018 - S200 - Request for Submission Complet

Additional Text: orders

258 3/6/2018 - 3370 - Order ...

Additional Text: FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE: DEFENDANTS' MOTION FOR SANCTIONS - Transaction 6564287 - Approved By: NOREVIEW : 03-06-2018:16:23:04

259 3/6/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6564290 - Approved By: NOREVIEW : 03-06-2018:16:23:52

260 3/6/2018 - 2842 - Ord Denying Motion

Additional Text: MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT AS MOOT - Transaction 6564297 - Approved By: NOREVIEW : 03-06-2018:16:25:44

261 3/6/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6564302 - Approved By: NOREVIEW : 03-06-2018:16:26:43

262 3/6/2018 - 2540 - Notice of Entry of Ord

Additional Text: NOTICE OF ENTRY OF FINDINGS OF FACTS AND CONCLUSIONS OF LAW AND ORDER - Transaction 6564488 - Approved By: NOREVIEW : 03-06-2018:17:45:50

263 3/6/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6564489 - Approved By: NOREVIEW : 03-06-2018:17:48:40

264 3/6/2018 - 2540 - Notice of Entry of Ord

Additional Text: NOTICE OF ENTRY OF ORDER DENYING PLAINTIFFS' MOTION TO PARTIALLY DISMISS PLAINTIFFS' COMPLAINT AS MOOT - Transaction 6564490 - Approved By: NOREVIEW : 03-06-2018:17:50:50

265 3/6/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6564493 - Approved By: NOREVIEW : 03-06-2018:17:51:50

266 3/8/2018 - 2490 - Motion ...

Additional Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS - Transaction 6567830 - Approved By: JAPARICI : 03-08-2018:14:00:24

267 3/8/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6567942 - Approved By: NOREVIEW : 03-08-2018:14:01:30

268 3/9/2018 - 3870 - Request

Additional Text: REQUEST FOR ENTRY OF JUDGMENT - Transaction 6569817 - Approved By: CSULEZIC : 03-09-2018:12:40:53

269 3/9/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6570047 - Approved By: NOREVIEW : 03-09-2018:12:41:55

270 3/12/2018 - MIN - ***Minutes

Additional Text: 12/12/17 PRE-TRIAL CONFERENCE - Transaction 6572395 - Approved By: NOREVIEW : 03-12-2018:13:45:47

271 3/12/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6572398 - Approved By: NOREVIEW : 03-12-2018:13:46:37

272 3/15/2018 - 4300 - Withdrawal of Counsel

Additional Text: DAVID C. O'MARA ESQ / PLAINTIFFS - Transaction 6580103 - Approved By: YVILORIA : 03-15-2018:16:43:38

273 3/15/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6580237 - Approved By: NOREVIEW : 03-15-2018:16:44:39

274 3/26/2018 - 2520 - Notice of Appearance

Additional Text: RICHARD WILLIAMSON, ESQ. AND JONATHAN TEW, ESQ. FOR PLAINTIFFS - Transaction 6596669 - Approved By: PMSEWELL : 03-26-2018:16:28:40

275 3/26/2018 - 2645 - Opposition to Mtn ...

Additional Text: OPPOSITION TO REQUEST FOR ENTRY OF JUDGMENT - Transaction 6596669 - Approved By: PMSEWELL : 03-26-201 8:16:28:40

276 3/26/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6596727 - Approved By: NOREVIEW : 03-26-2018:16:29:39

277 3/27/2018 - 2610 - Notice ...

Additional Text: NOTICE OF NON-OPPOSITION TO DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS - Transaction 6597394 - Approved By: CSULEZIC : 03-27-2018:10:27:01

278 3/27/2018 - 3860 - Request for Submission

Additional Text: MOTION TO DISMISS COUNTERCLAIMS - Transaction 6597399 - Approved By: CSULEZIC : 03-27-2018:10:32:07
PARTY SUBMITTING: BRIAN IRVINE ESQ
DATE SUBMITTED: 3/27/18
SUBMITTED BY: CS
DATE RECEIVED JUDGE OFFICE:

279 3/27/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6597509 - Approved By: NOREVIEW : 03-27-2018:10:28:15

280 3/27/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6597543 - Approved By: NOREVIEW : 03-27-2018:10:33:10

281 3/27/2018 - 3795 - Reply...

Additional Text: REPLY IN SUPPORT OF DEFENDANTS/COUNTERCLAIMANTS' REQUEST FOR ENTRY OF JUDGMENT - Transaction 6598618 - Approved By: PMSEWELL : 03-27-2018:15:42:39

282 3/27/2018 - 3860 - Request for Submission

Additional Text: REQUEST FOR ENTRY OF JUDGMENT FILED 3/09/18 - Transaction 6598628 - Approved By: CSULEZIC : 03-27-2018:15 :25:30
PARTY SUBMITTING: BRIAN IRVINE ESQ
DATE SUBMITTED: 3/27/18
SUBMITTED BY: CS
DATE RECEIVED JUDGE OFFICE:

283 3/27/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6598694 - Approved By: NOREVIEW : 03-27-2018:15:26:30

284 3/27/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6598792 - Approved By: NOREVIEW : 03-27-2018:15:43:46

285 4/12/2018 - 4050 - Stipulation ...

Additional Text: STIPULATION FOR DISMISAL WITH PREJUDICE AND [PROPOSED] ORDER - Transaction 6626047 - Approved By: JAPARICI : 04-12-2018:12:53:41

286 4/12/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6626396 - Approved By: NOREVIEW : 04-12-2018:12:54:36

287 4/13/2018 - 3060 - Ord Granting Mtn ...

Additional Text: DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS - Transaction 6628496 - Approved By: NOREVIEW : 04-13-2018:11:10:22

288 4/13/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6628507 - Approved By: NOREVIEW : 04-13-2018:11:11:56

289 4/13/2018 - 2910 - Ord Dismissal w/Prejudice

Additional Text: CLAIMS OF WOOLEY PLAINTIFFS - Transaction 6628513 - Approved By: NOREVIEW : 04-13-2018:11:13:04

290 4/13/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6628519 - Approved By: NOREVIEW : 04-13-2018:11:13:59

291 4/13/2018 - S200 - Request for Submission Complet

Additional Text: ORDER

292 4/16/2018 - 2540 - Notice of Entry of Ord

Additional Text: NOTICE OF ENTRY OF ORDER DISMISSING THE CLAIMS OF WOOLEY PLAINTIFFS WITH PREJUDICE - Transaction 6630140 - Approved By: NOREVIEW : 04-16-2018:09:31:58

293 4/16/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6630152 - Approved By: NOREVIEW : 04-16-2018:09:33:14

294 4/16/2018 - 2540 - Notice of Entry of Ord

Additional Text: NOTICE OF ENTRY OF ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS - Transaction 6630162 - Approved By: NOREVIEW : 04-16-2018:09:35:13

295 4/16/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6630166 - Approved By: NOREVIEW : 04-16-2018:09:36:08

296 4/18/2018 - 2490 - Motion ...

Additional Text: WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF - Transaction 6636476 - Approved By: YVILORIA : 04-18-2018 :16:00:05

297 4/18/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6636763 - Approved By: NOREVIEW : 04-18-2018:16:01:24

298 4/27/2018 - 2010 - Mtn for Attorney's Fee

Additional Text: MOTION FOR ATTORNEYS' FEES - Transaction 6651655 - Approved By: CSULEZIC : 04-27-2018:11:04:25

299 4/27/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6651822 - Approved By: NOREVIEW : 04-27-2018:11:06:35

300 5/18/2018 - 2490 - Motion ...

Additional Text: DEFENDANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS' OPPOSITION TO THE WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF - Transaction 6687914 - Approved By: CVERA : 05-18-2018:15:11:09

301 5/18/2018 - 2645 - Opposition to Mtn ...

Additional Text: DEFENDANTS/COUNTERCLAIMANTS' OPPOSITION TO RULE 60(b) MOTION FOR RELIEF - Transaction 6687973 - Approved By: JAPARICI : 05-18-2018:15:21:02

302 5/18/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6687981 - Approved By: NOREVIEW : 05-18-2018:15:12:29

303 5/18/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6688034 - Approved By: NOREVIEW : 05-18-2018:15:22:00

304 5/29/2018 - 3795 - Reply...

Additional Text: REPLY IN SUPPORT OF THE WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF - Transaction 6702327 - Approved By: CVERA : 05-30-2018:08:39:48

305 5/29/2018 - 2645 - Opposition to Mtn ...

Additional Text: Plaintiffs' Opposition to Defendants' Motion to Exceed Page Limit - Transaction 6702439 - Approved By: CSULEZIC : 05-30-2018:08:41:21

306 5/30/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6702532 - Approved By: NOREVIEW : 05-30-2018:08:40:53

307 5/30/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6702538 - Approved By: NOREVIEW : 05-30-2018:08:42:26

308 5/30/2018 - 3860 - Request for Submission

Additional Text: Transaction 6704564 - Approved By: CVERA : 05-31-2018:08:26:48
DOCUMENT TITLE: REPLY IN SUPPORT OF WILLARD PLAINTIFFS' RULE 60(B) MOTION FOR RELIEF
PARTY SUBMITTING: RICHARD D. WILLIAMSON, ESQ.
DATE SUBMITTED: 05/31/18
SUBMITTED BY: CVERA
DATE RECEIVED JUDGE OFFICE:

309 5/31/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6705232 - Approved By: NOREVIEW : 05-31-2018:08:27:47

310 6/1/2018 - 2645 - Opposition to Mtn ...

Additional Text: OPPOSITION TO MOTION FOR ATTORNEYS' FEES - Transaction 6709193 - Approved By: YVILORIA : 06-01-2018:16:16:55

311 6/1/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6709459 - Approved By: NOREVIEW : 06-01-2018:16:19:42

312 6/4/2018 - 2682 - Ord Addressing Motions

Additional Text: REQUEST FOR ENTRY OF JUDGMENT - Transaction 6710052 - Approved By: NOREVIEW : 06-04-2018:10:13:27

313 6/4/2018 - S200 - Request for Submission Complet

Additional Text: ORDER

314 6/4/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6710055 - Approved By: NOREVIEW : 06-04-2018:10:14:29

315 6/5/2018 - 3795 - Reply...

Additional Text: DEFENDANTS' REPLY IN SUPPORT OF MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS' OPPOSITION TO THE WILLARD PLAINTIFFS' RULE 60(B) MOTION FOR RELIEF - Transaction 6713926 - Approved By: JAPARICI : 06-06-2018:08:59:51

316 6/5/2018 - 3860 - Request for Submission

Additional Text: - Transaction 6713948 - Approved By: JAPARICI : 06-06-2018:08:56:44
DOCUMENT TITLE: REQUEST FOR SUBMISSION OF DEFENDANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS' OPPOSITION TO THE WILLARD PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF
PARTY SUBMITTING: BRIAN R. IRVINE, ESQ
DATE SUBMITTED: 06/06/2018
SUBMITTED BY: JAPARICIO
DATE RECEIVED JUDGE OFFICE:

317 6/6/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6714239 - Approved By: NOREVIEW : 06-06-2018:08:57:53

318 6/6/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6714263 - Approved By: NOREVIEW : 06-06-2018:09:01:28

319 6/6/2018 - 2475 - Mtn to Strike...

Additional Text: DEFENDANTS' MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY - Transaction 6716429 - Approved By: CSULEZIC : 06-06-2018:16:47:17

320 6/6/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6716521 - Approved By: NOREVIEW : 06-06-2018:16:48:24

321 6/11/2018 - 3795 - Reply...

Additional Text: DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES - Transaction 6722044 - Approved By: CVERA : 06-11-2018:11:20:35

322 6/11/2018 - 3860 - Request for Submission

Additional Text: Transaction 6722061 - Approved By: YVILORIA : 06-11-2018:11:21:31
DOCUMENT TITLE: DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR ATTORNEYS' FEES FILED 4-27-18
PARTY SUBMITTING: BRIAN IRVINE ESQ
DATE SUBMITTED: JUN 11, 2018
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:

323 6/11/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6722062 - Approved By: NOREVIEW : 06-11-2018:11:21:35

324 6/11/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6722066 - Approved By: NOREVIEW : 06-11-2018:11:22:31

325 6/22/2018 - 2645 - Opposition to Mtn ...

Additional Text: OPPOSITION TO DEFENDANTS' MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY - Transaction 6743308 - Approved By: YVILORIA : 06-22-2018:15:46:45

326 6/22/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6743466 - Approved By: NOREVIEW : 06-22-2018:15:47:46

327 6/29/2018 - 3795 - Reply...

Additional Text: REPLY IN SUPPORT OF MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY - Transaction 6754895 - Approved By: YVILORIA : 06-29-2018:13:24:33

328 6/29/2018 - 3860 - Request for Submission

Additional Text: Transaction 6754925 - Approved By: YVILORIA : 06-29-2018:13:25:47
DOCUMENT TITLE: DEFENDANTS/COUNTERCLAIMANTS' MOTION TO STRIKE, OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE SUR-REPLY FILED 6-6-18
PARTY SUBMITTING: BRIAN R IRVINE ESQ
DATE SUBMITTED: JUNE 29, 2018
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:

329 6/29/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6754952 - Approved By: NOREVIEW : 06-29-2018:13:25:35

330 6/29/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6754955 - Approved By: NOREVIEW : 06-29-2018:13:26:44

331 7/11/2018 - 3370 - Order ...

Additional Text: RE: MOTION FOR ATTORNEYS' FEES - Transaction 6771891 - Approved By: NOREVIEW : 07-11-2018:16:39:18

332 7/11/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6771896 - Approved By: NOREVIEW : 07-11-2018:16:41:58

333 7/11/2018 - 3060 - Ord Granting Mtn ...

Additional Text: DEFENDANTS' MOTION TO EXCEED PAGE LIMIT ON DEFENDANTS' OPPOSITION TO WILLARD PLAINTIFFS' RULE 60(B) MOTION FOR RELIEF - Transaction 6771902 - Approved By: NOREVIEW : 07-11-2018:16:42:02

334 7/11/2018 - 3242 - Ord Setting Hearing

Additional Text: Transaction 6771906 - Approved By: NOREVIEW : 07-11-2018:16:42:54

335 7/11/2018 - S200 - Request for Submission Complet

Additional Text: ORDER SETTING HEARING

336 7/11/2018 - S200 - Request for Submission Complet

Additional Text: ORDER

337 7/11/2018 - S200 - Request for Submission Complet

Additional Text: ORDER

338 7/11/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6771912 - Approved By: NOREVIEW : 07-11-2018:16:44:03

339 7/11/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6771922 - Approved By: NOREVIEW : 07-11-2018:16:45:11

340 7/19/2018 - 1250E - Application for Setting eFile

Additional Text: Transaction 6785734 - Approved By: NOREVIEW : 07-19-2018:13:41:19

341 7/19/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 6785739 - Approved By: NOREVIEW : 07-19-2018:13:42:23

342 9/4/2018 - S200 - Request for Submission Complet

Additional Text: IN ORAL ARGUMENTS, COUNSEL FOR PLAINTIFF STIPULATED TO THE FILING OF THE SUR-REPLY. MOTION IS NOW MOOT.

343 11/30/2018 - 2840 - Ord Denying ...

Additional Text: Transaction 7001598 - Approved By: NOREVIEW : 11-30-2018:16:08:53

344 11/30/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 7001607 - Approved By: NOREVIEW : 11-30-2018:16:10:25

345 11/30/2018 - S200 - Request for Submission Complet

Additional Text: PLAINTIFF'S RULE 60B MOTION DENIED

346 12/3/2018 - 2540 - Notice of Entry of Ord

Additional Text: NOTICE OF ENTRY OF ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF - Transaction 7002654 - Approved By: NOREVIEW : 12-03-2018:11:18:07

347 12/3/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 7002658 - Approved By: NOREVIEW : 12-03-2018:11:19:07

348 12/4/2018 - 3860 - Request for Submission

Additional Text: Transaction 7006848 - Approved By: YVILORIA : 12-04-2018:16:01:43
DOCUMENT TITLE: REQUEST FOR ENTRY OF JUDGMENT
PARTY SUBMITTING: BRIAN IRVINE ESQ
DATE SUBMITTED: 12-4-18
SUBMITTED BY: YV
DATE RECEIVED JUDGE OFFICE:

349 12/4/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 7006993 - Approved By: NOREVIEW : 12-04-2018:16:04:09

350 12/11/2018 - 1880 - Judgment

Additional Text: Transaction 7018896 - Approved By: NOREVIEW : 12-11-2018:15:23:30

351 12/11/2018 - S200 - Request for Submission Complet

Additional Text: JUDGMENT

352 12/11/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 7018899 - Approved By: NOREVIEW : 12-11-2018:15:24:28

353 12/11/2018 - 4105 - Supplemental ...

Additional Text: SUPPLEMENT TO MOTION FOR ATTORNEYS' FEES - Transaction 7019323 - Approved By: YVILORIA : 12-12-2018:10:0 9:12

354 12/11/2018 - 2535 - Notice of Entry of Judgment

Additional Text: NOTICE OF ENTRY OF JUDGMENT - Transaction 7019340 - Approved By: NOREVIEW : 12-11-2018:16:42:20

355 12/11/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 7019360 - Approved By: NOREVIEW : 12-11-2018:16:44:21

356 12/12/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 7019849 - Approved By: NOREVIEW : 12-12-2018:10:10:20

357 12/21/2018 - 2645 - Opposition to Mtn ...

Additional Text: OPPOSITION TO SUPPLEMENT TO MOTION FOR ATTORNEY FEES - Transaction 7037083 - Approved By: YVILORIA : 12-21-2018:15:50:27

358 12/21/2018 - NEF - Proof of Electronic Service

Additional Text: Transaction 7037186 - Approved By: NOREVIEW : 12-21-2018:15:53:04

359 12/28/2018 - $2515 - $Notice/Appeal Supreme Court

No additional text exists for this entry.

360 12/28/2018 - 1310 - Case Appeal Statement

No additional text exists for this entry.

361 12/28/2018 - 2547 - Notice of Filing Costs/Appeal

No additional text exists for this entry.

362 12/28/2018 - PAYRC - **Payment Receipted

Additional Text: A Payment of -$34.00 was made on receipt DCDC627800.

363 12/28/2018 - SAB - **Supreme Court Appeal Bond

Additional Text: Bond ID: SAB-18-00104; Total Bond Amount: $500.00.

Bond Code, SAB, Receipted for: SITE DEFINED TRUST DEPOSIT, on 28-DEC-2018 in the amount of $500.00 on case ID CV14-01712.

364 12/28/2018 - 1350 - Certificate of Clerk

Additional Text: CERTIFICATE OF CLERK AND TRANSMITTAL - NOTICE OF APPEAL - Transaction 7043398 - Approved By: NOREVIEW : 12-28-2018:14:44:23

FILED
Electronically
CV14-01712
2018-03-06 04:22:28 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6564287

3060
DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
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Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries, and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.

CASE NO. CV14-01712
DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

~~[PROPOSED]~~ FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). The Willard Plaintiffs are also counter-defendants in this matter.

2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been admitted to practice in Nevada *pro hac vice*, and David O'Mara of the O'Mara Law Firm, P.C., who is serving as local counsel.

3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants").

4. The Motion before this Court is Defendants' Motion for Sanctions, wherein Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170. (Defendants' Motion).

5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion was submitted to this Court on December 18, 2017.

6. This Court, having considered the briefing, and being otherwise fully advised, and GOOD CAUSE APPEARING, hereby finds the following facts and makes the following conclusions of law:

FINDINGS OF FACT

Plaintiffs' Complaint

7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a joint complaint against them. (Complaint).[1]

8. Willard sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. (First Amended Complaint ("FAC")).

9. Willard had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

10. Wooley sought the following damages against Defendants for an alleged breach of the lease between Wooley and BHI: (1) "rental income in the amount of $4,420,244.00 that [Wooley] otherwise would have received," discounted by a rate of 4% as specified in the Wooley Lease to $3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to be proven at trial but which is at least $2,000,000"; (3) property taxes in the amount of $1,500; (4) insurance for $3,840; (5) maintenance costs of $4,000; (6) management costs of $2,500; and (7) security deposit from subtenant for $2,485.00. (FAC).

11. Wooley had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

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[1]All of the referenced documents have been filed with this Court in this case, either as pleadings/ briefings/ motions or as exhibits to the same. References to "Defendants' Motion" are to Defendants' Motion for Sanctions. References to "Willard Motion" or "Wooley Motion" are to the Plaintiffs' respective Motions for Summary Judgment.

Plaintiffs' Initial Disclosures

12. On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to Defendants' Motion for Sanctions).

13. However, while Plaintiffs disclosed anticipated witnesses and documents, they did not provide any computation of their claimed damages, notwithstanding the express requirement to do so set forth in NRCP 16.1(a)(1)(C).

Defendants' February 12, 2015, Letter

14. On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies in their initial disclosures, and informing them that the disclosures did not include the damages computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants' Motion for Sanctions).

15. Defendants advised Plaintiffs that their failure to timely comply would result in Defendants seeking sanctions. *Id.*

16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon receipt of this letter or any time thereafter.

Plaintiffs' Interrogatory Responses

17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23, 2015, Motion to Compel).

18. Defendants had not received any NRCP 16.1 damages disclosures from Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

19. Plaintiffs did not respond, even after Defendants granted them multiple extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to Compel).

20. This Court granted the Motion to Compel, which Plaintiffs failed to oppose. Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

21. Only then did Plaintiffs respond, and, in pertinent part, simply repeated the allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

22. Notably, these Court-ordered responses were the last time Plaintiffs provided anything that even came close to a damages disclosure until October of 2017, and even these did not comply with the requirements of NRCP 16.1.

23. Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order from this Court to do so.

24. Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015 clearly did not deter any of their subsequent conduct in continuing to fail to comply with their discovery obligations and Court orders.

The September 3, 2015, Stipulation and Order to Continue Trial Date

25. On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs' continued failure to comply with discovery obligations and resulting prejudice to Defendants, and noting that Plaintiffs had also yet to comply with the promise they made during a status conference before this Court to provide Defendants with discovery responses to Defendants' outstanding discovery requests in advance of the parties' depositions scheduled to begin on August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).

26. Plaintiffs' failure to comply with discovery obligations necessitated a continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015, Stipulation and Order).

The Parties' May 2, 2016, Stipulation and Order to Continue the Trial Date

27. In March of 2016, Defendants wrote Plaintiffs twice, seeking documentation that Plaintiffs failed to provide, and asking that Plaintiffs comply with their NRCP 26(e) obligations

to supplement their responses as necessary. (Exhibits 8 and 9 to Defendants' Motion for Sanctions).

28. On April 20, 2016, Defendants continued to request the information that they sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents but they had not done so. (Exhibit 10 to Defendants' Motion).

29. Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting that "this is an issue which we have raised on multiple occasions." *Id.*

30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.

31. Defendants also stated that "[y]our clients' failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. Without such documents, we cannot depose several witnesses, and our experts are unable to complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions." *Id.*

32. Due to Plaintiffs continued failure to meet discovery obligations, the parties agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order). This Court signed the Order, adding that "no further continuances will be granted." *Id.*

33. Following the second continuance, trial was scheduled for May 2, 2017, and discovery was set to close on March 2, 2017.

Plaintiffs' Unsuccessful Purported Disclosure of Daniel Gluhaich as a Non-Retained Expert Witness

34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a non-retained expert. (Exhibit 11 to Defendants' Motion).

35. However, while Plaintiffs' disclosure generally referenced the categories as to which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts

and opinions to which the witness is expected to testify," as required by NRCP 16.1(a)(2)(B).[2] *Id.*

36. In fact, Plaintiffs immediately admitted that their disclosure of Mr. Gluhaich was inadequate and did not comply with NRCP 16.1, reiterating in an email to Defendants that Defendants had agreed to "allow Plaintiffs to provide an amended expert witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...." (Exhibit 12 to Defendants' Motion).

37. However, Plaintiffs did not provide an amended disclosure on December 8 or any time thereafter.

The Parties' December 2016 Correspondence

38. On December 9, 2016, Defendants' counsel wrote that Defendants did not receive the amended disclosure, or dates pursuant to which Defendants could depose Mr. Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that "[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion testimony that plaintiffs intent to present at trial. Please provide that information immediately." *Id.*

39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP 16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley," and asked Defendants' counsel to "forward...to Tim Herbst as [Defendants' counsel saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

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[2]In contrast, Defendants disclosed Michelle Salazar as an expert and served Plaintiffs with Ms. Salazar's report, which included, as required under NRCP 16.1(a)(2)(B) "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

tendering supplemental disclosures in the imminent future that will include the actual spreadsheet." *Id.* Defendants responded to this settlement information expressing concern about Wooley's continued failure to provide NRCP 16.1 damages, and once again demanded NRCP 16.1 damages computations from all Plaintiffs, immediately. (Exhibit 13 to Defendants' Motion).

40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit 14 to Defendants' Motion).

41. Defendants also stated that this conduct was prejudicing Defendants and making it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id.*

42. Next, Defendants expressed their concerns to Wooley that the damages spreadsheet recently provided for settlement purposes only, which Defendants could not share with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs had never before utilized in the case," and prejudiced Defendants in that they were unable to conduct discovery about this new computation of damages or the methodology used to arrive at the purported numbers in the Wooley settlement-only spreadsheet. *Id.*

43. Defendants concluded that "[w]e still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she could provide new opinions about any new damages model. *Id.*

44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to Defendants' Motion). Plaintiffs did not address their failure to provide their damages disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

with NRCP 16.1. *Id.* Rather, Plaintiffs stated that Defendants "are granted an open extension for submitting any expert reports rebutting the opinions of Mr. Gluhaich until [they] have received Plaintiffs' amended disclosure, deposed Mr. Gluhaich, and provided any rebuttal expert(s) with sufficient opportunity to review that material and prepare rebuttal report(s)." *Id.* Plaintiffs also stated that the amended expert witness disclosure would be tendered that day. *Id.*

45. However, Plaintiffs did not provide any amended expert disclosure that day or at any time thereafter.

<u>This Court's January 10, 2017, Hearing</u>

46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard and Wooley personally attended. (January 10, 2017, transcript).

47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims. *Id.*

48. Plaintiffs' counsel also represented to this Court that Wooley's damages disclosures to Defendants were complete and up-to-date. *Id.* This was a misrepresentation, as Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and certainly had not provided any updated disclosures since the court-ordered discovery response in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during the hearing. (January 10, 2017, transcript).

49. Upon orally granting Defendants' motion, this Court also ordered that "the Court enters a case management order that directs the plaintiffs to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damages disclosure." *Id.* at 68.

The February 9, 2017, Stipulation and Order

50. In spite of the rapidly impending trial date (at the time, May 2, 2017) and close of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any damages disclosures or otherwise supplement or update their discovery responses in any way. Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose any expert.

51. On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by stating that "as of the date of this letter, we have less than thirty (30) days to complete discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less than three months until the current trial date." (Exhibit 16 to Defendants' Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply with their obligations, Defendants would not be able to timely complete discovery or submit dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct necessitated yet another continuance of the trial date. *Id.*

52. In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply with expert disclosure requirements. *Id.* Defendants reminded Plaintiffs that Plaintiffs "were indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as demonstrated by [the parties'] December 5, 2016, telephonic conversation." *Id.* However, despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to comply with the Nevada Rules of Civil Procedure more than two months after the deadline, "without any justification whatsoever." *Id.*

53. Defendants further informed Plaintiffs that their "failure to comply with the Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

amended disclosure, is severely prejudicing Defendants." *Id.* With the close of discovery being one month away, "regardless of what Plaintiffs do at this point, this discovery deadline would need to be extended to enable the Defendants to complete discovery and disclose rebuttal experts in the time permitted by the rule, the parties' joint case conference report, and the stipulation and order on file with the Court." *Id.*

54. Defendants also addressed Plaintiffs' continued failure to provide Defendants with an NRCP 16.1 damages computation. *Id.* Defendants stated that it would be "patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of discovery," and it would be impossible for Defendants' expert to opine on any new damages theories under the current discovery deadlines if Plaintiffs were to seek any additional or different types of damages. *Id.*

55. Finally, Defendants requested that Plaintiffs also provide other outstanding discovery, stating that Plaintiffs "have been promising to disclose these documents for more than 10 months, but have yet to do so." *Id.*

56. Based on these issues, Defendants asked for a continuance of the trial date so that Plaintiffs could comply with their obligations such that Defendants could receive time to prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure and the parties' agreements. *Id.*

57. Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties signed a stipulation which contained several express recitals and stipulations regarding Plaintiffs' ongoing failure to comply with discovery obligations.

58. First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that this conduct had been prejudicial to Defendants:

> 4. On December 2, 2016, Plaintiffs disclosed Dan Gluhaich as a non-retained expert. Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding twelve separate subject matters and included Mr. Gluhaich's resume, but did not include "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B).

> 5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.
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> 6. Following receipt of Plaintiffs' supplemental disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants intend to depose Mr. Gluhaich and retain experts to rebut his opinions.
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> 10. ...[B]ecause Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants will be unable to complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.

(February 9, 2017, Stipulation and Order).

59. Second, Plaintiffs stipulated that they had not properly provided their NRCP 16.1 damages disclosures:

> 7. On January 10, 2017, the parties appeared in this Court for a hearing on Defendants' Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C), "[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." (January 10, 2017 Hearing Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the hearing that they have not yet provided Defendants with a complete damages disclosure pursuant to NRCP 16.1(a)(1)(C), and the Court ordered Plaintiffs "to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damage disclosure." *Id.* at 68.
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> 8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have Michelle Salazar supplement her initial expert report to include any opinions about any new or revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to conduct additional fact discovery on any new or revised damages claims or calculations submitted by Plaintiffs.

> 9. Discovery in this matter currently is scheduled to close on March 2, 2017, and dispositive motions must be filed and submitted for decision no later than March 31, 2017.
>
> 10. Because Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report of Michelle Salazar within the time currently allowed for discovery....

Id.

60. Plaintiffs stipulated that this Court should enter an order which, in pertinent part, requires "Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the date of the Order approving this Stipulation." *Id.*

61. Plaintiffs also stipulated to other pertinent deadlines:

> 3. The deadline for Defendants to serve a supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until sixty (60) days before the close of discovery....
>
> 5. The deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26.

Id.

62. The Stipulation also included a certification from counsel that "[u]ndersigned counsel certifies that their respective clients have been advised that a stipulation for continuance is to be submitted on their behalf and that the parties have no objection thereto." *Id.*

63. This Court entered an Order consistent with the stipulation on February 9, 2017. *Id.*

64. However, Plaintiffs did nothing as required by the Stipulation since the entry of this Order or the stipulation of the parties to rectify their failure to meet their outstanding discovery obligations.

65. The parties set a trial date of January 29, 2018, meaning that, per the Stipulation and Order, discovery was set to close on November 15, 2017.

This Court's May 30, 2017, Order

66. On May 30, 2017, this Court entered an Order granting Defendants' motion for partial summary judgment. (Order).

67. In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure." *Id.*

68. Again, Plaintiffs completely ignored the requirements and obligations imposed by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages computations, despite the express requirements of the NRCP and this Court's Orders.

Plaintiffs' Motions for Summary Judgment

69. After three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation or to supplement any damages calculations, and after nearly one year of refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in which they requested brand new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery. (Motions for Summary Judgment).

70. Further, their calculations were based upon opinions of Mr. Gluhaich, an expert witness who was never properly disclosed, and who primarily based his opinions on appraisals that were also never disclosed. *Id.*

71. These Motions were filed with only four weeks remaining in discovery—putting Defendants in the exact same predicament that they were placed in February of 2017—Defendants could not engage in the discovery (fact and expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit 16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

72. Plaintiffs' new damages and new expert opinions were all based upon information that was in Plaintiffs' possession throughout this case, meaning that there was no reason that Plaintiffs could not have timely disclosed a computation of their damages and the documents on which such computations are based.

Willard's Motion

73. In Willard's Motion, Willard sought more than triple the amount of damages (nearly $40 million more) than he sought in the complaint and ostensibly throughout this case.

74. Willard also had a brand new, different basis for his claimed "rent" damages: the liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Willard to provide expert opinion to support his request and meet his burden of proof. (Willard Lease; Willard Motion).

75. Willard also had a brand new claim for diminution in value damages that would also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for Summary Judgment).

76. Default interest was a brand new component of Willard's claimed damages. *Id.*

77. The property-related damages now had a different purported value and amount. *Id.*

78. Willard's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. *Id.*

79. Willard and his purported expert witness relied upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants. *See also* (Exhibit 17 to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1, 2012 through present.")).

Wooley's Motion

80. Wooley sought nearly double the amount of damages that he sought in his complaint and ostensibly throughout this case. (Wooley Motion).

81. Wooley used different bases for his claimed "rent" damages. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Wooley to introduce an expert opinion to meet his burden of proof, which Defendants would be entitled to rebut under Nevada law. (*Id.*; Exhibit 19 to Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley had testified at his deposition that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley was proceeding on an entirely new theory.

82. Default interest was also a brand new component of Wooley's claimed damages. (Wooley Motion).

83. The property-related damages were based in part upon new damages and documents that were not disclosed to Defendants. *Id.*

84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they were entitled to do. *Id.*; (February 9, 2017, Stipulation and Order).

85. Wooley and his purported expert relied upon an appraisal to establish "value" that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP 26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an appraisal performed when he bought the property, but had not produced that to his lawyer)).

Timing of the Motions

86. At this point in discovery, Defendants had obviously only been able to prepare defenses to the claimed bases for damages that Plaintiffs asserted in the Complaint and Interrogatory responses, not Plaintiffs' brand new, previously undisclosed, bases for damages.

87. This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9, 2017, Stipulation and Order).

88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to ignore their discovery obligations. Defendants have been forced to file two motions to compel and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery obligations.

89. Defendants have been required repeatedly to go to extraordinary lengths to attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the NRCP. (Exhibits 20-23 to Defendants' Motion).

90. This Court has also issued several Orders requiring Plaintiffs to meet their discovery obligations, but Plaintiffs have blatantly ignored those Orders.

91. Plaintiffs never submitted their Motions for Summary Judgment by the December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

This Court's December 12, 2017, Hearing

92. On November 15, 2017, Defendants filed, *inter alia*, Defendants' Motion for Sanctions.[3]

93. Therein, Defendants requested that this Court dismiss Plaintiffs' case with prejudice as a sanction for Plaintiffs' discovery violations.

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[3]Defendants had also filed a Motion to Strike/Motion in Limine to Preclude Daniel Gluhaich as an expert witness, and a Motion for Partial Summary Judgment on Plaintiffs' diminution in value claims. This Court has ruled on those Motions in other orders.

94. On December 6, 2017, Plaintiffs' filed a Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions.

95. At the Pre-Trial Status Conference on December 12, 2017, this Court granted Plaintiffs' Request for Extension and directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM.[4] This Court further directed Defendants to reply no later than January 8, 2018, and set the parties' Motions for oral argument on January 12, 2018.

96. This Court also admonished Plaintiffs that "you need to know going into these oppositions, that I'm very seriously considering granting all of it." (December 12, 2017, transcript).

97. This Court also admonished Plaintiffs that "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." *Id.*

98. However, Plaintiffs did not file any opposition to Defendants' Motions by December 18 or any time thereafter, nor did Plaintiffs request any further extension. In fact, this Court and Defendants' counsel have not heard anything from Plaintiffs or their counsel since the December 12, 2017, hearing.

99. Defendants filed a notice of non-opposition to their Motions and request for submission of their Motions on December 18.

CONCLUSIONS OF LAW

Legal standard

100. NRCP 16.1(a)(1)(A)(C) provides that "a party must, without awaiting a discovery request, provide to other parties...[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34

[4]This Court inquired as to why Plaintiffs failed to oppose Defendants' Motions. Mr. Moquin informed this Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained that he is a sole practitioner without access to an IT department.

the documents or other evidentiary matter, not privileged or protected from disclosure, on which such a computation is based, including materials bearing on the nature and extent of injuries suffered...." "The use of the word 'must' means that the rule's requirements are mandatory." *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. ___, ___, 309 P.3d 1017, 1020 (2013) (discussing the NRCP 16.1(a)(1)(D) requirements).

101. Further, "the rule requires a computation supported by documents.... A plaintiff is required to provide its assessment of damages in its initial disclosure in light of the information currently available to it in sufficient detail so as to enable each defendant to understand the contours of its potential exposure and make informed decisions as to settlement and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); *see generally Vanguard Piping*, 129 Nev. at ___, 309 P.3d at 1020 ("Because of the similarity in the language, federal cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive authority."). Indeed, it is the plaintiff's burden to prove damages, *see generally Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof."), and "the plaintiff cannot shift to the defendant the burden of attempting to determine the amount of the plaintiff's damages." 10 Fed. Proc., L. Ed. § 26:44.

102. Also pertinent, NRCP 16.1(a)(2)(B) requires that, with regard to a non-retained expert witness, a party must disclose, *inter alia*, a summary of the facts and opinions to which the witness is expected to testify. References to broad categories as to what the expert will testify are insufficient. *See Jones v. Colorado Cas. Ins. Co.*, 2015 WL 6123125, at *3 (D. Ariz. 2015).

103. Further, NRCP 26(e) requires that:

> A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

> (1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.
>
> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

104. Failure to comply with NRCP 16.1's requirements shall result in sanctions. Pursuant to NRCP 16.1(e)(3):

> If an attorney fails to reasonably comply with **any** provision in [NRCP 16.1], or if an attorney or a party fails to comply with an **order** entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, **shall** impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:
>
> (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);
>
> (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(Emphases added).

105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

106. Further, NRCP 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial...any witness or information not so disclosed." NRCP 37(c)(1) also provides that "[i]n addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C)."

107. Similarly, pursuant to NRCP 41(b), "[f]or failure of the plaintiff to comply with [the Nevada Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."

108. In addition to the rule-based authority discussed herein, the Nevada Supreme Court has also recognized that "the court has inherent power to enter defaults and dismiss actions for abusive litigation practices." *Blanco v. Blanco*, 129 Nev. ___, ___, 311 P.3d 1170, 1174 (2013).

109. The Nevada Supreme Court has also expressly held that "the factual nature of the underlying case is not an appropriate measure to evaluate whether a [case] should be dismissed for violations of court rules and/or orders." *Huckabay Props. v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 433 (2014) (discussing this in the context of dismissing an appeal, and also disapproving of prior case law "to the extent it indicates that a fact-based assessment of the underlying civil action should be made before determining whether to dismiss an appeal on procedural grounds.").

110. Finally, pursuant to DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

Plaintiffs' Conduct Demands Dismissal with Prejudice

111. When considering the issuance of dismissal with prejudice as a sanction, the Nevada Supreme Court has held that "[p]rocedural due process considerations require that such case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order." *Blanco*, 129 Nev. at ___, 311 P.3d at 1174.

112. Further, the Court must consider pertinent factors, including the extent of the offending party's willfulness, whether the non-offending party would be prejudiced by imposition of a lesser sanction, whether dismissal is too severe for the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal should only occur in the most extreme of cases. *Id.*

113. However, district courts are not required to consider every factor, so long as the district court's analysis is thoughtfully performed. *See generally Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).

114. Here, the factors readily demonstrate that dismissal with prejudice is warranted, and that there is no due process violation in so doing.

Plaintiffs did not oppose Defendants' motion or any of the points discussed therein.

115. It must be emphasized as a threshold matter that Plaintiffs never opposed Defendants' Motion.

116. Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

117. Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants' Motion.

118. However, separate from this consideration, good cause exists to dismiss this case.

Case-concluding discovery sanctions are just and relate to the claims at issue

119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.

120. Plaintiffs have also completely failed to properly disclose an expert witness, waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert witness to support their Motions for Summary Judgment without complying with the requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.

121. Plaintiffs have also ignored or failed to comply with multiple separate discovery obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and necessitating that the trial and discovery deadlines be extended on three occasions to accommodate for Plaintiffs' continued noncompliance.

122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.

123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general.

Plaintiffs' violations are willful

124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1, Plaintiffs have been on direct notice for three years that they have not complied with NRCP 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra.*

125. This Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017, Order); *see also Perez v. Siragusa*, 2008 WL 2704402, at *4 (E.D.N.Y. July 3, 2008) (dismissal under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed

willful when the court's orders have been clear, when the party has understood them and when the party's noncompliance is not due to factors beyond the party's control.").

126. Plaintiffs acknowledged in two stipulations that they have not complied with NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to comply. *See, e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation and Order; May 2, 2016, Stipulation and Order).

127. Further, Wooley misrepresented to this Court that he had provided complete and up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly, including in open court, that this document provided for settlement negotiations does not equate to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for litigation purposes in any manner. *See, e.g.*, (January 10, 2017, Transcript 62).

128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly evidenced by their eleventh-hour Motions requesting brand-new, different, categories and amounts of damages for double and triple what was originally sought, while such alleged damages were based upon information that has been in Plaintiffs' possession for the entire pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never been previously disclosed.

129. Plaintiffs' failure to properly disclose an expert witness is similarly willful. Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure did not comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants' Motion; Exhibits 14 and to Defendants' Motion).

130. Plaintiffs agreed that they failed to comply with NRCP 16.1(a)(2)(B) and agreed to the entry of a Court order requiring them to properly disclose an expert by March 11, 2017. (February 9, 2017, Stipulation and Order).

131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr. Gluhaich at any time in 2017.

132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their "designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even acknowledging their noncompliance, much less providing justification for it.

133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the Motions demonstrates that the purported facts and opinions that he provided could have been timely disclosed in December of 2016, further demonstrating that there was no justification other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events that occurred in 2015 or earlier)).

134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four weeks left in discovery. (February 9, 2017, Stipulation and Order).

135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was also willful.

136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine the purported "original" fair market value of the property. (Willard Motion at 19). According to Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr. Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

upon, *inter alia*, an appraisal from 2014 to establish the purported "fair rental value" of the property in 2014 for purposes of his newly-sought liquidated damages relief, and the purported "post-breach" value of the property in 2014. *Id.* at 19-20. Mr. Gluhaich averred that "The 2014 Appraisal was issued on February 11, 2014," and he "received [this appraisal] directly from Rob Cashell." (Gluhaich Aff. re: Willard ¶15). Mr. Gluhaich's purported opinions were heavily based on these appraisals. *Id.* ¶9 ("In my opinion, the 2008 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Virginia Property as leased."); ¶16 (relying on the appraisal to opine on the purported "as-is" fair market value); ¶17 (relying upon the appraisal to establish the purported fair market rental value). However, these appraisals were never disclosed to Defendants at any time before the present motion. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition). This is despite the fact that Defendants requested Willard to "produce any and all appraisals for the Property from January 1, 2012, through present," (Exhibit 17 to Defendants' Motion), and that Willard had an obligation to disclose this material pursuant to NRCP 16.1(a)(1)(C) and NRCP 26. Given that Willard freely admits that these appraisals were commissioned prior to the commencement of the case, and were in his possession, this is clearly willful omission.

137. With respect to Wooley, Wooley relies upon an appraisal that the Wooley Plaintiffs commissioned in August 2006. (Wooley Motion at 2). This appraisal is the basis for Gluhaich's opinion as to the "original" fair market value in Wooley's diminution in value claim. (Gluhaich Aff. Re: Wooley ("In my opinion, the 2006 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Highway 50 Property as leased.")). Defendants even asked about the appraisal during Wooley's deposition. (Exhibit 18 to Defendants' Motion at 125 (wherein Wooley stated that he had not given this appraisal to his lawyer)). Yet, this appraisal was never disclosed to Defendants until Wooley filed his Motion, which is a willful omission and is in complete derogation of Wooley's NRCP 16.1 and NRCP 26 obligations.

138. Plaintiffs' strategic decision to wait to disclose both the appraisals and the opinions of Mr. Gluhaich until they filed their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to conduct discovery regarding the appraisals, to conduct an expert deposition of Mr. Gluhaich or to prepare and disclose expert witnesses to rebut the opinions of Mr. Gluhaich.

139. Finally, as noted, this is part of a larger pattern and practice by Plaintiffs to disregard their discovery obligations at every point in this litigation. (Motions to Compel).

140. Indeed, Plaintiffs completely failed to even respond to Defendants' Motion for Sanctions, even when this Court gave them an additional extension and expressly warned them, in open court, that "you need to know going into these oppositions, that I'm very seriously considering granting all of it," and "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." (December 12, 2017, transcript).

Defendants have been prejudiced by Plaintiffs' conduct and would be prejudiced by the imposition of a lesser sanction

141. Plaintiffs' repeated and willful delay in providing necessary information to Defendants has necessarily prejudiced Defendants. *Cf. generally Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) (concluding that "appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their willful and recalcitrant disregard of the judicial process, which presumably prejudiced [the non-offending party"); *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (cited in *Foster* as "upholding the district court's strike order where the defaulting party's 'constant failure to follow [the court's] orders was unexplained and unwarranted'"); *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir.2006) (cited in *Foster* as "holding that, with respect to discovery abuses, '[p]rejudice from unreasonable delay is presumed' and failure to comply with court orders mandating discovery 'is sufficient prejudice'"); *Perez*, 2008 WL 2704402 at *6 ("The behavior exhibited by plaintiffs has prejudiced defendants by delaying the

resolution of the claims and increasing the costs of litigation. The parties have not made any progress with discovery or moved closer to trial readiness. This factor...weighs in favor of dismissing the action.").

142. In fact, this is Plaintiffs' second case against Defendants based on the same set of facts.

143. Plaintiffs attempted to prosecute this case against Defendants in California, which was dismissed for a lack of personal jurisdiction.

144. Defendants are entitled to resolution, not to Plaintiffs languidly holding Defendants in litigation while simultaneously failing to meet their obligations under the NRCP to provide threshold information necessary to defend this case and to comply with the other obligations imposed by the NRCP.

145. Further, Plaintiffs' collective new requests and bases are not harmless additions: they would require Defendants to engage in additional fact discovery, retain direct and rebuttal experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended three times to account for Plaintiffs' continued noncompliance.

Dismissal is not too severe for these discovery abuses, and lesser sanctions are not feasible or fair

146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law.

147. The Plaintiffs have been sanctioned for other discovery violations, (Order Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions have had no effect on Plaintiffs' recalcitrant conduct.

148. For example, in the context of granting Defendants' Motion to Compel Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

149. Not only have Plaintiffs not ever paid these expenses, but it is incontrovertible that this Court's imposition of monetary sanctions on Plaintiffs in 2015 had absolutely no deterrent effect on Plaintiffs' conduct, as Plaintiffs continued to commit discovery violations and continued to violate and ignore this Court's orders well after the issuance of the July 1, 2015, Order, completely undeterred by the imposition of monetary sanctions.

150. Further, Plaintiffs' conduct has already caused three continuances of the trial date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure. (Stipulations and Orders).

151. Given that this Court has already issued lesser sanctions, ordered continuances, and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs' conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs' misconduct.

152. The fact that this Court granted Plaintiffs an additional extension to oppose Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so without any excuse whatsoever further demonstrates that this Court's orders, and any lesser sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the court's warnings in the past, issuing additional warnings would be futile.

153. Nor would a less severe sanction be fair to Defendants, who have been continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued efforts to work with Plaintiffs and provide extensions to Plaintiffs.

154. Additionally, it must be noted that the Nevada Supreme Court has noted that "a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

counsel's unexcused conduct, as to do so would offend general agency principles"); *see also, e.g.*, *Link v. Wabash R. Co.*, 370 U.S. 626, 634 n.10 (1962) ("Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant.").

The policy favoring adjudication on the merits does not militate against dismissal

155. Although there is a policy favoring adjudication on the merits, Plaintiffs themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail.

156. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. (Exhibits 24-35 of Defendants' Motion).

157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses.

158. As the Nevada Supreme Court has held, the policy favoring adjudication on the merits "is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and

administration concerns, such as the court's need to manage its large and growing docket." *Huckabay Props v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 432 (2014) (also holding, in the context of a dismissal of an appeal, that "a party cannot rely on the preference for deciding cases on the merits to the exclusion of all other policy considerations, and when an appellant fails to adhere to Nevada's appellate procedure.

159. Again, this is Plaintiffs' second time prosecuting this case against Defendants without undertaking the necessary conduct and requirements imposed by court rules to reach the merits.

Dismissal is required to deter similar abusive conduct

160. The need to deter similar abusive conduct also weighs heavily in favor of dismissal.

161. The discovery rules are in place for a reason, and are mandatory.

162. Compliance with this Court's Orders is also mandatory.

163. Yet, Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure.

164. Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so.

165. If Plaintiffs are permitted to continue prosecuting this case without severe consequences, then this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court orders. *Cf. generally Foster*, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."); *see also Langermann v. Prop. & Cas. Ins. Co.*, 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to

comply with a scheduling order is not harmless, and re-opening discovery after the expiration of the deadlines only encourages cavalier treatment of deadlines").

166. Plaintiffs' disregard for this Court's orders and docket, Nevada law, and Defendants' rights to prepare a defense necessitates dismissal.

Dismissal would not violate Plaintiffs' due process rights

167. There is also no issue of due process deprivation upon dismissal.

168. Plaintiffs' response to Defendants' Motions, including Defendants' Motion for Sanctions, was originally due on December 4, 2017.

169. There is no dispute that Plaintiffs were served with the Motions. (December 12, 2017, transcript).

170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs were given until December 18, 2017, to file Oppositions. *Id.*

171. Defendants were expressly warned that this Court was seriously considering dismissal, and that Plaintiffs' oppositions needed to be "compelling." *Id.*

172. However, Plaintiffs did not file any Opposition by that time or any time thereafter; nor did Plaintiffs request another extension.

173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions, are not being deprived of any due process. *See* DCR 13(3); *Huckabay*, 130 Nev. at ___, 322 P.3d at 436. No evidentiary hearing was needed. *See Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant factors in an evidentiary hearing.").

174. Indeed, this Court held a hearing on December 12, 2017, which was attended by both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that hearing, or otherwise provided any new information, there would be nothing new to discuss at another hearing. *See* DCR 13(3).

ORDER

Defendants' Motion for Sanctions is GRANTED.

Plaintiffs' claims against Defendants are DISMISSED WITH PREJUDICE.

DATED this 6th day of March, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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Berry Hinckley Industries, and
Jerry Herbst

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 16th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

BRIAN IRVINE, ESQ.

DAVID O'MARA, ESQ.

BRIAN MOQUIN, ESQ.

JOHN DESMOND, ESQ.

ANJALI WEBSTER, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

_____

F I L E D
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CV14-01712
2018-03-06 05:45:12 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6564488

2540
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.

/

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

CASE NO. CV14-01712

DEPT. 6

NOTICE OF ENTRY OF FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

PLEASE TAKE NOTICE that on March 6, 2018, this Court entered its Findings of Facts, Conclusions of Law and Order on Defendant's Motion for Sanctions ("Findings and Conclusions"). A true and correct copy of the Findings and Conclusions is attached hereto as **Exhibit 1**.

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 6th day of March, 2018.

DICKINSON WRIGHT

/s/ Brian R. Irvine

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Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER** on the parties through the Second Judicial District Court's EFlex filing system to the following:

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LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

David C. O'Mara
THE O'MARA LAW FIRM
311 E. Liberty Street
Reno, Nevada 89501

DATED this 6th day of March, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT

EXHIBIT LIST

Exhibit	Description	Pages[1]
1	Findings of Fact, Conclusions of Law and Order on Defendant's Motion for Sanctions	34

[1] Exhibit page count is exclusive of exhibit slip sheet.

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Clerk of the Court
Transaction # 6564488

EXHIBIT 1

EXHIBIT 1

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Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.

CASE NO. CV14-01712
DEPT. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

~~[PROPOSED]~~ FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON DEFENDANTS' MOTION FOR SANCTIONS

1. Plaintiffs in this matter are Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund; Overland Development Corporation, a California corporation (collectively, "Willard" or the "Willard Plaintiffs"); Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). The Willard Plaintiffs are also counter-defendants in this matter.

2. Plaintiffs' counsel are Brian Moquin, a California attorney who has been admitted to practice in Nevada *pro hac vice*, and David O'Mara of the O'Mara Law Firm, P.C., who is serving as local counsel.

3. Defendants/counter-claimants in this matter are Berry-Hinckley Industries ("BHI") and Jerry Herbst (collectively, "Defendants").

4. The Motion before this Court is Defendants' Motion for Sanctions, wherein Defendants sought, in pertinent part, dismissal with prejudice of this action pursuant to NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170. (Defendants' Motion).

5. Defendants' Motion was filed on November 15, 2017. Plaintiffs did not file an Opposition, despite Defendants and this Court granting several extensions. Defendants' Motion was submitted to this Court on December 18, 2017.

6. This Court, having considered the briefing, and being otherwise fully advised, and GOOD CAUSE APPEARING, hereby finds the following facts and makes the following conclusions of law:

FINDINGS OF FACT

Plaintiffs' Complaint

7. On August 8, 2014, Plaintiffs commenced this action against Defendants, filing a joint complaint against them. (Complaint).[1]

8. Willard sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. (First Amended Complaint ("FAC")).

9. Willard had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

10. Wooley sought the following damages against Defendants for an alleged breach of the lease between Wooley and BHI: (1) "rental income in the amount of $4,420,244.00 that [Wooley] otherwise would have received," discounted by a rate of 4% as specified in the Wooley Lease to $3,323,543.90 as of March 1, 2013; (2) a "diminution in value in an amount to be proven at trial but which is at least $2,000,000"; (3) property taxes in the amount of $1,500; (4) insurance for $3,840; (5) maintenance costs of $4,000; (6) management costs of $2,500; and (7) security deposit from subtenant for $2,485.00. (FAC).

11. Wooley had also sought several other categories of damages which have since been dismissed or withdrawn. (May 30, 2017, Order).

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[1]All of the referenced documents have been filed with this Court in this case, either as pleadings/ briefings/ motions or as exhibits to the same. References to "Defendants' Motion" are to Defendants' Motion for Sanctions. References to "Willard Motion" or "Wooley Motion" are to the Plaintiffs' respective Motions for Summary Judgment.

Plaintiffs' Initial Disclosures

12. On December 12, 2014, Plaintiffs provided their initial disclosures. (Exhibit 1 to Defendants' Motion for Sanctions).

13. However, while Plaintiffs disclosed anticipated witnesses and documents, they did not provide any computation of their claimed damages, notwithstanding the express requirement to do so set forth in NRCP 16.1(a)(1)(C).

Defendants' February 12, 2015, Letter

14. On February 12, 2015, Defendants wrote to Plaintiffs regarding the deficiencies in their initial disclosures, and informing them that the disclosures did not include the damages computations required by the Nevada Rules of Civil Procedure. (Exhibit 4 to Defendants' Motion for Sanctions).

15. Defendants advised Plaintiffs that their failure to timely comply would result in Defendants seeking sanctions. *Id.*

16. However, Plaintiffs did not comply with their NRCP 16.1 obligations upon receipt of this letter or any time thereafter.

Plaintiffs' Interrogatory Responses

17. In April of 2015, Defendants served Plaintiffs with written discovery. (June 23, 2015, Motion to Compel).

18. Defendants had not received any NRCP 16.1 damages disclosures from Plaintiffs, and asked Plaintiffs in separate interrogatories to "[p]lease explain in detail how the damages...alleged in your Amended Complaint were calculated." (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

19. Plaintiffs did not respond, even after Defendants granted them multiple extensions, requiring Defendants to file a motion to compel. (June 23, 2015, Motion to Compel).

20. This Court granted the Motion to Compel, which Plaintiffs failed to oppose. Therein, this Court ordered, in pertinent part, that Plaintiffs shall pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

21. Only then did Plaintiffs respond, and, in pertinent part, simply repeated the allegations in their Complaint when discussing their damages. (Plaintiffs' Interrogatory Responses, Exhibits 5 and 6 to Defendants' Motion for Sanctions).

22. Notably, these Court-ordered responses were the last time Plaintiffs provided anything that even came close to a damages disclosure until October of 2017, and even these did not comply with the requirements of NRCP 16.1.

23. Plaintiffs did not pay Defendants' reasonable expenses, despite the direct order from this Court to do so.

24. Further, the fact that the Court imposed monetary sanctions on Plaintiffs in 2015 clearly did not deter any of their subsequent conduct in continuing to fail to comply with their discovery obligations and Court orders.

The September 3, 2015, Stipulation and Order to Continue Trial Date

25. On August 28, 2015, Defendants wrote to Plaintiffs, referencing Plaintiffs' continued failure to comply with discovery obligations and resulting prejudice to Defendants, and noting that Plaintiffs had also yet to comply with the promise they made during a status conference before this Court to provide Defendants with discovery responses to Defendants' outstanding discovery requests in advance of the parties' depositions scheduled to begin on August 20, 2015. (Exhibit 7 to Defendants' Motion for Sanctions).

26. Plaintiffs' failure to comply with discovery obligations necessitated a continuance of the trial date and an extension of all discovery deadlines. (September 3, 2015, Stipulation and Order).

The Parties' May 2, 2016, Stipulation and Order to Continue the Trial Date

27. In March of 2016, Defendants wrote Plaintiffs twice, seeking documentation that Plaintiffs failed to provide, and asking that Plaintiffs comply with their NRCP 26(e) obligations

to supplement their responses as necessary. (Exhibits 8 and 9 to Defendants' Motion for Sanctions).

28. On April 20, 2016, Defendants continued to request the information that they sought in their March 2016 letters, noting that Plaintiffs had promised to provide the documents but they had not done so. (Exhibit 10 to Defendants' Motion).

29. Defendants again requested Plaintiffs' NRCP 16.1 damages calculations, noting that "this is an issue which we have raised on multiple occasions." *Id.*

30. Yet again, Plaintiffs did not provide their NRCP 16.1 calculations.

31. Defendants also stated that "[y]our clients' failure to provide us with the discovery documents ha[s] prejudiced our ability to prepare a defense on behalf of our clients. Without such documents, we cannot depose several witnesses, and our experts are unable to complete their opinions. This also jeopardizes our ability to submit dispositive motions with complete information in time for the Court to fully consider those motions." *Id.*

32. Due to Plaintiffs continued failure to meet discovery obligations, the parties agreed to continue the trial date for a second time. The agreed-upon basis for a continuance was that Plaintiffs needed to provide Defendants with documents and information, and also needed to provide "Plaintiffs' NRCP 16.1 damages calculations." (May 2, 2016, Stipulation and Order). This Court signed the Order, adding that "no further continuances will be granted." *Id.*

33. Following the second continuance, trial was scheduled for May 2, 2017, and discovery was set to close on March 2, 2017.

Plaintiffs' Unsuccessful Purported Disclosure of Daniel Gluhaich as a Non-Retained Expert Witness

34. On December 2, 2016, Plaintiffs purported to disclose Daniel Gluhaich as a non-retained expert. (Exhibit 11 to Defendants' Motion).

35. However, while Plaintiffs' disclosure generally referenced the categories as to which Mr. Gluhaich was expected to testify, Plaintiffs did not provide "a summary of the facts

and opinions to which the witness is expected to testify," as required by NRCP 16.1(a)(2)(B).[2] *Id.*

36. In fact, Plaintiffs immediately admitted that their disclosure of Mr. Gluhaich was inadequate and did not comply with NRCP 16.1, reiterating in an email to Defendants that Defendants had agreed to "allow Plaintiffs to provide an amended expert witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...." (Exhibit 12 to Defendants' Motion).

37. However, Plaintiffs did not provide an amended disclosure on December 8 or any time thereafter.

The Parties' December 2016 Correspondence

38. On December 9, 2016, Defendants' counsel wrote that Defendants did not receive the amended disclosure, or dates pursuant to which Defendants could depose Mr. Gluhaich. (Exhibit 13 to Defendants' Motion). Defendants advised Plaintiffs' counsel that "[o]bviously, we will be prejudiced by further delay in learning all of the expert opinion testimony that plaintiffs intent to present at trial. Please provide that information immediately." *Id.*

39. Defendants also addressed Plaintiffs' continued failure to provide their NRCP 16.1 damages. *Id.* On December 5, 2016, Wooley had provided a spreadsheet of damages expressly "for use in the ongoing informal settlement negotiations between Tim Herbst and Ed Wooley," and asked Defendants' counsel to "forward...to Tim Herbst as [Defendants' counsel saw] fit." (Exhibit 12 to Defendants' Motion). Plaintiffs' counsel also stated that he would "be

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[2]In contrast, Defendants disclosed Michelle Salazar as an expert and served Plaintiffs with Ms. Salazar's report, which included, as required under NRCP 16.1(a)(2)(B) "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years."

tendering supplemental disclosures in the imminent future that will include the actual spreadsheet." *Id.* Defendants responded to this settlement information expressing concern about Wooley's continued failure to provide NRCP 16.1 damages, and once again demanded NRCP 16.1 damages computations from all Plaintiffs, immediately. (Exhibit 13 to Defendants' Motion).

40. On December 23, 2016, Defendants' counsel discussed with Plaintiffs' counsel Plaintiffs' continued failure to properly disclose Mr. Gluhaich or even work with Defendants on expert deposition dates, even though Defendants had provided Plaintiffs an extension. (Exhibit 14 to Defendants' Motion).

41. Defendants also stated that this conduct was prejudicing Defendants and making it impossible for Defendants to comply with discovery deadlines for rebuttal experts. *Id.*

42. Next, Defendants expressed their concerns to Wooley that the damages spreadsheet recently provided for settlement purposes only, which Defendants could not share with their expert or use to prepare any defenses, contained a "new damages model that Plaintiffs had never before utilized in the case," and prejudiced Defendants in that they were unable to conduct discovery about this new computation of damages or the methodology used to arrive at the purported numbers in the Wooley settlement-only spreadsheet. *Id.*

43. Defendants concluded that "[w]e still have never received an NRCP 16.1 damages computation from either set of Plaintiffs, despite numerous demands. Please ensure that Plaintiffs meet their obligations to provide such computations immediately, or we will seek to preclude Plaintiffs from seeking any non-disclosed damages at trial, including those contained in the Wooley spreadsheet you sent me on December 5." *Id.* Defendants also added that they reserved the right to provide Plaintiffs' damages disclosure to their expert so that she could provide new opinions about any new damages model. *Id.*

44. On December 27, 2016, Plaintiffs' counsel responded. (Exhibit 15 to Defendants' Motion). Plaintiffs did not address their failure to provide their damages disclosures in any way, nor did they provide an expert disclosure of Mr. Gluhaich compliant

with NRCP 16.1. *Id.* Rather, Plaintiffs stated that Defendants "are granted an open extension for submitting any expert reports rebutting the opinions of Mr. Gluhaich until [they] have received Plaintiffs' amended disclosure, deposed Mr. Gluhaich, and provided any rebuttal expert(s) with sufficient opportunity to review that material and prepare rebuttal report(s)." *Id.* Plaintiffs also stated that the amended expert witness disclosure would be tendered that day. *Id.*

45. However, Plaintiffs did not provide any amended expert disclosure that day or at any time thereafter.

<u>This Court's January 10, 2017, Hearing</u>

46. On January 10, 2017, this Court held a hearing on Defendants' motion for partial summary judgment on Plaintiffs' overreaching consequential damages, which Messrs. Willard and Wooley personally attended. (January 10, 2017, transcript).

47. At the hearing, in pertinent part, Defendants' counsel informed this Court that Defendants had never received a damages computation from the Plaintiffs pursuant to NRCP 16.1, despite Defendants' many demands. *Id.* at 18. Plaintiffs' counsel attempted to claim that Plaintiffs' interrogatory responses satisfied Plaintiffs' requirements. *Id.* at 42-43. But Plaintiffs' counsel admitted, in open court, that "with respect to Willard, they do not" have an up-to-date, clear picture of Plaintiffs' damages claims. *Id.*

48. Plaintiffs' counsel also represented to this Court that Wooley's damages disclosures to Defendants were complete and up-to-date. *Id.* This was a misrepresentation, as Wooley had never provided Defendants with any NRCP 16.1 damages disclosures, and certainly had not provided any updated disclosures since the court-ordered discovery response in July of 2015. Further, the December 2016 damages spreadsheet was for use in settlement negotiations only per Wooley's counsel's own words, and therefore was not a disclosure in this litigation that could be utilized as contemplated by the Nevada Rules of Civil Procedure. (Exhibit 12 to Defendants' Motion). Defendants' counsel apprised this Court of this fact during the hearing. (January 10, 2017, transcript).

49. Upon orally granting Defendants' motion, this Court also ordered that "the Court enters a case management order that directs the plaintiffs to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damages disclosure." *Id.* at 68.

The February 9, 2017, Stipulation and Order

50. In spite of the rapidly impending trial date (at the time, May 2, 2017) and close of discovery (at the time, March 2, 2017), Plaintiffs did not provide Defendants with any damages disclosures or otherwise supplement or update their discovery responses in any way. Nor did Plaintiffs supplement their improper disclosure of Mr. Gluhaich or properly disclose any expert.

51. On February 3, 2017, Defendants wrote Plaintiffs, prefacing their letter by stating that "as of the date of this letter, we have less than thirty (30) days to complete discovery, less than sixty (60) days to fully-brief and submit dispositive motions to the Court for decision and less than three months until the current trial date." (Exhibit 16 to Defendants' Motion). Defendants wrote this letter to inform Plaintiffs that because of their failure to comply with their obligations, Defendants would not be able to timely complete discovery or submit dispositive motions, all to Defendants' prejudice, and to inform Plaintiffs that their conduct necessitated yet another continuance of the trial date. *Id.*

52. In the letter, Defendants first addressed Plaintiffs' obstinate refusal to comply with expert disclosure requirements. *Id.* Defendants reminded Plaintiffs that Plaintiffs "were indisputably aware of the fact that Plaintiffs' disclosures did not comply with the Nevada Rules of Civil Procedure at the time [they] served the deficient disclosure or immediately thereafter, as demonstrated by [the parties'] December 5, 2016, telephonic conversation." *Id.* However, despite Defendants having granted Plaintiffs an extension, Plaintiffs had not even attempted to comply with the Nevada Rules of Civil Procedure more than two months after the deadline, "without any justification whatsoever." *Id.*

53. Defendants further informed Plaintiffs that their "failure to comply with the Nevada Rules of Civil Procedure in the first instance, or to rectify their failure by providing an

amended disclosure, is severely prejudicing Defendants." *Id.* With the close of discovery being one month away, "regardless of what Plaintiffs do at this point, this discovery deadline would need to be extended to enable the Defendants to complete discovery and disclose rebuttal experts in the time permitted by the rule, the parties' joint case conference report, and the stipulation and order on file with the Court." *Id.*

54. Defendants also addressed Plaintiffs' continued failure to provide Defendants with an NRCP 16.1 damages computation. *Id.* Defendants stated that it would be "patently prejudicial to Defendants to receive Plaintiffs' damages model within mere days of the close of discovery," and it would be impossible for Defendants' expert to opine on any new damages theories under the current discovery deadlines if Plaintiffs were to seek any additional or different types of damages. *Id.*

55. Finally, Defendants requested that Plaintiffs also provide other outstanding discovery, stating that Plaintiffs "have been promising to disclose these documents for more than 10 months, but have yet to do so." *Id.*

56. Based on these issues, Defendants asked for a continuance of the trial date so that Plaintiffs could comply with their obligations such that Defendants could receive time to prepare their defenses in the timeline entitled to them by the Nevada Rules of Civil Procedure and the parties' agreements. *Id.*

57. Plaintiffs agreed to a third trial continuance, and on February 9, 2017, the parties signed a stipulation which contained several express recitals and stipulations regarding Plaintiffs' ongoing failure to comply with discovery obligations.

58. First, Plaintiffs agreed that they never properly disclosed Mr. Gluhaich and that this conduct had been prejudicial to Defendants:

> 4. On December 2, 2016, Plaintiffs disclosed Dan Gluhaich as a non-retained expert. Plaintiffs' disclosure of Mr. Gluhaich indicated that Mr. Gluhaich would offer testimony regarding twelve separate subject matters and included Mr. Gluhaich's resume, but did not include "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B).

> 5. Because Plaintiffs' disclosure of Mr. Gluhaich did not include a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants have been unable to conduct a meaningful deposition of Mr. Gluhaich or to retain experts to rebut Mr. Gluhaich's opinions, because those opinions remain unknown to Defendants.
>
> 6. Following receipt of Plaintiffs' supplemental disclosure of Mr. Gluhaich, if any, which includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants intend to depose Mr. Gluhaich and retain experts to rebut his opinions.
>
> 10. ...[B]ecause Plaintiffs have not yet provided an expert disclosure of Mr. Gluhaich that includes a summary of the facts and opinions to which the witness is expected to testify as required by NRCP 16.1(a)(2)(B), Defendants will be unable to complete the deposition of Mr. Gluhaich or to retain and disclose experts to rebut Mr. Gluhaich's opinions within the time currently allowed for discovery.

(February 9, 2017, Stipulation and Order).

59. Second, Plaintiffs stipulated that they had not properly provided their NRCP 16.1 damages disclosures:

> 7. On January 10, 2017, the parties appeared in this Court for a hearing on Defendants' Motion for Partial Summary Judgment. At the hearing, the parties discussed with the Court Plaintiffs' obligation to provide, pursuant to NRCP 16.1(a)(1)(C), "[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered." (January 10, 2017 Hearing Transcript at 18, 42-43 and 61-62). Plaintiffs conceded at the hearing that they have not yet provided Defendants with a complete damages disclosure pursuant to NRCP 16.1(a)(1)(C), and the Court ordered Plaintiffs "to serve, within 15 days after the entry of the summary judgment, an updated 16.1 damage disclosure." *Id.* at 68.
>
> 8. Upon receipt of Plaintiffs' NRCP 16.1 damages disclosure, Defendants intend to have Michelle Salazar supplement her initial expert report to include any opinions about any new or revised damages claims or calculations submitted by Plaintiffs, and Defendants may also need to conduct additional fact discovery on any new or revised damages claims or calculations submitted by Plaintiffs.

> 9. Discovery in this matter currently is scheduled to close on March 2, 2017, and dispositive motions must be filed and submitted for decision no later than March 31, 2017.
>
> 10. Because Plaintiffs have not yet provided a complete NRCP 16.1 damages disclosure, Defendants will not be able to complete necessary fact discovery on Plaintiffs' damages, or to disclose an updated expert report of Michelle Salazar within the time currently allowed for discovery....

Id.

60. Plaintiffs stipulated that this Court should enter an order which, in pertinent part, requires "Plaintiffs to serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26 within thirty (30) days of the date of the Order approving this Stipulation." *Id.*

61. Plaintiffs also stipulated to other pertinent deadlines:

> 3. The deadline for Defendants to serve a supplemental expert disclosure of Michelle Salazar providing any opinions about any new or revised damages claims or calculations submitted by Plaintiffs shall be extended until sixty (60) days before the close of discovery....
>
> 5. The deadline for Defendants to serve any rebuttal expert disclosures shall be extended until forty-five (45) days after Plaintiffs serve Defendants with an updated initial expert disclosure of Dan Gluhaich that is fully-compliant with NRCP 16.1 and NRCP 26.

Id.

62. The Stipulation also included a certification from counsel that "[u]ndersigned counsel certifies that their respective clients have been advised that a stipulation for continuance is to be submitted on their behalf and that the parties have no objection thereto." *Id.*

63. This Court entered an Order consistent with the stipulation on February 9, 2017. *Id.*

64. However, Plaintiffs did nothing as required by the Stipulation since the entry of this Order or the stipulation of the parties to rectify their failure to meet their outstanding discovery obligations.

65. The parties set a trial date of January 29, 2018, meaning that, per the Stipulation and Order, discovery was set to close on November 15, 2017.

This Court's May 30, 2017, Order

66. On May 30, 2017, this Court entered an Order granting Defendants' motion for partial summary judgment. (Order).

67. In pertinent part, this Court stated that "[i]t is further ordered Plaintiffs shall serve, within fifteen (15) days of entry of this order, an updated NRCP 16.1 damage disclosure." *Id.*

68. Again, Plaintiffs completely ignored the requirements and obligations imposed by this order. They have failed to both properly disclose Mr. Gluhaich or to provide damages computations, despite the express requirements of the NRCP and this Court's Orders.

Plaintiffs' Motions for Summary Judgment

69. After three years of obstinate refusal to provide Defendants with an NRCP 16.1 damages calculation or to supplement any damages calculations, and after nearly one year of refusing to comply with the requirements to properly disclose an expert, Plaintiffs filed motions for summary judgment in which they requested brand new, never-disclosed types, categories, and amounts of damages with only four weeks remaining in discovery. (Motions for Summary Judgment).

70. Further, their calculations were based upon opinions of Mr. Gluhaich, an expert witness who was never properly disclosed, and who primarily based his opinions on appraisals that were also never disclosed. *Id.*

71. These Motions were filed with only four weeks remaining in discovery—putting Defendants in the exact same predicament that they were placed in February of 2017—Defendants could not engage in the discovery (fact and expert) necessary to adequately respond to Plaintiffs' brand new information, untimely disclosures, and new requests for relief. (Exhibit 16 to Defendants' Motion; February 9, 2017, Stipulation and Order).

72. Plaintiffs' new damages and new expert opinions were all based upon information that was in Plaintiffs' possession throughout this case, meaning that there was no reason that Plaintiffs could not have timely disclosed a computation of their damages and the documents on which such computations are based.

Willard's Motion

73. In Willard's Motion, Willard sought more than triple the amount of damages (nearly $40 million more) than he sought in the complaint and ostensibly throughout this case.

74. Willard also had a brand new, different basis for his claimed "rent" damages: the liquidated damages provision in the Lease. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Willard to provide expert opinion to support his request and meet his burden of proof. (Willard Lease; Willard Motion).

75. Willard also had a brand new claim for diminution in value damages that would also require Willard to offer expert opinions to meet his burden of proof. (Willard's Motion for Summary Judgment).

76. Default interest was a brand new component of Willard's claimed damages. *Id.*

77. The property-related damages now had a different purported value and amount. *Id.*

78. Willard's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert witness, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they are expressly entitled to do under Nevada law. *Id.*

79. Willard and his purported expert witness relied upon appraisals from 2008 and 2014 which were never disclosed in this litigation, despite Willard's NRCP 16.1 and NRCP 26(e) obligations and affirmative discovery requests served by Defendants. *See also* (Exhibit 17 to Defendants' Motion ("Please produce any and all appraisals for the Property from January 1, 2012 through present.")).

Wooley's Motion

80. Wooley sought nearly double the amount of damages that he sought in his complaint and ostensibly throughout this case. (Wooley Motion).

81. Wooley used different bases for his claimed "rent" damages. Unlike the damages sought in his Complaint, the liquidated damages clause contains a variable—reasonable rental value—that would necessarily require Wooley to introduce an expert opinion to meet his burden of proof, which Defendants would be entitled to rebut under Nevada law. (*Id.*; Exhibit 19 to Defendants' Motion). Wooley's basis for these damages was also different because Mr. Wooley had testified at his deposition that he had not yet terminated the lease and that it was ongoing, yet termination is a prerequisite to utilizing the liquidated damages formula per the parties' lease. (Exhibit 18 to Defendants' Motion; Exhibit 19 to Defendants' Motion). Thus, Wooley was proceeding on an entirely new theory.

82. Default interest was also a brand new component of Wooley's claimed damages. (Wooley Motion).

83. The property-related damages were based in part upon new damages and documents that were not disclosed to Defendants. *Id.*

84. Wooley's damages were based upon the opinions of Mr. Gluhaich, an undisclosed expert, and therefore Defendants did not have the chance to explore Mr. Gluhaich's opinions or rebut them as they were entitled to do. *Id.*; (February 9, 2017, Stipulation and Order).

85. Wooley and his purported expert relied upon an appraisal to establish "value" that was not previously disclosed in this litigation, despite Wooley's NRCP 16.1 and NRCP 26(e) obligations. (Exhibit 18 to Defendants' Motion (wherein Wooley stated that he had an appraisal performed when he bought the property, but had not produced that to his lawyer)).

Timing of the Motions

86. At this point in discovery, Defendants had obviously only been able to prepare defenses to the claimed bases for damages that Plaintiffs asserted in the Complaint and Interrogatory responses, not Plaintiffs' brand new, previously undisclosed, bases for damages.

87. This timing of these Motions undeniably deprived Defendants of the process that the parties expressly agreed was necessary to rebut any properly-disclosed expert opinions or properly-disclosed NRCP 16.1 damages calculations, as ordered by this Court. (February 9, 2017, Stipulation and Order).

88. Indeed, the conduct discussed herein is part of a larger pattern of Plaintiffs to ignore their discovery obligations. Defendants have been forced to file two motions to compel and a motion for contempt and sanctions, simply to have Plaintiffs comply with their discovery obligations.

89. Defendants have been required repeatedly to go to extraordinary lengths to attempt to force Plaintiffs to comply with basic obligations and deadlines imposed by the NRCP. (Exhibits 20-23 to Defendants' Motion).

90. This Court has also issued several Orders requiring Plaintiffs to meet their discovery obligations, but Plaintiffs have blatantly ignored those Orders.

91. Plaintiffs never submitted their Motions for Summary Judgment by the December 15, 2017 deadline to submit dispositive motions, or any time thereafter.

This Court's December 12, 2017, Hearing

92. On November 15, 2017, Defendants filed, *inter alia*, Defendants' Motion for Sanctions.[3]

93. Therein, Defendants requested that this Court dismiss Plaintiffs' case with prejudice as a sanction for Plaintiffs' discovery violations.

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[3]Defendants had also filed a Motion to Strike/Motion in Limine to Preclude Daniel Gluhaich as an expert witness, and a Motion for Partial Summary Judgment on Plaintiffs' diminution in value claims. This Court has ruled on those Motions in other orders.

94. On December 6, 2017, Plaintiffs' filed a Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions.

95. At the Pre-Trial Status Conference on December 12, 2017, this Court granted Plaintiffs' Request for Extension and directed Plaintiffs to respond no later than Monday, December 18, 2017, at 10 AM.[4] This Court further directed Defendants to reply no later than January 8, 2018, and set the parties' Motions for oral argument on January 12, 2018.

96. This Court also admonished Plaintiffs that "you need to know going into these oppositions, that I'm very seriously considering granting all of it." (December 12, 2017, transcript).

97. This Court also admonished Plaintiffs that "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." *Id.*

98. However, Plaintiffs did not file any opposition to Defendants' Motions by December 18 or any time thereafter, nor did Plaintiffs request any further extension. In fact, this Court and Defendants' counsel have not heard anything from Plaintiffs or their counsel since the December 12, 2017, hearing.

99. Defendants filed a notice of non-opposition to their Motions and request for submission of their Motions on December 18.

CONCLUSIONS OF LAW

Legal standard

100. NRCP 16.1(a)(1)(A)(C) provides that "a party must, without awaiting a discovery request, provide to other parties...[a] computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34

[4]This Court inquired as to why Plaintiffs failed to oppose Defendants' Motions. Mr. Moquin informed this Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained that he is a sole practitioner without access to an IT department.

the documents or other evidentiary matter, not privileged or protected from disclosure, on which such a computation is based, including materials bearing on the nature and extent of injuries suffered...." "The use of the word 'must' means that the rule's requirements are mandatory." *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. ___, ___, 309 P.3d 1017, 1020 (2013) (discussing the NRCP 16.1(a)(1)(D) requirements).

101. Further, "the rule requires a computation supported by documents.... A plaintiff is required to provide its assessment of damages in its initial disclosure in light of the information currently available to it in sufficient detail so as to enable each defendant to understand the contours of its potential exposure and make informed decisions as to settlement and discovery." 10 Fed. Proc., L. Ed. § 26:44 (discussing FRCP 26); *see generally Vanguard Piping*, 129 Nev. at ___, 309 P.3d at 1020 ("Because of the similarity in the language, federal cases interpreting [the FRCP corollary to NRCP 16.1(A)(1)(D)] are strong persuasive authority."). Indeed, it is the plaintiff's burden to prove damages, *see generally Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543-44 (1994) ("The party seeking damages has the burden of proving the fact that he was damaged and the amount thereof."), and "the plaintiff cannot shift to the defendant the burden of attempting to determine the amount of the plaintiff's damages." 10 Fed. Proc., L. Ed. § 26:44.

102. Also pertinent, NRCP 16.1(a)(2)(B) requires that, with regard to a non-retained expert witness, a party must disclose, *inter alia*, a summary of the facts and opinions to which the witness is expected to testify. References to broad categories as to what the expert will testify are insufficient. *See Jones v. Colorado Cas. Ins. Co.*, 2015 WL 6123125, at *3 (D. Ariz. 2015).

103. Further, NRCP 26(e) requires that:

> A party who has made a disclosure under Rule 16.1 or 16.2 or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired, if ordered by the court or in the following circumstances:

> (1) A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) or 16.2(a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under Rule 16.1(a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 16.1(a)(3) are due.
>
> (2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production or request for admission, if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

104. Failure to comply with NRCP 16.1's requirements shall result in sanctions. Pursuant to NRCP 16.1(e)(3):

> If an attorney fails to reasonably comply with **any** provision in [NRCP 16.1], or if an attorney or a party fails to comply with an **order** entered pursuant to [NRCP 16.1(d)], the court, upon motion or upon its own initiative, **shall** impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:
>
> (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);
>
> (B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

(Emphases added).

105. In turn, NRCP 37(b)(2) provides that a court may make: "(B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters into evidence", or "(C) striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

106. Further, NRCP 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial...any witness or information not so disclosed." NRCP 37(c)(1) also provides that "[i]n addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C)."

107. Similarly, pursuant to NRCP 41(b), "[f]or failure of the plaintiff to comply with [the Nevada Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."

108. In addition to the rule-based authority discussed herein, the Nevada Supreme Court has also recognized that "the court has inherent power to enter defaults and dismiss actions for abusive litigation practices." *Blanco v. Blanco*, 129 Nev. ___, ___, 311 P.3d 1170, 1174 (2013).

109. The Nevada Supreme Court has also expressly held that "the factual nature of the underlying case is not an appropriate measure to evaluate whether a [case] should be dismissed for violations of court rules and/or orders." *Huckabay Props. v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 433 (2014) (discussing this in the context of dismissing an appeal, and also disapproving of prior case law "to the extent it indicates that a fact-based assessment of the underlying civil action should be made before determining whether to dismiss an appeal on procedural grounds.").

110. Finally, pursuant to DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

Plaintiffs' Conduct Demands Dismissal with Prejudice

111. When considering the issuance of dismissal with prejudice as a sanction, the Nevada Supreme Court has held that "[p]rocedural due process considerations require that such case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order." *Blanco*, 129 Nev. at ___, 311 P.3d at 1174.

112. Further, the Court must consider pertinent factors, including the extent of the offending party's willfulness, whether the non-offending party would be prejudiced by imposition of a lesser sanction, whether dismissal is too severe for the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal should only occur in the most extreme of cases. *Id.*

113. However, district courts are not required to consider every factor, so long as the district court's analysis is thoughtfully performed. *See generally Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).

114. Here, the factors readily demonstrate that dismissal with prejudice is warranted, and that there is no due process violation in so doing.

Plaintiffs did not oppose Defendants' motion or any of the points discussed therein.

115. It must be emphasized as a threshold matter that Plaintiffs never opposed Defendants' Motion.

116. Under DCR 13(3), the failure of an opposing party to serve and file a written opposition may be construed as an admission that the motion is meritorious and consent to granting the same.

117. Thus, this Court finds that Plaintiffs' failure to file an opposition constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting Defendants' Motion.

118. However, separate from this consideration, good cause exists to dismiss this case.

Case-concluding discovery sanctions are just and relate to the claims at issue

119. Plaintiffs' failure to provide damages disclosures are so central to this litigation, and to Defendants' rights and ability to defend this case, that dismissal of the entire case is necessary.

120. Plaintiffs have also completely failed to properly disclose an expert witness, waiting instead until the virtual end of discovery to attempt to utilize an undisclosed expert witness to support their Motions for Summary Judgment without complying with the requirements of the Nevada Rules of Civil Procedure, when it was too late for Defendants to disclose rebuttal expert testimony or otherwise defend against Plaintiffs' claims for damages.

121. Plaintiffs have also ignored or failed to comply with multiple separate discovery obligations throughout this case, forcing Defendants to repeatedly file motions to compel, and necessitating that the trial and discovery deadlines be extended on three occasions to accommodate for Plaintiffs' continued noncompliance.

122. Further, Plaintiffs have ignored this Court's express admonition to Plaintiffs that this Court was "seriously considering" dismissal and that Plaintiff's Oppositions would need to be "compelling." Plaintiffs did not even attempt to file oppositions, even after this warning.

123. Indeed, Plaintiffs have exhibited complete disregard for this Court's Orders, deadlines imposed by this Court, and the judicial process in general.

Plaintiffs' violations are willful

124. Plaintiffs' violations are willful. In addition to the plain language of NRCP 16.1, Plaintiffs have been on direct notice for three years that they have not complied with NRCP 16.1(a)(1)(C), yet have not attempted to rectify their wrongdoing. *Supra.*

125. This Court has ordered Plaintiffs to provide their damages disclosures, but Plaintiffs blatantly disregarded these orders. (January 10, 2017, Transcript at 68; May 30, 2017, Order); *see also Perez v. Siragusa*, 2008 WL 2704402, at *4 (E.D.N.Y. July 3, 2008) (dismissal under FRCP 37 and 41, noting that "[n]on-compliance with discovery orders will be deemed

willful when the court's orders have been clear, when the party has understood them and when the party's noncompliance is not due to factors beyond the party's control.").

126. Plaintiffs acknowledged in two stipulations that they have not complied with NRCP 16.1, yet have not even attempted to do so, despite promising and being ordered to comply. *See, e.g.*, (January 10, 2017, Transcript (for Willard); February 9, 2017, Stipulation and Order; May 2, 2016, Stipulation and Order).

127. Further, Wooley misrepresented to this Court that he had provided complete and up-to-date disclosures to Defendants when he had not. (January 10, 2017, Transcript). If anything, Wooley had only provided a spreadsheet that was, per Wooley's own words, for use in "settlement negotiations." *See* NRS 48.105(1). Defendants have informed Wooley repeatedly, including in open court, that this document provided for settlement negotiations does not equate to a disclosure, and Plaintiffs have never authorized Defendants to use that spreadsheet for litigation purposes in any manner. *See, e.g.*, (January 10, 2017, Transcript 62).

128. Plaintiffs' bad faith motives in waiting to ambush Defendants are also plainly evidenced by their eleventh-hour Motions requesting brand-new, different, categories and amounts of damages for double and triple what was originally sought, while such alleged damages were based upon information that has been in Plaintiffs' possession for the entire pendency of this case. Plaintiffs' strategic decision to only disclose their damages in their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to defend against damages that had never been previously disclosed.

129. Plaintiffs' failure to properly disclose an expert witness is similarly willful. Plaintiffs acknowledged immediately after the initial purported "disclosure" that the disclosure did not comply with Nevada law. *See* (December 5, 2016, email (three days after disclosures due) (wherein Plaintiffs' counsel stated that "[Defendants] agreed to allow Plaintiffs to provide an amended witness disclosure by mid-afternoon Thursday, December 8, 2016 to include the facts and conclusions to which Mr. Gluhaich will be testifying...."), Exhibit 12 to Defendants' Motion; Exhibits 14 and to Defendants' Motion).

130. Plaintiffs agreed that they failed to comply with NRCP 16.1(a)(2)(B) and agreed to the entry of a Court order requiring them to properly disclose an expert by March 11, 2017. (February 9, 2017, Stipulation and Order).

131. Yet, Plaintiffs did not even attempt to provide a proper disclosure of Mr. Gluhaich at any time in 2017.

132. Then, on October 17 and 18, 2017, less than four weeks prior to the close of discovery, Plaintiffs filed Motions for Summary Judgment, referring to Mr. Gluhaich as their "designated expert," (Willard Motion at 19-20; Wooley Motion at 12-13), without even acknowledging their noncompliance, much less providing justification for it.

133. Further, even a cursory review of Mr. Gluhaich's Affidavits in support of the Motions demonstrates that the purported facts and opinions that he provided could have been timely disclosed in December of 2016, further demonstrating that there was no justification other than willful noncompliance. (Gluhaich Affidavit re: Willard (relying exclusively on events that occurred in 2014 or earlier); Gluhaich Affidavit re: Wooley (relying exclusively on events that occurred in 2015 or earlier)).

134. These Motions and Mr. Gluhaich's Affidavits were filed at a point in the case where it was too late for Defendants to properly explore or rebut Mr. Gluhaich's conclusions and the bases therefor, a fact that Plaintiffs acknowledged in February with approximately four weeks left in discovery. (February 9, 2017, Stipulation and Order).

135. In addition, it is clear that Plaintiffs' failure to disclose the appraisals upon which many of their calculations were based was also willful.

136. With respect to Willard, Willard relies upon an appraisal from 2008 to determine the purported "original" fair market value of the property. (Willard Motion at 19). According to Willard, this appraisal was "commissioned in 2008 by the Willard Plaintiffs." *Id.* Indeed, Mr. Gluhaich avers that "in September 2008 Willard commissioned an appraisal of the Virginia Property...from CB Richard Ellis..., a copy of which was sent directly to me by Jason Buckholz of CBRE on October 17, 2008." (Gluhaich Aff. re: Willard ¶5). Willard also relies

upon, *inter alia*, an appraisal from 2014 to establish the purported "fair rental value" of the property in 2014 for purposes of his newly-sought liquidated damages relief, and the purported "post-breach" value of the property in 2014. *Id.* at 19-20. Mr. Gluhaich averred that "The 2014 Appraisal was issued on February 11, 2014," and he "received [this appraisal] directly from Rob Cashell." (Gluhaich Aff. re: Willard ¶15). Mr. Gluhaich's purported opinions were heavily based on these appraisals. *Id.* ¶9 ("In my opinion, the 2008 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Virginia Property as leased."); ¶16 (relying on the appraisal to opine on the purported "as-is" fair market value); ¶17 (relying upon the appraisal to establish the purported fair market rental value). However, these appraisals were never disclosed to Defendants at any time before the present motion. (Decl. of B. Irvine, Exhibit 1 to Willard Opposition). This is despite the fact that Defendants requested Willard to "produce any and all appraisals for the Property from January 1, 2012, through present," (Exhibit 17 to Defendants' Motion), and that Willard had an obligation to disclose this material pursuant to NRCP 16.1(a)(1)(C) and NRCP 26. Given that Willard freely admits that these appraisals were commissioned prior to the commencement of the case, and were in his possession, this is clearly willful omission.

137. With respect to Wooley, Wooley relies upon an appraisal that the Wooley Plaintiffs commissioned in August 2006. (Wooley Motion at 2). This appraisal is the basis for Gluhaich's opinion as to the "original" fair market value in Wooley's diminution in value claim. (Gluhaich Aff. Re: Wooley ("In my opinion, the 2006 Appraisal presents a thorough, detailed, professional, and highly compelling analysis of the market value of the Highway 50 Property as leased.")). Defendants even asked about the appraisal during Wooley's deposition. (Exhibit 18 to Defendants' Motion at 125 (wherein Wooley stated that he had not given this appraisal to his lawyer)). Yet, this appraisal was never disclosed to Defendants until Wooley filed his Motion, which is a willful omission and is in complete derogation of Wooley's NRCP 16.1 and NRCP 26 obligations.

138. Plaintiffs' strategic decision to wait to disclose both the appraisals and the opinions of Mr. Gluhaich until they filed their Motions for Summary Judgment prejudiced Defendants by depriving them of the opportunity to conduct discovery regarding the appraisals, to conduct an expert deposition of Mr. Gluhaich or to prepare and disclose expert witnesses to rebut the opinions of Mr. Gluhaich.

139. Finally, as noted, this is part of a larger pattern and practice by Plaintiffs to disregard their discovery obligations at every point in this litigation. (Motions to Compel).

140. Indeed, Plaintiffs completely failed to even respond to Defendants' Motion for Sanctions, even when this Court gave them an additional extension and expressly warned them, in open court, that "you need to know going into these oppositions, that I'm very seriously considering granting all of it," and "you know going into this motion for sanctions that you're—I haven't decided it, but I need to see compelling opposition not to grant it." (December 12, 2017, transcript).

Defendants have been prejudiced by Plaintiffs' conduct and would be prejudiced by the imposition of a lesser sanction

141. Plaintiffs' repeated and willful delay in providing necessary information to Defendants has necessarily prejudiced Defendants. *Cf. generally Foster v. Dingwall*, 126 Nev. 56, 66, 227 P.3d 1042, 1049 (2010) (concluding that "appellants' continued discovery abuses and failure to comply with the district court's first sanction order evidences their willful and recalcitrant disregard of the judicial process, which presumably prejudiced [the non-offending party"); *Hamlett v. Reynolds*, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (cited in *Foster* as "upholding the district court's strike order where the defaulting party's 'constant failure to follow [the court's] orders was unexplained and unwarranted'"); *In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir.2006) (cited in *Foster* as "holding that, with respect to discovery abuses, '[p]rejudice from unreasonable delay is presumed' and failure to comply with court orders mandating discovery 'is sufficient prejudice'"); *Perez*, 2008 WL 2704402 at *6 ("The behavior exhibited by plaintiffs has prejudiced defendants by delaying the

resolution of the claims and increasing the costs of litigation. The parties have not made any progress with discovery or moved closer to trial readiness. This factor...weighs in favor of dismissing the action.").

142. In fact, this is Plaintiffs' second case against Defendants based on the same set of facts.

143. Plaintiffs attempted to prosecute this case against Defendants in California, which was dismissed for a lack of personal jurisdiction.

144. Defendants are entitled to resolution, not to Plaintiffs languidly holding Defendants in litigation while simultaneously failing to meet their obligations under the NRCP to provide threshold information necessary to defend this case and to comply with the other obligations imposed by the NRCP.

145. Further, Plaintiffs' collective new requests and bases are not harmless additions: they would require Defendants to engage in additional fact discovery, retain direct and rebuttal experts, take depositions, re-open the briefing schedule, and again delay the trial for tasks that could, and should, have been accomplished during a discovery period that was already extended three times to account for Plaintiffs' continued noncompliance.

Dismissal is not too severe for these discovery abuses, and lesser sanctions are not feasible or fair

146. Plaintiffs' damages disclosures are central to this case, and dismissal is not too severe for Plaintiffs' repeated and willful noncompliance with Court orders and with Nevada law.

147. The Plaintiffs have been sanctioned for other discovery violations, (Order Granting Motion to Compel), yet remain undeterred, demonstrating that less severe sanctions have had no effect on Plaintiffs' recalcitrant conduct.

148. For example, in the context of granting Defendants' Motion to Compel Discovery Responses, this Court ordered Plaintiffs to pay Defendants' reasonable expenses incurred in making the motion, including attorneys' fees. (July 1, 2015, Order).

149. Not only have Plaintiffs not ever paid these expenses, but it is incontrovertible that this Court's imposition of monetary sanctions on Plaintiffs in 2015 had absolutely no deterrent effect on Plaintiffs' conduct, as Plaintiffs continued to commit discovery violations and continued to violate and ignore this Court's orders well after the issuance of the July 1, 2015, Order, completely undeterred by the imposition of monetary sanctions.

150. Further, Plaintiffs' conduct has already caused three continuances of the trial date, all to accommodate for Plaintiffs' continued disregard for Nevada discovery procedure. (Stipulations and Orders).

151. Given that this Court has already issued lesser sanctions, ordered continuances, and given Plaintiffs repeated admonitions about complying with deadlines and their NRCP obligations, all to no avail, it is clear that lesser sanctions have had no effect on Plaintiffs' conduct, and the issuance of lesser sanctions would only serve to encourage Plaintiffs' misconduct.

152. The fact that this Court granted Plaintiffs an additional extension to oppose Defendants' Motions, including their Motion for Sanctions, and Plaintiffs failed to do so without any excuse whatsoever further demonstrates that this Court's orders, and any lesser sanctions, have no effect on Plaintiffs' conduct. Given Plaintiffs' repeated failure to heed the court's warnings in the past, issuing additional warnings would be futile.

153. Nor would a less severe sanction be fair to Defendants, who have been continually prejudiced by Plaintiffs' willful disregard of their obligations despite their continued efforts to work with Plaintiffs and provide extensions to Plaintiffs.

154. Additionally, it must be noted that the Nevada Supreme Court has noted that "a party cannot seek to avoid a dismissal based on arguments that his or her attorney's acts or omissions led to the dismissal." *Huckabay Props v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 432 (2014) (also discussing that "[t]he United States Supreme Court has recognized that when an action is dismissed for failure to comply with court rules, the litigant cannot seek a do-over of their dismissed action based on arguments that dismissal is too harsh a penalty for

counsel's unexcused conduct, as to do so would offend general agency principles"); *see also, e.g.*, *Link v. Wabash R. Co.*, 370 U.S. 626, 634 n.10 (1962) ("Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant.").

The policy favoring adjudication on the merits does not militate against dismissal

155. Although there is a policy favoring adjudication on the merits, Plaintiffs themselves have frustrated this policy by refusing to provide Defendants with their damages calculations or proper expert disclosures. Defendants have not frustrated this policy; instead, the record is clear that Defendants, and this Court, have repeatedly attempted to force Plaintiffs to comply with basic discovery obligations, to no avail.

156. Indeed, Defendants have served multiple rounds of written discovery upon Plaintiffs, in an attempt to obtain basic information on Plaintiffs' damages; have taken multiple depositions, and have been requesting compliant disclosures throughout this case so that they can address the merits. (Exhibits 24-35 of Defendants' Motion).

157. Plaintiffs should not be permitted to hide behind the policy of adjudicating cases on the merits when it is they who have frustrated this policy throughout the litigation. Defendants cannot reach the merits when they must spend the entire case asking Plaintiffs for threshold information and receiving no meaningful responses.

158. As the Nevada Supreme Court has held, the policy favoring adjudication on the merits "is not boundless and must be weighed against other policy considerations, including the public's interest in expeditious...resolution, which coincides with the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing party; and

administration concerns, such as the court's need to manage its large and growing docket." *Huckabay Props v. NC Auto Parts*, 130 Nev. ___, ___, 322 P.3d 429, 432 (2014) (also holding, in the context of a dismissal of an appeal, that "a party cannot rely on the preference for deciding cases on the merits to the exclusion of all other policy considerations, and when an appellant fails to adhere to Nevada's appellate procedure.

159. Again, this is Plaintiffs' second time prosecuting this case against Defendants without undertaking the necessary conduct and requirements imposed by court rules to reach the merits.

Dismissal is required to deter similar abusive conduct

160. The need to deter similar abusive conduct also weighs heavily in favor of dismissal.

161. The discovery rules are in place for a reason, and are mandatory.

162. Compliance with this Court's Orders is also mandatory.

163. Yet, Plaintiffs have completely ignored multiple Orders from this Court, deadlines imposed by this Court, and their obligations pursuant to the Nevada Rules of Civil Procedure.

164. Plaintiffs have received multiple opportunities and extensions to rectify their noncompliance, but have not even attempted to do so.

165. If Plaintiffs are permitted to continue prosecuting this case without severe consequences, then this type of abusive litigation practice will continue to the prejudice of defending parties and will make a mockery of the Nevada Rules of Civil Procedure and court orders. *Cf. generally Foster*, 126 Nev. at 66, 227 P.3d at 1049 (noting that "[i]n light of appellants' repeated and continued abuses, the policy of adjudicating cases on the merits would not have been furthered in this case, and the ultimate sanctions were necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders."); *see also Langermann v. Prop. & Cas. Ins. Co.*, 2015 WL 4714512 at *5 (D. Nev. 2015) (failing "to

comply with a scheduling order is not harmless, and re-opening discovery after the expiration of the deadlines only encourages cavalier treatment of deadlines").

166. Plaintiffs' disregard for this Court's orders and docket, Nevada law, and Defendants' rights to prepare a defense necessitates dismissal.

Dismissal would not violate Plaintiffs' due process rights

167. There is also no issue of due process deprivation upon dismissal.

168. Plaintiffs' response to Defendants' Motions, including Defendants' Motion for Sanctions, was originally due on December 4, 2017.

169. There is no dispute that Plaintiffs were served with the Motions. (December 12, 2017, transcript).

170. Through extensions granted by Defendants, and ultimately this Court, Plaintiffs were given until December 18, 2017, to file Oppositions. *Id.*

171. Defendants were expressly warned that this Court was seriously considering dismissal, and that Plaintiffs' oppositions needed to be "compelling." *Id.*

172. However, Plaintiffs did not file any Opposition by that time or any time thereafter; nor did Plaintiffs request another extension.

173. Thus, Plaintiffs, in voluntarily choosing to not respond to Defendants' Motions, are not being deprived of any due process. *See* DCR 13(3); *Huckabay*, 130 Nev. at ___, 322 P.3d at 436. No evidentiary hearing was needed. *See Nevada Power Co. v. Fluor Illinois*, 108 Nev. 638 (1992) ("If a party against whom dismissal may be imposed raises a question of fact as to any of [the] factors [for dismissal], the court must allow the parties to address the relevant factors in an evidentiary hearing.").

174. Indeed, this Court held a hearing on December 12, 2017, which was attended by both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that hearing, or otherwise provided any new information, there would be nothing new to discuss at another hearing. *See* DCR 13(3).

ORDER

Defendants' Motion for Sanctions is GRANTED.

Plaintiffs' claims against Defendants are DISMISSED WITH PREJUDICE.

DATED this 6th day of March, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 16th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

BRIAN IRVINE, ESQ.

DAVID O'MARA, ESQ.

BRIAN MOQUIN, ESQ.

JOHN DESMOND, ESQ.

ANJALI WEBSTER, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:

_____

FILED
Electronically
CV14-01712
2018-11-30 04:08:13 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7001598

Code:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.

_____/

CASE NO. CV14-01712

DEPT. 6

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants[1].

_____/

[1] On April 13, 2018, this Court entered its *Order of Dismissal of Claims of Wooley Plaintiffs with Prejudice*. On the same date, this Court entered its *Order Granting Defendants/ Counterclaimants' Motion to Dismiss Counterclaims*. All counterclaims were dismissed by said Order.

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("*Rule 60(b) Motion*") filed by PLAINTIFFS LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE LARRY JAMES WILLARD TRUST FUND AND OVERLAND DEVELOPMENT CORPORATION, A CALIFORNIA CORPORATION (collectively, "Willard" or the "Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson.[2] By their *Rule 60(b) Motion*, Plaintiffs seek, pursuant to NRCP 60(b), to set aside: (a) this Court's January 4, 2018, *Order Granting Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*; (b) this Court's January 4, 2018, *Order Granting Defendants' Motion for Sanctions*; and (c) this Court's March 6, 2018, *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions*.

Thereafter, DEFENDANTS BERRY-HINCKLEY INDUSTRIES ("BHI") AND JERRY HERBST (collectively, "Defendants"), filed their *Opposition to Rule 60(b) Motion for Relief,* by and through their counsel, Dickinson Wright, PLLC.

Plaintiffs then filed their *Reply in Support of the Willard Plaintiffs Rule 60(b) Motion for Relief* and the parties set the matter for hearing.

This Court carefully considered the papers submitted, the arguments of counsel, the entire court file herein, and is fully advised in the premises, and enters its order as follows.

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[2] Plaintiffs' former local counsel was David O'Mara of the O'Mara Law Firm, P.C. Mr. O'Mara filed a *Notice of Withdrawal of Local Counsel* ("*Notice*"), *on March 15, 2018.* Brian Moquin remains counsel of record as he has not withdrawn; however, he is not indicated as counsel filing the *Rule 60(b) Motion.*

FINDINGS OF FACT

The Court makes the following Findings of Fact:

Plaintiffs' Complaint

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[3] *Complaint*, generally.

2. By way of their *Complaint* and subsequent *First Amended Complaint,* Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *First Amended Complaint* ("*FAC*"), generally.

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order.*

Plaintiffs' Failure to Comply with the Nevada Rules of Civil Procedure and this Court's Orders

4. Plaintiffs failed to provide a compliant damages disclosure in this action.

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12, and failed to provide damages computations at any time despite numerous demands on both Mr. Moquin and Mr. O'Mara. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54.

---

[3] Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.

6. Plaintiffs failed to provide complete and adequate responses to interrogatories requesting information about Plaintiffs' damages in the normal course of discovery.

7. Plaintiffs failed to provide complete and adequate responses to interrogatories in violation of this Court's *Order Granting Defendants' Motion to Compel* and failed to comply with this Court's *Order* ("*January Hearing Order*") issued after the parties discussed Plaintiffs' failure to provide damages computations at the January 10, 2017 hearing attended by Mr. Moquin, Mr. O'Mara and Mr. Willard. *Sanctions Order* ¶¶ 17-25.

8. The *January Hearing Order* required Plaintiffs to provide damages computations and supporting materials. *Sanctions Order* ¶¶ 46-49, 54, 59-64 and 67-68; *Defendants' Opposition Plaintiffs' Rule 60(b) Motion*, Ex. 2, *Transcript* of January 10, 2017 Hearing at pp. 61-63 and 68; *January Hearing Order.*

9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness as required by NRCP 16.1(a)(2). *Sanctions Order* ¶¶ 34-37.

10. In contravention of this Court's *January Hearing Order*, Plaintiffs failed to provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made multiple requests. *Sanctions Order* ¶¶ 38-45, ¶¶ 50-64.

<u>Plaintiffs' Summary Judgment Motion</u>

11. Pursuant to the February 9, 2017, *Stipulation and Order to Continue Trial,* discovery closed in mid-November, 2017.

12. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed their *Motion for Summary Judgment* asserting they were entitled, as a

matter of law, to more than triple the amount of damages alleged in and requested by their *First Amended Complaint*. *Sanctions Order* ¶¶ 69 and 73.

13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not previously disclosed. The motion was also supported by previously undisclosed expert opinions and documents. *Sanctions Order* ¶¶ 74-79.

14. On November 13, 2017, Defendants filed their Opposition to Plaintiffs' *Motion for Summary Judgment*.

15. Plaintiffs' did not submit the *Motion for Summary Judgment* for decision.

Defendants' *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* and *Motion for Sanctions*

16. On November 14, 2017, Defendants filed their *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("*Motion to Strike*").

17. In the *Motion to Strike*, Defendants maintained this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (a) Plaintiffs failed to adequately disclose Mr. Gluhaich as an expert because they failed to provide "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B); (b) the opinions offered by Mr. Gluhaich in support of Plaintiffs' *Motion for Summary Judgment* were based upon inadmissible hearsay and were based solely on the opinions of others; and (c) Mr. Gluhaich was not qualified to offer the opinions included in his Declaration attached to and filed in support of Plaintiffs' *Motion for Summary Judgment*.

18. On November 15, 2017, Defendants filed their *Motion for Sanctions* ("*Sanctions Motion*").

19. In the *Sanctions Motion*, Defendants argued this Court should sanction Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims with prejudice, or, in the alternative, preclude Plaintiffs from seeking new damages or relying upon their undisclosed expert and appraisals.

20. Defendants agreed to give Plaintiffs' several extensions of time to oppose the *Motion to Strike* and *Sanctions Motion*, but no oppositions were filed.

21. On December 6, 2017, Plaintiffs requested relief from the Court by extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* ¶ 94; *Plaintiffs' Request for a Brief Extension of Time ("Brief Extension Request"),* generally.

22. This Court held a status conference on December 12, 2017, attended by Defendants' counsel and Plaintiffs' counsel, Mr. Moquin and Mr. O'Mara. At the status conference, after observing Mr. Moquin, having significant dialog with Mr. Moquin, and over vehement objection by the Defendants' counsel, this Court granted *Plaintiffs' Brief Extension Request* plus granted more time than that requested. The Court directed Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 2017, at 10:00 am. *Sanctions Order* ¶ 95.

23. Tis Court further directed Defendants to file their reply briefs no later than January 8, 2018. The Court set the parties' outstanding Motions for oral argument on January 12, 2018. *Sanctions Order* ¶ 96.

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24. This Court admonished Plaintiffs, stating "you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it." *Opposition to Rule 60(b) Motion*, Ex. 3, December 12, 2017, *Transcript of Status Conference*, in part.

25. Plaintiffs did not file an opposition or response to the *Motion to Strike* or *Motion for Sanctions* by December 18, 2017 or any time thereafter, nor did Plaintiffs request any further extension.

26. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* on January 4, 2018 ("*Order Granting Motion to Strike*").

27. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion for Sanctions* on January 4, 2018 ("*Order Granting Sanctions*").

28. This Court entered its *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* on March 6, 2018. ("*Sanctions Order*")[4]

Withdrawal of Local Counsel

29. Mr. O'Mara's *Notice of Withdrawal of Local Counsel, ("Notice")* filed March 15, 2018, states, "Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such a response." *Notice,* 1.

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[4] The *Order Granting Sanctions* ordered sanctions and directed Defendants to "submit a Proposed Order granting *Defendants'/Counterclaimants' Motion for Sanctions*, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this *Order* in accordance with WDCR 9." *Order Granting Sanctions, 4.* For purposes of the instant motion, the Court considers the *Order Granting Sanctions* and *Sanctions Order*, as one for purposes of the analysis herein.

30. The *Notice* describes the terms of retention of Mr. O'Mara as, "Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines. Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." *Notice*, 1.

Plaintiffs' *Rule 60(b) Motion*

31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a notice of appearance on behalf of Plaintiffs.

32. On April 18, 2018, Plaintiffs filed the *Rule 60(b) Motion*. In the *Rule 60(b) Motion*. Plaintiffs argue this Court should set aside its *Order Granting the Motion to Strike, Order Granting Sanctions,* and *Sanctions Order,* based upon Mr. Moquin's excusable neglect. Plaintiff's further argue the underlying *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 787 P.2d 777 (1990) because the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for the misconduct of their attorney.

33. Plaintiffs argue their failure to provide the damages computations and adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure and this Court's orders, as well as their failure to file oppositions to the *Motion to Strike* and *Motion for Sanctions* were all due to Mr. Moquin failing "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion,* 1.

34. The *Rule 60(b) Motion* purports to support its arguments primarily through the *Declaration of Larry J. Willard. Rule 60(b) Motion,* Ex. 1 ("*Willard Declaration" and "WD"* in citations to the record)[5].

35. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. It states Mr. Willard is "**convinced**" Mr. Moquin was dealing with issues and demons beyond his control. *WD* ¶ 66. It further states he "**learned**" that Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work. *WD* ¶ 67. The *Willard Declaration* states Mr. Moquin suffered a "total mental breakdown." *WD* ¶ 68. It states Mr. Moquin **explained** to Mr. Willard he had been diagnosed with bipolar disorder. *WD* ¶ 70. He declares he believes Mr. Moquin's disorder to be "severe and debilitating." *WD* ¶ 73. He states he **now sees** "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case." *WD* ¶ 76. And, Mr. Willard declares he **can now see** how Mr. Moquin's alleged psychological issues affected Plaintiffs' case. *WD* ¶ 87 (emphasis supplied).

36. The *Rule 60(b) Motion* also includes an internet printout purporting to list symptoms of bipolar disorder (*Rule 60(b) Motion,* Ex. 5), and several documents related to alleged spousal abuse by Mr. Moquin, some of which reference Mr. Moquin's alleged bipolar disorder, and which include an Emergency Protective Order from a California proceeding (*Rule 60(b) Motion,* Ex. 6), a Pre-Booking Information Sheet from a California proceeding (*Rule 60(b) Motion,* Ex. 7) and a Request for Domestic Violence Restraining Order, also from a California proceeding (*Rule 60(b) Motion,*

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[5] The *Willard Declaration* includes paragraphs discussing the underlying facts of the action and the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the *Rule 60(b) Motion* and are not considered. *See e.g.*, WD ¶¶ 1-51, 100.

Ex. 8). The documents from the California proceedings are not certified by the clerk of the court.

37. Defendants filed their *Opposition to Rule 60(b) Motion Relief* on May 18, 2018 ("*Opposition*").

38. Plaintiffs filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion* on May 29, 2018 ("*Reply*"). The *Reply* attached eleven (11) new exhibits, including the new *Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief. Reply,* Ex. 1 ("*Reply Willard Declaration*" and "*RWD" for citations*). [6] The *Reply's* exhibits include copies of text messages between Mr. Willard and Mr. Moquin (*Reply,* Ex. 2, 4 and 7), copies of emails between Mr. Willard and his counsel (*Reply, Ex.* 3, 6, 8 and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (*Reply,* Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018 (*Reply,* Ex. 9).

39. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *Reply* because: (a) Defendants did not have the opportunity to respond to those exhibits in their *Opposition to the Rule 60(b) Motion*; (b) exhibits contained inadmissible hearsay and/or inadmissible lay opinion testimony; and (c) a number of exhibits were not relevant to this Court's determination of excusable neglect.

40. Defendants' *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply* was fully-briefed and submitted to this Court for decision on June 29,

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[6] The Court disregards the paragraphs included in the *Willard Declaration* and the *Reply Willard Declaration* that can be construed to be stated appeal to the Court's sympathy. *See e.g., WD* ¶ 91 -100; *RWD* ¶ 67

2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply. No sur-reply was filed by Defendants.

41. In its *Sanctions Order*, the Court made the following findings of fact and conclusions of law, among others: First, Plaintiffs failed to provide damages disclosures and failed to properly disclose an expert witness in violation of this Court's express Orders. *Sanctions Order* ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). *Stipulation and Order*, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of this Court. Thereafter, Defendants filed several motions to compel and Plaintiffs' non-compliance forced extension of trial and discovery deadlines on three separate occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants' expenses incurred in filing the *Motion to Compel*.

42. Plaintiffs did not oppose the *Sanctions Motion* despite this Court's express admonitions that the Court was "seriously considering" dismissal.

43. If any of the following Conclusions of Law contain or may be construed to contain Findings of Fact, they are incorporated here and shall be treated as appropriately identified and designated.

CONCLUSIONS OF LAW

Based on the Court's Findings of Fact, the Court makes its Conclusions of Law as follows.

1. If any the foregoing Findings of Fact contain or may be construed to contain Conclusions of Law, they are incorporated here and shall be treated as appropriately identified and designated.

Rule 60(b) Standard

2. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an order or final judgment[7] on grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1).

3. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); *see also Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("'[t]he burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence.'") (quoting *Luz v. Lopes*, 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

The Rule 60(b) Motion is not Supported by Competent, Admissible and Substantial Evidence.

4. Plaintiffs' ground asserted to set aside the *Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order*[8] is Mr. Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion*, 1.

5. While this Court "has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Electric,*

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[7] This Court entered its *Order re Request for Entry of Judgment* on June 4, 2018, declining to enter judgment as the Court deemed it appropriate to consider the *Rule 60(b) Motion* on the underlying *Sanctions Order.*

[8] Plaintiffs argue that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion,* 12. This is addressed by the Court hereinafter.

Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), "this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *see also Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (holding a court abuses its discretion when its decision is not supported by substantial evidence; substantial evidence "defined as that which a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).

6. The *Rule 60(b) Motion* purports to provide substantial evidence to support its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain statements and documents that are inadmissible, and in some instances, inadmissible on multiple grounds.

7. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. As set forth in the Findings of Fact, *supra,* Mr. Willard declares he is "convinced" Mr. Moquin was dealing with issues and demons beyond his control (*WD* ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work (WD ¶ 67; *RWD* ¶ 15); Mr. Moquin suffered a "total mental breakdown" (*WD* ¶ 68; *RWD* ¶16); Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder (*WD* ¶ 70; *RWD* ¶ *37*); Mr. Willard believes Mr. Moquin's disorder to be "severe and debilitating" (*WD* ¶ 73); Mr. Willard now sees "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on

the case (*WD* ¶ 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[9]

8. The *Willard Declaration* addresses Mr. Moquin's private life, including his personal mental status and the conflict in his marriage.

9. Mr. Willard statements are not all based on his own perceptions.

10. It logically follows, based on the subject matter, Mr. Willard could not have credibly obtained this information by observing it.

11. Mr. Willard lacks personal knowledge to testify to the assertions included in the *Willard Declaration* and the *Reply Willard Declaration* regarding Mr. Moquin's mental disorder, private personal life, and private marital conflicts.

12. It further logically follows, Mr. Willard could only have obtained this information by communication from Mr. Moquin (or Mr. Moquin's wife), although he does not overtly state this.

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[9] The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

***Willlard Declaration* Paragraph**	***Reply Willard Declaration* Paragraph**
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 (Similar - not exact)
89	3
91	67

13. The *Willard Declaration* and *Reply Willard Declaration* include inadmissible hearsay and under NRS 51.035 and 51.065. *See Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010), as modified, (Apr. 27, 2018) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Indus. v. Rice,* 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation).

14. Separate and apart from the challenge to the *Willard Declaration* and the *Reply Willard Declaration* on hearsay grounds, Mr. Willard's statements are also speculative and therefore inadmissible. He does not declare he personally observed Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the case, and, even if he had, he speculates what the mental disorder could cause and caused, offering an internet article to boost his credibility, which is also hearsay with no applicable exception offered.

15. The assertion describing Mr. Moquin's statement to Mr. Willard that Dr. Mar diagnosed Mr. Moquin with bipolar disorder (*WD* ¶ 69; *RWD* ¶35) is inadmissible hearsay with no exception under NRS 51.105(1) because the Mr. Willard's declaration does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health." Instead, Dr. Mar, purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis. The statements were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance.

16. Even if it is construed that Mr. Moquin's report of Dr. Mar's diagnosis constituted Mr. Moquin's statement of then existing mental condition. Mr. Willard's statements are not admissible as contemporaneous statements Mr. Moquin made about his own present physical symptoms or feelings. *See* 2 McCormick on Evid. §273 (7th ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement."). No spontaneous statement of Mr. Moquin, as the declarant, were offered.

17. The *Willard Declaration* and the *Reply Willard Declaration* also contains hearsay within hearsay, which is inadmissible under NRS 51.067.

18. Mr. Willard also purports to declare Mr. Moquin had a complete mental breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest, and how those symptoms may have affected Mr. Moquin's work. *WD* ¶¶ 68, 73-76 and 87-88; *RWD* ¶ 16, 38.

19. These statements are inadmissible as impermissible lay opinion under NRS 50.265. Mr. Willard is not a licensed health care provider qualified to opine on Mr. Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested.

20. Mr. Willard surmises, speculates and draws conclusions. He is not qualified to testify about what medical, physical, or mental condition Mr. Moquin may have, or the effect of that condition on his work. *White v. Com*, 616 S.E.2d 49, 54, 46 Va. App. 123, 134 (2005) ("While lay witnesses may testify to the attitude and demeanor

of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (Citations omitted).

21. Plaintiffs contend Mr. Willard's opinions of how Mr. Moquin's alleged condition might manifest with symptoms and how those symptoms may have affected Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a person's sanity." *Reply*, 2. Plaintiffs cite *Criswell v. State*, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a person's sanity. However, *Criswell* was overruled in 2001. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity defense and statutorily created "guilty, but mentally ill plea" and holding the legislative abolishment of insanity as a complete defense to a criminal offense unconstitutional, among other holdings, including that lay witnesses cannot testify as to "insanity" because the term has a precise and narrow definition under Nevada law).

22. The Court concludes the *Finger* holdings are not applicable here. First, the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not testify that Mr. Moquin was sane or insane; he testified about the diagnosis of bipolar disorder, possible symptoms of bipolar disorder and how those symptoms, if present, might have affected Mr. Moquin's work.

23. The Nevada Revised Statutes (Evidence Code) provides:

> A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and ... [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

NRS 50.275; *Burnside v. State,* 131 Nev. Adv. Op. 40, ___, 352 P.3d 627, 636 (death penalty case detective allowed to testify about cell phone records as lay witness). Further,

> [t]he key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? *See Randolph v. Collectramatic, Inc.,* 590 F.2d 844, 846 (10th Cir.1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed.R.Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); *State v. Tierney,* 150 N.H. 339, 839 A.2d 38, 46 (2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

Id.

24. While the Nevada Supreme Court and Court of Appeals have not addressed lay witness testimony, such as that contained in the *Willard Declaration* and *Reply Willard Declaration,* regarding bipolar disorder, this has been specifically addressed by the Pennsylvania court and is persuasive here. In the case of *In re Petition for Involuntary Commitment of Joseph R. Barbour,* the Superior Court of Pennsylvania held, "Lay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder." *In re Petition for Involuntary Commitment of Joseph R. Barbour,* 733 A.2d 1286 (PA. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion.*

25. The documents attached as Exhibits 6, 7 and 8 to the *Rule 60(b) Motion*, which purport to detail Mr. Moquin's alleged domestic abuse of his family, and which also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, with regard to bipolar disorder.

26. Exhibits 6, 7 and 8 to the *Rule 60(b) Motion* are not, and cannot be, authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no personal knowledge of their authenticity. He therefore cannot authenticate or identify the documents pursuant to NRS 52.015(1) or NRS 52.025.

27. Exhibits 6, 7 and 8 do not meet the requirements for presumed authenticity under NRS 52.125, as the exhibits are not certified copies of public records.

28. Pursuant to NRS 47.150, a judge or court may take judicial notice, whether requested to or not. Further, a judge or court shall take judicial notice if requested by a party and supplied with the necessary information. NRS 47.150. Here, no party requested this Court to take judicial notice of the California court records contained in the exhibits Exhibit 6 to the *Rule 60(b) Motion* and the *Reply* based on certified copies. The Court exercises its discretion and declines to take judicial notice here.

29. Moreover, even if Exhibits 6, 7 and 8 could be authenticated, the statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder and condition, are inadmissible lay opinion about bipolar disorder and would still be inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

30. A number of *Reply* Exhibits and discussed in *Reply Willard Declaration* also contain inadmissible hearsay.

31. All of the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065.

32. Specifically, Exhibit 2 and 3 to the *Reply*, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in Exhibit 10 are therefore disregarded as inadmissible hearsay.

33. Exhibits attached to the *Reply* also contain communications occurring after this Court issued its *Order Granting Motion to Strike* and its *Order Granting Sanctions.*

34. All of statements in the *Reply Willard Declaration* set forth after Paragraph 37 detail events and communications from late January, 2018 through late May, 2018, all of which occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order*. *Willard Declaration* ¶¶ 37-67.

35. Exhibits 5, 6, 7, 8, 9, and 10 to the *Reply* contain only communications and descriptions of events that occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order*.

36. Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside.

37. Statements in the *Reply Willard Declaration* after Paragraph 37 and Exhibits 5, 6, 7, 8, 9, and10 to the *Reply* are not relevant to this Court's determination of

whether Plaintiffs have met their burden of proving excusable neglect under NRCP 60(b).

38. Competent and substantial evidence has not been presented to establish *Rule 60(b) Relief.*

Notwithstanding Plaintiff's Lack of Admissible Evidence, Plaintiffs Fail to Meet their Burden under Rule 60(b) to Set Aside the *Sanctions Order* and *Order Granting Motion to Strike.*

39. Under Nevada law, "'clients must be held accountable for the acts and omissions of their attorneys.'" *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 433 (2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The client "'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent.'" *Huckabay Props.*, 130 Nev. at 204, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (rejecting the argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because petitioner voluntarily chose his attorney).

40. In *Huckabay Props.*, the Nevada Supreme Court dismissed an appeal where appellant's counsel failed to file an opening brief following two granted extensions and a court order granting appellants a final extension. *Huckabay Props.*, 130 Nev. 209, 322 P.3d at 437. In *Huckabay Props.*, the appellant was represented by

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two attorneys. In dismissing the appeal, and applicable to civil litigation at the trial court level here, the Court held:

> Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders . . . and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions.

Huckabay Props. v. NC Auto Parts, 130 Nev. at 209, 322 P.3d at 437.

41. In *Huckabay Props.,* however, the court recognized exceptional circumstances providing two possible exceptions "to the general agency rule that the 'sins' of the lawyer are visited upon his client where the lawyer's addictive disorder and abandonment of his legal practice or criminal conduct justified relief for the victimized client." *Id.* at 204 n.4, 322 P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Notably, these exceptions noted by the court in *Huckabay Props.* are not present here, as the facts of *Pasarelli* are readily distinguishable.

42. First, in *Passarelli*, the record included evidence the attorney suffered from a substance abuse disorder that resulted in missed office days and appointments and an inability to function. *Passarelli*, 102 Nev. at 285. Second, the attorney voluntarily

closed his law practice. *Id.* Third, the attorney was placed on disability inactive status by the Nevada Bar. *Id.* Finally, the client in *Passarelli* had only one attorney. *Id.*

43. None of these facts are present in this case. As concluded, *supra*, no competent, reliable and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court. Further, there is no evidence of missed meetings or absences from office due to the claimed conditions. There is no evidence that Mr. Moquin closed his law practice.

44. Mr. Moquin is on active status with the California Bar. *Opposition to Rule 60(b) Motion*, Ex. 5; *Attorney Search, The State Bar of California, http://members.calbar.ca.gov/fal/LicenseeSearch* (last visited Nov. 30, 2018).

45. Pursuant to NRS 47.150, the Court may take judicial notice, whether requested or not. A fact subject to judicial notice must be either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. NRS 47.130. It follows that the State Bar of California provides accurate information regarding licensing of attorneys which cannot be reasonably questioned. The Court takes judicial notice of Mr. Moquin's active status.

46. Applied here, the *Huckabay Props./Passarelli* analysis compels denial of the *Rule 60(b) Motion*. The standard for "excusable neglect" based on activities of a party's attorney requires the attorney be completely unable to respond or appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where attorney failed to attend trial due to psychiatric disorder which caused him to shut down his practice and was placed on disability inactive status by the State Bar of Nevada); *see also Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court

found excusable neglect where respondent lived out of state and suffered a nervous breakdown shortly after retaining out of state counsel, who was unaware and uninformed of the time to appear).

47. Here, Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and expert disclosures were ignored. Further, this Court granted, upon was also ignored.

48. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin had suffered a complete mental breakdown and his personal life was "in shambles." In addition, to the preclusion of evidence discussed, *supra*, the evidence is vague at best regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and are vague in asserting when any of the alleged events took place. Plaintiffs do attach additional exhibits to their *Reply* that offer some information on timing but are inadequate for the Court's determination.

49. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr. Willard and Mr. Moquin from December 2, 2017 through December 6, 2017, in which Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions*. *Reply*, Ex. 2. The text messages reflect Mr. Willard was aware of the initial deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based on the November 15, 2017 filing date and electronic service).

50. Defendants agreed to extensions through 3:00 pm on December 6, 2017 for Plaintiffs to file their oppositions.

51. The Court granted an additional extension through December 18, 2018.

52. Plaintiffs had knowledge of the initial filing deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the delinquent filings (*Reply,* Ex. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Sanctions Order* ¶ 95.

53. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Sanctions Order* ¶ 98.

54. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion*.

55. Plaintiffs started looking for attorneys who might be able to help. *Reply Willard Declaration* ¶ 36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *WD* ¶ 71; *RWD* ¶ 39.

56. Plaintiffs knew timely oppositions were not filed.

57. Plaintiffs chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the *Motion for Sanctions*. Plaintiffs cannot now avoid the consequences of the acts of omissions of their freely selected agent.

58. Plaintiffs voluntarily chose to stop seeking new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons. *Willard Declaration* ¶ 81.

59. Plaintiffs' multiple instances of non-compliance, including the Plaintiffs failure to provide a compliant damages disclosure in this action, is reflected in the court file for this proceeding, occurring well before Mr. Moquin's purported breakdown in

December, 2017 or January, 2018 asserted as preventing him from opposing the motions.

60. Mr. O'Mara was counsel of record and did not report any issues related to Mr. Moquin to this Court until the filing of his *Notice* in March. *Notice, 1.*

61. The Court gave counsel notice of the seriousness of Plaintiffs' violations and expressed it was considering dismissal based on those violations. *Opposition to Rule 60(b) Motion*. Ex. 3, December 12, 2017 Transcript ("you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their attorneys were given notice of the potential consequence of failing to file an opposition to the *Sanctions Motion.*

62. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations.

63. A party "cannot be relieved from a judgment [order] taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney," *Cicerchia*, 77 Nev. at 161.

Plaintiffs Knew of Mr. Moquin's Alleged Condition and Alleged Non-responsiveness prior to the *Sanctions Order* and <u>did Nothing and, therefore, Cannot Establish Excusable Neglect.</u>

64. In the *Willard Declaration* and *Reply Willard Declaration,* Mr. Willard admits he knew Mr. Moquin was having personal financial difficulties and that he borrowed money from friends and family to fund Mr. Moquin's personal expenses. *WD*

¶¶ 63-65; *RWD* ¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to Mr. Moquin and he again borrowed money from a friend to pay for Mr. Moquin's treatment. *WD* ¶¶ 68-71; *RWD* ¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order*, yet continued to allow Mr. Moquin to represent Plaintiffs.

65. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this case from the cases upon which Plaintiffs rely in the *Rule 60(b) Motion*, where the parties were unaware of their attorneys' problems. *See e.g., Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation") (emphasis added); *U.S. v. Cirami*, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner v. Heise*, 2009 WL 1360975 at *2 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of attorney's mental condition until several months after dismissal). Here, Mr. Willard knew of the actions that supported the *Sanctions Order*.

66. Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *Willard Declaration* ¶81. Plaintiffs' knowledge and inaction vitiates excuse for neglect.

67. The *Rule 60(b) Motion* cites authority for the proposition that even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b). However, "client diligence must still be shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a

duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....").

68. Mr. Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility as he admits he was able to borrow money to fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources to retain new attorneys at the time.

69. Plaintiffs have not established by substantial evidence that they exercise diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness.

The *Rule 60(b) Motion* should be Denied because Two Attorneys Represented Plaintiffs had an Obligation to Ensure Compliance with the Nevada Rules of Civil Procedure and this Court's Orders.

70. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

> (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.
> (b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.
> (c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

SCR 42(14). Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

71. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel. Motion to Associate Counsel.*

72. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC*.

73. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

74. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosures, (*Opposition to Rule 60(b) Motion,* Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order.*

75. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court representing,

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues.... Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

Brief Extension Request.

76. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

The *Sanctions Order* was Sufficient under Nevada Law

77. Plaintiffs assert that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion* at 12. However, consideration of this factor is discretionary, not mandatory. See *Young v. Johnny Ribeiro*, 106 Nev. at 93 ("The factors a court **may** properly consider include . . . whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney") (emphasis supplied).

78. The Court concludes factors enumerated in *Young v. Johnny Ribeiro Bldg., Inc.* were met by the *Sanctions Order*. Specifically, the Nevada Supreme Court held where a court issues an order of dismissal with prejudice as a discovery sanction a court may consider, among others, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, and the feasibility and fairness of alternative, less severe sanctions. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. at 93. The factors are not mandatory so long as the Court supports the order with "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Id.*

79. While each suggested factor discussion in the *Sanctions Order* was not labeled by factor, the Court addressed the factors it deemed appropriate.

80. In light of the circumstances in this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*.

80.

81. Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment and not an order, as here, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

The *Rule 60(b) Motion* should be Denied.

82. After weighing the credibility and admissibility of the evidence provided in support of the *Rule 60(b) Motion,* substantial evidence has not been presented to establish excusable neglect.

83. Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect so as to justify relief under NRCP 60(b).

ORDER

Based upon the foregoing, Plaintiffs' *Rule 60(b) Motion* is **DENIED**, in its entirety.

DATED this 31th day of November, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 30 day of November, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

RICHARD WILLIAMSON, ESQ.

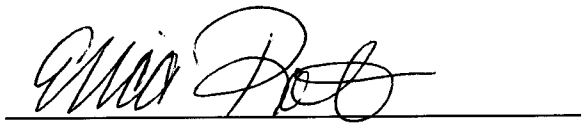
JONATHAN TEW, ESQ.

BRIAN IRVINE, ESQ.

ANJALI WEBSTER, ESQ.

JOHN DESMOND, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:



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Electronically
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2018-12-03 11:17:39 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7002654

2540
DICKINSON WRIGHT, PLLC
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Attorney for Berry Hinckley Industries and Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual; Defendants. _____/ BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual; Counterclaimants, vs LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;	CASE NO. CV14-01712 DEPT. 6

Counter-defendants.

_____/

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on November 30, 2018, an Order was entered in the above-captioned matter denying Plaintiffs' Rule 60(b) Motion for Relief. A true and correct copy of the order is attached hereto as **Exhibit 1.**

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 3rd day of December, 2018.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF ORDER** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

DATED this 3rd day of December, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

Exhibit	Description	Pages[1]
1	November 30, 2018, Order	32

[1] Exhibit page counts are exclusive of exhibit slip sheets.

F I L E D
Electronically
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2018-12-03 11:17:39 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 7002654

EXHIBIT 1

EXHIBIT 1

FILED
Electronically
CV14-01712
2018-11-30 04:08:13 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7001598

Code:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiffs,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual;

Defendants.

_____/

CASE NO. CV14-01712

DEPT. 6

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants[1].

_____/

[1] On April 13, 2018, this Court entered its *Order of Dismissal of Claims of Wooley Plaintiffs with Prejudice*. On the same date, this Court entered its *Order Granting Defendants/ Counterclaimants' Motion to Dismiss Counterclaims*. All counterclaims were dismissed by said Order.

ORDER DENYING PLAINTIFFS' RULE 60(b) MOTION FOR RELIEF

Before this Court is Plaintiffs' Rule 60(b) Motion for Relief ("*Rule 60(b) Motion*") filed by PLAINTIFFS LARRY J. WILLARD, INDIVIDUALLY AND AS TRUSTEE OF THE LARRY JAMES WILLARD TRUST FUND AND OVERLAND DEVELOPMENT CORPORATION, A CALIFORNIA CORPORATION (collectively, "Willard" or the "Plaintiffs"), by and through counsel, Robertson, Johnson, Miller & Williamson.[2] By their *Rule 60(b) Motion*, Plaintiffs seek, pursuant to NRCP 60(b), to set aside: (a) this Court's January 4, 2018, *Order Granting Defendants/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich*; (b) this Court's January 4, 2018, *Order Granting Defendants' Motion for Sanctions*; and (c) this Court's March 6, 2018, *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions.*

Thereafter, DEFENDANTS BERRY-HINCKLEY INDUSTRIES ("BHI") AND JERRY HERBST (collectively, "Defendants"), filed their *Opposition to Rule 60(b) Motion for Relief,* by and through their counsel, Dickinson Wright, PLLC.

Plaintiffs then filed their *Reply in Support of the Willard Plaintiffs Rule 60(b) Motion for Relief* and the parties set the matter for hearing.

This Court carefully considered the papers submitted, the arguments of counsel, the entire court file herein, and is fully advised in the premises, and enters its order as follows.

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[2] Plaintiffs' former local counsel was David O'Mara of the O'Mara Law Firm, P.C. Mr. O'Mara filed a *Notice of Withdrawal of Local Counsel* ("*Notice*"), *on March 15, 2018.* Brian Moquin remains counsel of record as he has not withdrawn; however, he is not indicated as counsel filing the *Rule 60(b) Motion.*

FINDINGS OF FACT

The Court makes the following Findings of Fact:

Plaintiffs' Complaint

1. On August 8, 2014, Plaintiffs commenced this action by filing their *Complaint* against Defendants.[3] *Complaint*, generally.

2. By way of their *Complaint* and subsequent *First Amended Complaint,* Plaintiffs sought the following damages against Defendants for an alleged breach of the lease between Willard and BHI: (1) "rental income" for $19,443,836.94, discounted by 4% per the lease to $15,741,360.75 as of March 1, 2013; and (2) certain property-related damages, such as insurance and installation of a security fence. *First Amended Complaint* ("*FAC*"), generally.

3. Willard also sought several other categories of damages which have since been dismissed or withdrawn. May 30, 2017, *Order.*

Plaintiffs' Failure to Comply with the Nevada Rules of Civil Procedure and this Court's Orders

4. Plaintiffs failed to provide a compliant damages disclosure in this action.

5. Plaintiffs failed to provide a damages computation in their initial disclosures, as required under NRCP 16.1(a)(1)(C). *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* ("*Sanctions Order*") ¶ 12, and failed to provide damages computations at any time despite numerous demands on both Mr. Moquin and Mr. O'Mara. *Sanctions Order* ¶¶ 14-16, 25, 27-33, 39, 43-44 and 51-54.

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[3] Willard filed the initial complaint jointly with Edward E. Wooley and Judith A. Wooley, individually and as Trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 (collectively, "Wooley"). However, Defendants and Wooley entered into a settlement agreement and stipulation for dismissal. This Court entered its Order on April 13, 2018 dismissing Wooley's claims with prejudice.

6. Plaintiffs failed to provide complete and adequate responses to interrogatories requesting information about Plaintiffs' damages in the normal course of discovery.

7. Plaintiffs failed to provide complete and adequate responses to interrogatories in violation of this Court's *Order Granting Defendants' Motion to Compel* and failed to comply with this Court's *Order* ("*January Hearing Order*") issued after the parties discussed Plaintiffs' failure to provide damages computations at the January 10, 2017 hearing attended by Mr. Moquin, Mr. O'Mara and Mr. Willard. *Sanctions Order* ¶¶ 17-25.

8. The *January Hearing Order* required Plaintiffs to provide damages computations and supporting materials. *Sanctions Order* ¶¶ 46-49, 54, 59-64 and 67-68; *Defendants' Opposition Plaintiffs' Rule 60(b) Motion*, Ex. 2, *Transcript* of January 10, 2017 Hearing at pp. 61-63 and 68; *January Hearing Order.*

9. Plaintiffs failed to properly disclose Daniel Gluhaich as an expert witness as required by NRCP 16.1(a)(2). *Sanctions Order* ¶¶ 34-37.

10. In contravention of this Court's *January Hearing Order*, Plaintiffs failed to provide an amended disclosure of Mr. Gluhaich, although Defendants' counsel made multiple requests. *Sanctions Order* ¶¶ 38-45, ¶¶ 50-64.

<u>Plaintiffs' Summary Judgment Motion</u>

11. Pursuant to the February 9, 2017, *Stipulation and Order to Continue Trial,* discovery closed in mid-November, 2017.

12. On October 18, 2017, less than a month before the close of discovery, Plaintiffs filed their *Motion for Summary Judgment* asserting they were entitled, as a

matter of law, to more than triple the amount of damages alleged in and requested by their *First Amended Complaint*. *Sanctions Order* ¶¶ 69 and 73.

13. The damages asserted in Plaintiffs' *Motion for Summary Judgment* were not previously disclosed. The motion was also supported by previously undisclosed expert opinions and documents. *Sanctions Order* ¶¶ 74-79.

14. On November 13, 2017, Defendants filed their Opposition to Plaintiffs' *Motion for Summary Judgment*.

15. Plaintiffs' did not submit the *Motion for Summary Judgment* for decision.

Defendants' *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* and *Motion for Sanctions*

16. On November 14, 2017, Defendants filed their *Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("*Motion to Strike*").

17. In the *Motion to Strike*, Defendants maintained this Court should preclude Plaintiffs from offering Mr. Gluhaich's testimony on the grounds: (a) Plaintiffs failed to adequately disclose Mr. Gluhaich as an expert because they failed to provide "a summary of the facts and opinions to which the witness is expected to testify" as required by NRCP 16.1(a)(2)(B); (b) the opinions offered by Mr. Gluhaich in support of Plaintiffs' *Motion for Summary Judgment* were based upon inadmissible hearsay and were based solely on the opinions of others; and (c) Mr. Gluhaich was not qualified to offer the opinions included in his Declaration attached to and filed in support of Plaintiffs' *Motion for Summary Judgment*.

18. On November 15, 2017, Defendants filed their *Motion for Sanctions* ("*Sanctions Motion*").

19. In the *Sanctions Motion*, Defendants argued this Court should sanction Plaintiffs for their continued and intentional conduct in failing to comply with the Nevada Rules of Civil Procedure and this Court's orders requiring Plaintiffs to provide damages computations and full and adequate expert disclosures, and dismiss Plaintiffs' claims with prejudice, or, in the alternative, preclude Plaintiffs from seeking new damages or relying upon their undisclosed expert and appraisals.

20. Defendants agreed to give Plaintiffs' several extensions of time to oppose the *Motion to Strike* and *Sanctions Motion*, but no oppositions were filed.

21. On December 6, 2017, Plaintiffs requested relief from the Court by extension to respond until "December 7, 2017 at 4:29 p.m." *Sanctions Order* ¶ 94; *Plaintiffs' Request for a Brief Extension of Time ("Brief Extension Request"),* generally.

22. This Court held a status conference on December 12, 2017, attended by Defendants' counsel and Plaintiffs' counsel, Mr. Moquin and Mr. O'Mara. At the status conference, after observing Mr. Moquin, having significant dialog with Mr. Moquin, and over vehement objection by the Defendants' counsel, this Court granted *Plaintiffs' Brief Extension Request* plus granted more time than that requested. The Court directed Plaintiffs to respond to the outstanding motions no later than Monday, December 18, 2017, at 10:00 am. *Sanctions Order* ¶ 95.

23. Tis Court further directed Defendants to file their reply briefs no later than January 8, 2018. The Court set the parties' outstanding Motions for oral argument on January 12, 2018. *Sanctions Order* ¶ 96.

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24. This Court admonished Plaintiffs, stating "you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it." *Opposition to Rule 60(b) Motion*, Ex. 3, December 12, 2017, *Transcript of Status Conference*, in part.

25. Plaintiffs did not file an opposition or response to the *Motion to Strike* or *Motion for Sanctions* by December 18, 2017 or any time thereafter, nor did Plaintiffs request any further extension.

26. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* on January 4, 2018 ("*Order Granting Motion to Strike*").

27. This Court entered its *Order Granting Defendants'/Counterclaimants' Motion for Sanctions* on January 4, 2018 ("*Order Granting Sanctions*").

28. This Court entered its *Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions* on March 6, 2018. ("*Sanctions Order*")[4]

Withdrawal of Local Counsel

29. Mr. O'Mara's *Notice of Withdrawal of Local Counsel, ("Notice")* filed March 15, 2018, states, "Mr. Moquin was unresponsive during the time in which this Court was deciding the pending motions, even after counsel begged him for a response to be filed with the Court and was told he would provide such a response." *Notice,* 1.

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[4] The *Order Granting Sanctions* ordered sanctions and directed Defendants to "submit a Proposed Order granting *Defendants'/Counterclaimants' Motion for Sanctions*, including factual and legal analysis and discussion, to Department 6 within twenty (20) days of the date of this *Order* in accordance with WDCR 9." *Order Granting Sanctions, 4.* For purposes of the instant motion, the Court considers the *Order Granting Sanctions* and *Sanctions Order*, as one for purposes of the analysis herein.

30. The *Notice* describes the terms of retention of Mr. O'Mara as, "Undersigned Counsel was retained solely as local counsel, and provided Mr. Moquin with the necessary information related to the Court's filing requirement and timelines. Undersigned Counsel was retained only to provide services as directed by Mr. Moquin, and would be relieved of services if Mr. Moquin was removed." *Notice*, 1.

Plaintiffs' *Rule 60(b) Motion*

31. On March 26, 2018, Robertson, Johnson, Miller & Williamson filed a notice of appearance on behalf of Plaintiffs.

32. On April 18, 2018, Plaintiffs filed the *Rule 60(b) Motion*. In the *Rule 60(b) Motion*. Plaintiffs argue this Court should set aside its *Order Granting the Motion to Strike, Order Granting Sanctions,* and *Sanctions Order,* based upon Mr. Moquin's excusable neglect. Plaintiff's further argue the underlying *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 787 P.2d 777 (1990) because the Court did not consider whether sanctions unfairly operate to penalize Plaintiffs for the misconduct of their attorney.

33. Plaintiffs argue their failure to provide the damages computations and adequate expert disclosures, as required by both the Nevada Rules of Civil Procedure and this Court's orders, as well as their failure to file oppositions to the *Motion to Strike* and *Motion for Sanctions* were all due to Mr. Moquin failing "to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion,* 1.

34. The *Rule 60(b) Motion* purports to support its arguments primarily through the *Declaration of Larry J. Willard. Rule 60(b) Motion,* Ex. 1 ("*Willard Declaration" and "WD"* in citations to the record)[5].

35. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. It states Mr. Willard is "**convinced**" Mr. Moquin was dealing with issues and demons beyond his control. *WD* ¶ 66. It further states he "**learned**" that Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work. *WD* ¶ 67. The *Willard Declaration* states Mr. Moquin suffered a "total mental breakdown." *WD* ¶ 68. It states Mr. Moquin **explained** to Mr. Willard he had been diagnosed with bipolar disorder. *WD* ¶ 70. He declares he believes Mr. Moquin's disorder to be "severe and debilitating." *WD* ¶ 73. He states he **now sees** "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on the case." *WD* ¶ 76. And, Mr. Willard declares he **can now see** how Mr. Moquin's alleged psychological issues affected Plaintiffs' case. *WD* ¶ 87 (emphasis supplied).

36. The *Rule 60(b) Motion* also includes an internet printout purporting to list symptoms of bipolar disorder (*Rule 60(b) Motion,* Ex. 5), and several documents related to alleged spousal abuse by Mr. Moquin, some of which reference Mr. Moquin's alleged bipolar disorder, and which include an Emergency Protective Order from a California proceeding (*Rule 60(b) Motion,* Ex. 6), a Pre-Booking Information Sheet from a California proceeding (*Rule 60(b) Motion,* Ex. 7) and a Request for Domestic Violence Restraining Order, also from a California proceeding (*Rule 60(b) Motion,*

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[5] The *Willard Declaration* includes paragraphs discussing the underlying facts of the action and the initial filing of the suit in California. These paragraphs are not relevant to the Court's determination of the *Rule 60(b) Motion* and are not considered. *See e.g.*, WD ¶¶ 1-51, 100.

Ex. 8). The documents from the California proceedings are not certified by the clerk of the court.

37. Defendants filed their *Opposition to Rule 60(b) Motion Relief* on May 18, 2018 ("*Opposition*").

38. Plaintiffs filed their *Reply in Support of the Willard Plaintiffs' Rule 60(b) Motion* on May 29, 2018 ("*Reply*"). The *Reply* attached eleven (11) new exhibits, including the new *Declaration of Larry J. Willard in Response to Defendants' Opposition to Rule 60(b) Motion for Relief. Reply,* Ex. 1 ("*Reply Willard Declaration*" and "*RWD" for citations*). [6] The *Reply's* exhibits include copies of text messages between Mr. Willard and Mr. Moquin (*Reply,* Ex. 2, 4 and 7), copies of emails between Mr. Willard and his counsel (*Reply, Ex.* 3, 6, 8 and 10), a receipt detailing an alleged payment made by Mr. Willard to Mr. Moquin's doctor on March 13, 2018 (*Reply,* Ex. 5), and a letter from Mr. Williamson to Mr. Moquin dated May 14, 2018 (*Reply,* Ex. 9).

39. On June 6, 2018, Defendants filed their *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply*, arguing this Court should strike Exhibits 1-10 to the *Reply* because: (a) Defendants did not have the opportunity to respond to those exhibits in their *Opposition to the Rule 60(b) Motion*; (b) exhibits contained inadmissible hearsay and/or inadmissible lay opinion testimony; and (c) a number of exhibits were not relevant to this Court's determination of excusable neglect.

40. Defendants' *Motion to Strike, or in the Alternative, Motion for Leave to File Sur-Reply* was fully-briefed and submitted to this Court for decision on June 29,

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[6] The Court disregards the paragraphs included in the *Willard Declaration* and the *Reply Willard Declaration* that can be construed to be stated appeal to the Court's sympathy. *See e.g., WD* ¶ 91 -100; *RWD* ¶ 67

2018. Subsequently, Plaintiffs' counsel stipulated to the filing of a sur-reply. No sur-reply was filed by Defendants.

41. In its *Sanctions Order*, the Court made the following findings of fact and conclusions of law, among others: First, Plaintiffs failed to provide damages disclosures and failed to properly disclose an expert witness in violation of this Court's express Orders. *Sanctions Order* ¶¶ 67, 68. Plaintiffs acknowledged their failure to properly disclose an expert witness in accordance with NRCP 16.1(a)(2)(B). *Stipulation and Order*, February 9, 2017. Plaintiffs did not thereafter attempt to properly disclose the expert witness for the entirety of 2017. Plaintiffs failed to comply with multiple orders of this Court. Thereafter, Defendants filed several motions to compel and Plaintiffs' non-compliance forced extension of trial and discovery deadlines on three separate occasions. This Court sanctioned Plaintiffs by ordering payment of Defendants' expenses incurred in filing the *Motion to Compel*.

42. Plaintiffs did not oppose the *Sanctions Motion* despite this Court's express admonitions that the Court was "seriously considering" dismissal.

43. If any of the following Conclusions of Law contain or may be construed to contain Findings of Fact, they are incorporated here and shall be treated as appropriately identified and designated.

CONCLUSIONS OF LAW

Based on the Court's Findings of Fact, the Court makes its Conclusions of Law as follows.

1. If any the foregoing Findings of Fact contain or may be construed to contain Conclusions of Law, they are incorporated here and shall be treated as appropriately identified and designated.

Rule 60(b) Standard

2. Under NRCP 60(b)(1), on motion, this Court may relieve a party from an order or final judgment[7] on grounds of mistake, inadvertence, surprise, or excusable neglect. NRCP 60(b)(1).

3. A party who seeks to set aside an order pursuant to NRCP 60(b)(1) "has the burden to prove mistake, inadvertence, surprise, or excusable neglect by a preponderance of the evidence." *Polivka v. Kuller*, 128 Nev. 926, 381 P.3d 651 (2012) (citations omitted); *see also Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("'[t]he burden of proof on [a motion to set aside under Rule 60(b)] is on the moving party who must establish his position by a preponderance of the evidence.'") (quoting *Luz v. Lopes*, 55 Cal.2d 54, 10 Cal.Rptr. 161, 166, 358 P.2d 289, 294 (1960)).

The Rule 60(b) Motion is not Supported by Competent, Admissible and Substantial Evidence.

4. Plaintiffs' ground asserted to set aside the *Order Granting Defendants' Motion to Strike, Order Granting the Motion for Sanctions, and Sanctions Order*[8] is Mr. Moquin "failed to properly prosecute this case due to a serious mental illness and a personal life that was apparently in shambles." *Rule 60(b) Motion*, 1.

5. While this Court "has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b)," *Stoecklein v. Johnson Electric,*

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[7] This Court entered its *Order re Request for Entry of Judgment* on June 4, 2018, declining to enter judgment as the Court deemed it appropriate to consider the *Rule 60(b) Motion* on the underlying *Sanctions Order.*

[8] Plaintiffs argue that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion,* 12. This is addressed by the Court hereinafter.

Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993), "this discretion is a legal discretion and cannot be sustained where there is no competent evidence to justify the court's action." *Id.* (emphasis added) (citing *Lukey v. Thomas*, 75 Nev. 20, 22, 333 P.2d 979 (1959)); *see also Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (holding a court abuses its discretion when its decision is not supported by substantial evidence; substantial evidence "defined as that which a reasonable mind might accept as adequate to support a conclusion" (internal quotation marks omitted)).

6. The *Rule 60(b) Motion* purports to provide substantial evidence to support its legal argument through the *Willard Declaration* and the *Reply Willard Declaration* together with the attached exhibits, all of which contain statements and documents that are inadmissible, and in some instances, inadmissible on multiple grounds.

7. The *Willard Declaration* includes several statements about Mr. Moquin's alleged mental disorder. As set forth in the Findings of Fact, *supra,* Mr. Willard declares he is "convinced" Mr. Moquin was dealing with issues and demons beyond his control (*WD* ¶ 66); he "learned" Mr. Moquin was struggling with constant marital conflict that greatly interfered with his work (WD ¶ 67; *RWD* ¶ 15); Mr. Moquin suffered a "total mental breakdown" (*WD* ¶ 68; *RWD* ¶16); Mr. Moquin explained to Mr. Willard he had been diagnosed with bipolar disorder (*WD* ¶ 70; *RWD* ¶ *37*); Mr. Willard believes Mr. Moquin's disorder to be "severe and debilitating" (*WD* ¶ 73); Mr. Willard now sees "that Mr. Moquin was suffering from [symptoms of bipolar disorder] throughout his work on

the case (*WD* ¶ 76); and, Mr. Willard can now see how Mr. Moquin's alleged psychological issues affected his case (*WD* ¶ 87).[9]

8. The *Willard Declaration* addresses Mr. Moquin's private life, including his personal mental status and the conflict in his marriage.

9. Mr. Willard statements are not all based on his own perceptions.

10. It logically follows, based on the subject matter, Mr. Willard could not have credibly obtained this information by observing it.

11. Mr. Willard lacks personal knowledge to testify to the assertions included in the *Willard Declaration* and the *Reply Willard Declaration* regarding Mr. Moquin's mental disorder, private personal life, and private marital conflicts.

12. It further logically follows, Mr. Willard could only have obtained this information by communication from Mr. Moquin (or Mr. Moquin's wife), although he does not overtly state this.

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[9] The *Willard Declaration and the Reply Willard Declaration* contain many nearly identical statements. They compare as follows:

***Willlard Declaration* Paragraph**	***Reply Willard Declaration* Paragraph**
53	7
54	8
59	9
63	11
64	12 (slightly differs)
65	13
67	15
68	16
69	35
70	38
71	39
82	10 (Similar - not exact)
89	3
91	67

13. The *Willard Declaration* and *Reply Willard Declaration* include inadmissible hearsay and under NRS 51.035 and 51.065. *See Agnello v. Walker*, 306 S.W.3d 666, 675 (Mo. App. 2010), as modified, (Apr. 27, 2018) (hearsay testimony or documentation cannot serve as the evidence necessary to meet movant's burden of persuasion to set aside judgment under Rule 60); *New Image Indus. v. Rice,* 603 So.2d 895, 897 (Ala. 1992) (affirming trial court's refusal to grant Rule 60 relief where the only evidence of excusable neglect was an affidavit containing inadmissible hearsay and speculation).

14. Separate and apart from the challenge to the *Willard Declaration* and the *Reply Willard Declaration* on hearsay grounds, Mr. Willard's statements are also speculative and therefore inadmissible. He does not declare he personally observed Mr. Moquin's alleged condition until he draws this unqualified conclusion late in the case, and, even if he had, he speculates what the mental disorder could cause and caused, offering an internet article to boost his credibility, which is also hearsay with no applicable exception offered.

15. The assertion describing Mr. Moquin's statement to Mr. Willard that Dr. Mar diagnosed Mr. Moquin with bipolar disorder (*WD* ¶ 69; *RWD* ¶35) is inadmissible hearsay with no exception under NRS 51.105(1) because the Mr. Willard's declaration does not constitute Mr. Moquin's declaration of "then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health." Instead, Dr. Mar, purportedly diagnosed Mr. Moquin; Mr. Moquin told Mr. Willard of Dr. Mar's purported diagnosis; and Mr. Willard makes the statement of Mr. Moquin's diagnosis. The statements were not spontaneous and instead were a basis for Mr. Moquin to request monetary assistance.

16. Even if it is construed that Mr. Moquin's report of Dr. Mar's diagnosis constituted Mr. Moquin's statement of then existing mental condition. Mr. Willard's statements are not admissible as contemporaneous statements Mr. Moquin made about his own present physical symptoms or feelings. *See* 2 McCormick on Evid. §273 (7th ed.) ("[s]tatements of the declarant's present bodily condition and symptoms, including pain and other feelings, offered to prove the truth of the statements, have been generally recognized as an exception to the hearsay rule. Special reliability is provided by the spontaneous quality of the declarations, assured by the requirement that the declaration purport to describe a condition presently existing at the time of the statement."). No spontaneous statement of Mr. Moquin, as the declarant, were offered.

17. The *Willard Declaration* and the *Reply Willard Declaration* also contains hearsay within hearsay, which is inadmissible under NRS 51.067.

18. Mr. Willard also purports to declare Mr. Moquin had a complete mental breakdown, how Mr. Moquin's symptoms of his alleged bipolar disorder might manifest, and how those symptoms may have affected Mr. Moquin's work. *WD* ¶¶ 68, 73-76 and 87-88; *RWD* ¶ 16, 38.

19. These statements are inadmissible as impermissible lay opinion under NRS 50.265. Mr. Willard is not a licensed health care provider qualified to opine on Mr. Moquin's mental condition, mental disorder, or symptoms of any disorder or condition that manifested.

20. Mr. Willard surmises, speculates and draws conclusions. He is not qualified to testify about what medical, physical, or mental condition Mr. Moquin may have, or the effect of that condition on his work. *White v. Corn*, 616 S.E.2d 49, 54, 46 Va. App. 123, 134 (2005) ("While lay witnesses may testify to the attitude and demeanor

of the defendant, lay witnesses cannot express an opinion as to the existence of a particular mental disease or condition.") (Citations omitted).

21. Plaintiffs contend Mr. Willard's opinions of how Mr. Moquin's alleged condition might manifest with symptoms and how those symptoms may have affected Mr. Moquin's work are appropriate because "lay witnesses can offer testimony as to a person's sanity." *Reply*, 2. Plaintiffs cite *Criswell v. State*, 84 Nev. 459, 464, 443 P.2d 552, 555 (1968) for the proposition that lay witnesses can offer testimony as to a person's sanity. However, *Criswell* was overruled in 2001. *See Finger v. State*, 117 Nev. 548, 576-77, 27 P.3d 66, 85 (2001) (en banc decision regarding the legal insanity defense and statutorily created "guilty, but mentally ill plea" and holding the legislative abolishment of insanity as a complete defense to a criminal offense unconstitutional, among other holdings, including that lay witnesses cannot testify as to "insanity" because the term has a precise and narrow definition under Nevada law).

22. The Court concludes the *Finger* holdings are not applicable here. First, the *Finger* case involves a defense to criminal charges. Second, Mr. Willard did not testify that Mr. Moquin was sane or insane; he testified about the diagnosis of bipolar disorder, possible symptoms of bipolar disorder and how those symptoms, if present, might have affected Mr. Moquin's work.

23. The Nevada Revised Statutes (Evidence Code) provides:

> A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and ... [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

NRS 50.275; *Burnside v. State,* 131 Nev. Adv. Op. 40, ___, 352 P.3d 627, 636 (death penalty case detective allowed to testify about cell phone records as lay witness). Further,

> [t]he key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience? *See Randolph v. Collectramatic, Inc.,* 590 F.2d 844, 846 (10th Cir.1979) (observing that lay witness may not express opinion "as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness"); Fed.R.Evid. 701 advisory committee's note (2000 amend.) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." (internal quotation marks omitted)); *State v. Tierney,* 150 N.H. 339, 839 A.2d 38, 46 (2003) ("Lay testimony must be confined to personal observations that any layperson would be capable of making.").

Id.

24. While the Nevada Supreme Court and Court of Appeals have not addressed lay witness testimony, such as that contained in the *Willard Declaration* and *Reply Willard Declaration,* regarding bipolar disorder, this has been specifically addressed by the Pennsylvania court and is persuasive here. In the case of *In re Petition for Involuntary Commitment of Joseph R. Barbour,* the Superior Court of Pennsylvania held, "Lay witness and non-expert could not provide expert testimony regarding involuntary committee's medical diagnosis, specifically the existence of mood disorder known as bipolar disorder." *In re Petition for Involuntary Commitment of Joseph R. Barbour,* 733 A.2d 1286 (PA. 1999). This Court therefore concludes such testimony is inadmissible to support the *Rule 60(b) Motion*.

25. The documents attached as Exhibits 6, 7 and 8 to the *Rule 60(b) Motion*, which purport to detail Mr. Moquin's alleged domestic abuse of his family, and which also contain statements about Mr. Moquin's alleged bipolar condition, are inadmissible as discussed, *supra*, with regard to bipolar disorder.

26. Exhibits 6, 7 and 8 to the *Rule 60(b) Motion* are not, and cannot be, authenticated by Mr. Willard. Mr. Willard is not the author of the documents and has no personal knowledge of their authenticity. He therefore cannot authenticate or identify the documents pursuant to NRS 52.015(1) or NRS 52.025.

27. Exhibits 6, 7 and 8 do not meet the requirements for presumed authenticity under NRS 52.125, as the exhibits are not certified copies of public records.

28. Pursuant to NRS 47.150, a judge or court may take judicial notice, whether requested to or not. Further, a judge or court shall take judicial notice if requested by a party and supplied with the necessary information. NRS 47.150. Here, no party requested this Court to take judicial notice of the California court records contained in the exhibits Exhibit 6 to the *Rule 60(b) Motion* and the *Reply* based on certified copies. The Court exercises its discretion and declines to take judicial notice here.

29. Moreover, even if Exhibits 6, 7 and 8 could be authenticated, the statements contained in those exhibits regarding Mr. Moquin's alleged mental disorder and condition, are inadmissible lay opinion about bipolar disorder and would still be inadmissible hearsay, as they were apparently authored by Mr. Moquin's wife, and Plaintiffs are offering them to prove that Mr. Moquin suffers from bipolar disorder and his life was in "shambles."

30. A number of *Reply* Exhibits and discussed in *Reply Willard Declaration* also contain inadmissible hearsay.

31. All of the texts and emails offered by Plaintiffs and authored by Mr. Moquin or Mr. O'Mara constitute inadmissible hearsay under NRS 51.035 and 51.065.

32. Specifically, Exhibit 2 and 3 to the *Reply*, the text messages authored by Mr. Moquin in Exhibit 4, the text messages authored by Mr. Moquin in Exhibit 7, the email authored by Mr. Moquin in Exhibit 8, and the emails authored by Mr. Moquin in Exhibit 10 are therefore disregarded as inadmissible hearsay.

33. Exhibits attached to the *Reply* also contain communications occurring after this Court issued its *Order Granting Motion to Strike* and its *Order Granting Sanctions.*

34. All of statements in the *Reply Willard Declaration* set forth after Paragraph 37 detail events and communications from late January, 2018 through late May, 2018, all of which occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order. Willard Declaration* ¶¶ 37-67.

35. Exhibits 5, 6, 7, 8, 9, and 10 to the *Reply* contain only communications and descriptions of events that occurred after this Court issued its *Order Granting Motion to Strike, Order Granting Sanctions, and Sanctions Order.*

36. Logically, relevant events asserted to support Plaintiffs' argument of excusable neglect must have necessarily occurred prior to the entry of the orders Plaintiffs seek to set aside.

37. Statements in the *Reply Willard Declaration* after Paragraph 37 and Exhibits 5, 6, 7, 8, 9, and10 to the *Reply* are not relevant to this Court's determination of

whether Plaintiffs have met their burden of proving excusable neglect under NRCP 60(b).

38. Competent and substantial evidence has not been presented to establish *Rule 60(b) Relief.*

Notwithstanding Plaintiff's Lack of Admissible Evidence, Plaintiffs Fail to Meet their Burden under Rule 60(b) to Set Aside the *Sanctions Order* and *Order Granting Motion to Strike.*

39. Under Nevada law, "'clients must be held accountable for the acts and omissions of their attorneys.'" *Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 204, 322 P.3d 429, 433 (2014) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). The client "'voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts of omissions of this freely selected agent.'" *Huckabay Props.*, 130 Nev. at 204, 322 P.3d at 433 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (rejecting the argument that petitioner's claim should not have been dismissed based on counsel's unexcused conduct because petitioner voluntarily chose his attorney).

40. In *Huckabay Props.*, the Nevada Supreme Court dismissed an appeal where appellant's counsel failed to file an opening brief following two granted extensions and a court order granting appellants a final extension. *Huckabay Props.*, 130 Nev. 209, 322 P.3d at 437. In *Huckabay Props.,* the appellant was represented by

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two attorneys. In dismissing the appeal, and applicable to civil litigation at the trial court level here, the Court held:

> Nevada's jurisprudence expresses a policy preference for merits-based resolution of appeals, and our appellate procedure rules embody this policy, among others, litigants should not read the rules or any of this court's decisions as endorsing noncompliance with court rules and directives, as to do so risks forfeiting appellate relief. In these appeals, appellants failed to timely file the opening brief and appendix after having been warned that failure to do so could result in the appeals' dismissals. Appellants actually had two attorneys who received copies of this court's notices and orders regarding the briefing deadline, but they nevertheless failed to comply with briefing deadlines and court rules and orders . . . and an appeal may be dismissed for failure to comply with court rules and orders and still be consistent with the court's preference for deciding cases on their merits, as that policy must be balanced against other policies, including the public's interest in an expeditious appellate process, the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration considerations, such as case and docket management. As for declining to dismiss the appeal because the dilatory conduct was occasioned by counsel, and not the client, that reasoning does not comport with general agency principles, under which a client is bound by its civil attorney's actions or inactions.

Huckabay Props. v. NC Auto Parts, 130 Nev. at 209, 322 P.3d at 437.

41. In *Huckabay Props.,* however, the court recognized exceptional circumstances providing two possible exceptions "to the general agency rule that the 'sins' of the lawyer are visited upon his client where the lawyer's addictive disorder and abandonment of his legal practice or criminal conduct justified relief for the victimized client." *Id.* at 204 n.4, 322 P.3d at 434 n.4 (citing *Passarelli*, 102 Nev. at 286). Notably, these exceptions noted by the court in *Huckabay Props.* are not present here, as the facts of *Pasarelli* are readily distinguishable.

42. First, in *Passarelli*, the record included evidence the attorney suffered from a substance abuse disorder that resulted in missed office days and appointments and an inability to function. *Passarelli*, 102 Nev. at 285. Second, the attorney voluntarily

closed his law practice. *Id.* Third, the attorney was placed on disability inactive status by the Nevada Bar. *Id.* Finally, the client in *Passarelli* had only one attorney. *Id.*

43. None of these facts are present in this case. As concluded, *supra*, no competent, reliable and admissible evidence of Mr. Moquin's claimed mental disorder is before this Court. Further, there is no evidence of missed meetings or absences from office due to the claimed conditions. There is no evidence that Mr. Moquin closed his law practice.

44. Mr. Moquin is on active status with the California Bar. *Opposition to Rule 60(b) Motion*, Ex. 5; *Attorney Search, The State Bar of California, http://members.calbar.ca.gov/fal/LicenseeSearch* (last visited Nov. 30, 2018).

45. Pursuant to NRS 47.150, the Court may take judicial notice, whether requested or not. A fact subject to judicial notice must be either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. NRS 47.130. It follows that the State Bar of California provides accurate information regarding licensing of attorneys which cannot be reasonably questioned. The Court takes judicial notice of Mr. Moquin's active status.

46. Applied here, the *Huckabay Props./Passarelli* analysis compels denial of the *Rule 60(b) Motion*. The standard for "excusable neglect" based on activities of a party's attorney requires the attorney be completely unable to respond or appear in the proceedings. *See Passarelli*, 102 Nev. at 285 (court found excusable neglect where attorney failed to attend trial due to psychiatric disorder which caused him to shut down his practice and was placed on disability inactive status by the State Bar of Nevada); *see also Cicerchia v. Cicerchia*, 77 Nev. 158, 160-61, 360 P.2d 839, 841 (1961) (court

found excusable neglect where respondent lived out of state and suffered a nervous breakdown shortly after retaining out of state counsel, who was unaware and uninformed of the time to appear).

47. Here, Plaintiffs' attorneys did not completely abandon the case. Rather, the Nevada Rules of Civil Procedure, this Court's express orders, and Defendants' requests for damages computations and expert disclosures were ignored. Further, this Court granted, upon was also ignored.

48. Plaintiffs attempt to excuse this conduct in their *Rule 60(b) Motion* by claiming Mr. Moquin had suffered a complete mental breakdown and his personal life was "in shambles." In addition, to the preclusion of evidence discussed, *supra*, the evidence is vague at best regarding these assertions and vague regarding if, and when, Mr. Moquin's alleged disorder impaired him and are vague in asserting when any of the alleged events took place. Plaintiffs do attach additional exhibits to their *Reply* that offer some information on timing but are inadequate for the Court's determination.

49. Specifically, Exhibit 2 to the *Reply* appears to be a text string between Mr. Willard and Mr. Moquin from December 2, 2017 through December 6, 2017, in which Mr. Willard inquires about the status of Plaintiffs' filing in response to the *Motion for Sanctions*. *Reply*, Ex. 2. The text messages reflect Mr. Willard was aware of the initial deadline, December 4, 2017, for Plaintiffs to respond to the *Motion for Sanctions* (based on the November 15, 2017 filing date and electronic service).

50. Defendants agreed to extensions through 3:00 pm on December 6, 2017 for Plaintiffs to file their oppositions.

51. The Court granted an additional extension through December 18, 2018.

52. Plaintiffs had knowledge of the initial filing deadline. They were aware no opposition papers were filed. Mr. Willard continued to communicate with both Mr. Moquin and Mr. O'Mara from December 11 until December 25, 2017 regarding the delinquent filings (*Reply,* Ex. 3, 4), well after this Court's final filing deadline of December 18, 2017. *Sanctions Order* ¶ 95.

53. Despite knowing no oppositions had been filed, neither Mr. Willard (through Mr. O'Mara), Mr. Moquin, nor Mr. O'Mara contacted Defendants' counsel or this Court to address the status of this case. *Sanctions Order* ¶ 98.

54. Plaintiffs did nothing to apprise this Court of any issues until they filed the *Rule 60(b) Motion*.

55. Plaintiffs started looking for attorneys who might be able to help. *Reply Willard Declaration* ¶ 36. Plaintiffs instead provided personal financial assistance to Mr. Moquin and did not terminate his services. *WD* ¶ 71; *RWD* ¶ 39.

56. Plaintiffs knew timely oppositions were not filed.

57. Plaintiffs chose to retain Mr. Moquin and did not terminate his representation, even after becoming aware that he did not file a timely response to the *Motion for Sanctions*. Plaintiffs cannot now avoid the consequences of the acts of omissions of their freely selected agent.

58. Plaintiffs voluntarily chose to stop seeking new counsel to assist and chose to continue to rely on Mr. Moquin solely for financial reasons. *Willard Declaration* ¶ 81.

59. Plaintiffs' multiple instances of non-compliance, including the Plaintiffs failure to provide a compliant damages disclosure in this action, is reflected in the court file for this proceeding, occurring well before Mr. Moquin's purported breakdown in

December, 2017 or January, 2018 asserted as preventing him from opposing the motions.

60. Mr. O'Mara was counsel of record and did not report any issues related to Mr. Moquin to this Court until the filing of his *Notice* in March. *Notice, 1.*

61. The Court gave counsel notice of the seriousness of Plaintiffs' violations and expressed it was considering dismissal based on those violations. *Opposition to Rule 60(b) Motion*. Ex. 3, December 12, 2017 Transcript ("you need to know going into these oppositions, that I'm very seriously considering granting all of it . . . I haven't decided it, but I need to see compelling opposition not to grant it."). Plaintiffs and their attorneys were given notice of the potential consequence of failing to file an opposition to the *Sanctions Motion.*

62. Mr. Moquin did not abandon Plaintiffs. He appeared at status hearings, participated in depositions, filed motions and other papers, including a lengthy opposition to Defendants' motion for partial summary judgment. Mr. Moquin participated in oral arguments and filed two summary judgment motions with substantial supporting exhibits and detailed declarations.

63. A party "cannot be relieved from a judgment [order] taken against him in consequence of the neglect, carelessness, forgetfulness, or inattention of his attorney," *Cicerchia*, 77 Nev. at 161.

Plaintiffs Knew of Mr. Moquin's Alleged Condition and Alleged Non-responsiveness prior to the *Sanctions Order* and <u>did Nothing and, therefore, Cannot Establish Excusable Neglect.</u>

64. In the *Willard Declaration* and *Reply Willard Declaration,* Mr. Willard admits he knew Mr. Moquin was having personal financial difficulties and that he borrowed money from friends and family to fund Mr. Moquin's personal expenses. *WD*

¶¶ 63-65; *RWD* ¶ 11-13. Mr. Willard also admits that he recommended a psychiatrist to Mr. Moquin and he again borrowed money from a friend to pay for Mr. Moquin's treatment. *WD* ¶¶ 68-71; *RWD* ¶ 11-13. Mr. Willard was aware of Mr. Moquin's alleged problems prior to this Court's *Order Granting Motion to Strike and Sanctions Order*, yet continued to allow Mr. Moquin to represent Plaintiffs.

65. Mr. Willard was aware of Mr. Moquin's inaction which distinguishes this case from the cases upon which Plaintiffs rely in the *Rule 60(b) Motion*, where the parties were unaware of their attorneys' problems. *See e.g., Passarelli*, 102 Nev. at 286 ("Passarelli was effectually and unknowingly deprived of legal representation") (emphasis added); *U.S. v. Cirami*, 563 F.2d 26, 29-31 (2d Cir. 1977) (client discovered that attorney had a mental disorder that prevented him from opposing summary judgment more than two years later); *Boehner v. Heise*, 2009 WL 1360975 at *2 (S.D.N.Y. 2009) (client did not learn case had been dismissed or and did not learn of attorney's mental condition until several months after dismissal). Here, Mr. Willard knew of the actions that supported the *Sanctions Order*.

66. Mr. Willard admits he was informed by Mr. O'Mara prior to the dismissal of the Plaintiffs' claims that Mr. Moquin was not responsive. Plaintiffs failed to replace Mr. Moquin or take other action due to perceived financial reasons. *Willard Declaration* ¶81. Plaintiffs' knowledge and inaction vitiates excuse for neglect.

67. The *Rule 60(b) Motion* cites authority for the proposition that even "where an attorney's mishandling of a movant's case stems from the attorney's mental illness," which might justify relief under Rule 60(b). However, "client diligence must still be shown." *Cobos v. Adelphi Univ.*, 179 F.R.D. 381, 388 (E.D.N.Y. 1998); see also *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993) ("A party has a

duty of diligence to inquire about the status of a case...."); *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985) ("This Court has pointedly announced that a party has a duty of diligence to inquire about the status of a case....").

68. Mr. Willard's claim that he had no choice but to continue working with Mr. Moquin due to financial issues lacks credibility as he admits he was able to borrow money to fund Mr. Moquin's personal life and medical treatment. It logically follows he had resources to retain new attorneys at the time.

69. Plaintiffs have not established by substantial evidence that they exercise diligence to rectify representation in their case despite ample knowledge of Mr. Moquin's non-responsiveness.

The *Rule 60(b) Motion* should be Denied because Two Attorneys Represented Plaintiffs had an Obligation to Ensure Compliance with the Nevada Rules of Civil Procedure and this Court's Orders.

70. Plaintiffs' *Rule 60(b) Motion* ignores the fact David O'Mara served as local counsel. In Nevada, the responsibilities of local counsel are clearly defined, and encompass active responsibility to represent the client and manage the case:

> (a) The Nevada attorney of record shall be responsible for and actively participate in the representation of a client in any proceeding that is subject to this rule.
> (b) The Nevada attorney of record shall be present at all motions, pre-trials, or any matters in open court unless otherwise ordered by the court.
> (c) The Nevada attorney of record shall be responsible to the court...for the administration of any proceeding that is subject to this rule and for compliance with all state and local rules of practice. It is the responsibility of Nevada counsel to ensure that the proceeding is tried and managed in accordance with all applicable Nevada procedural and ethical rules.

SCR 42(14). Mr. O'Mara's representation, even if contractually limited, was governed by this rule.

71. Mr. O'Mara expressly "consent[ed] as Nevada Counsel of Record to the designation of Petitioner to associate in this cause pursuant to SCR 42" as part of his *Motion to Associate Counsel. Motion to Associate Counsel.*

72. Mr. O'Mara attended every hearing and court conference in this case. And, among other things, Mr. O'Mara signed the Verified Complaint and the First Amended Verified Complaint. *Complaint*; *FAC.*

73. WDCR 23(1) provides:

> Counsel who has appeared for any party shall represent that party in the case and shall be recognized by the court and by all parties as having control of the client's case, until counsel withdraws, another attorney is substituted, or until counsel is discharged by the client in writing, filed with the filing office, in accordance with SCR 46 and this rule.

WDCR 23.

74. Mr. O'Mara was the sole signatory on Plaintiffs' deficient initial disclosures, (*Opposition to Rule 60(b) Motion,* Ex. 6), the uncured deficiencies of which were a basis for sanction of dismissal. *Sanctions Order.*

75. Mr. O'Mara also signed and filed the *Brief Extension Request* with this Court representing,

> Counsel has been diligently working for weeks to respond to Defendant's serial motions, which include seeking dismissal of Plaintiffs' case. With the full intention of submitting said responses, Counsel for Plaintiffs encountered unforeseen computer issues.... Counsel for Plaintiffs is confident that with a one-day extension they will be able to recreate and submit the oppositions to Defendants' three motions.

Brief Extension Request.

76. Mr. O'Mara's involvement precludes a conclusion of excusable neglect here.

The *Sanctions Order* was Sufficient under Nevada Law

77. Plaintiffs assert that the *Sanctions Order* was insufficient under *Young v. Johnny Ribeiro*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) because the *Sanctions Order* did not consider "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." *Rule 60(b) Motion* at 12. However, consideration of this factor is discretionary, not mandatory. See *Young v. Johnny Ribeiro*, 106 Nev. at 93 ("The factors a court **may** properly consider include . . . whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney") (emphasis supplied).

78. The Court concludes factors enumerated in *Young v. Johnny Ribeiro Bldg., Inc.* were met by the *Sanctions Order*. Specifically, the Nevada Supreme Court held where a court issues an order of dismissal with prejudice as a discovery sanction a court may consider, among others, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, and the feasibility and fairness of alternative, less severe sanctions. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. at 93. The factors are not mandatory so long as the Court supports the order with "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Id.*

79. While each suggested factor discussion in the *Sanctions Order* was not labeled by factor, the Court addressed the factors it deemed appropriate.

80. In light of the circumstances in this case, the dismissal of Plaintiffs' claims did not unfairly penalize Plaintiffs based on the factors analyzed in the *Sanctions Order*. 80.

81. Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment and not an order, as here, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

The *Rule 60(b) Motion* should be Denied.

82. After weighing the credibility and admissibility of the evidence provided in support of the *Rule 60(b) Motion,* substantial evidence has not been presented to establish excusable neglect.

83. Plaintiffs have failed to meet their burden of proving, by a preponderance of the evidence, excusable neglect so as to justify relief under NRCP 60(b).

ORDER

Based upon the foregoing, Plaintiffs' *Rule 60(b) Motion* is **DENIED**, in its entirety.

DATED this 30th day of November, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 30 day of November, 2018, I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

RICHARD WILLIAMSON, ESQ.

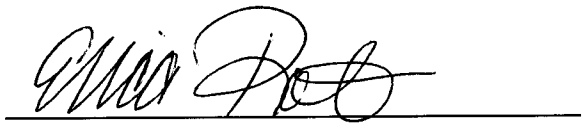
JONATHAN TEW, ESQ.

BRIAN IRVINE, ESQ.

ANJALI WEBSTER, ESQ.

JOHN DESMOND, ESQ.

And, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true and correct copy of the attached document addressed as follows:



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Jacqueline Bryant
Clerk of the Court
Transaction # 7018896

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DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
Nevada Bar No. 5618
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Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual

Defendants.

CASE NO. CV14-01712

DEPT. 6

_____/

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

~~[PROPOSED]~~ JUDGMENT

This action, having come before this Court, the Honorable Lynne K. Simons presiding, and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice.

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///

IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are dismissed without prejudice.

DATED this 11th day of December, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
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Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

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Jacqueline Bryant
Clerk of the Court
Transaction # 7019340

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DICKINSON WRIGHT, PLLC
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Attorney for Berry Hinckley Industries and Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD E. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, Plaintiffs, vs. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an Individual; Defendants. _____/ BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual; Counterclaimants, vs LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;	CASE NO. CV14-01712 DEPT. 6

Counter-defendants.

_____/

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that on December 11, 2018, a Judgment was entered in the above-captioned matter in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice. A true and correct copy of the order is attached hereto as **Exhibit 1.**

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 11th day of December, 2018.

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
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Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT PLLC, and that on this date, pursuant to NRCP 5(b); I am serving a true and correct copy of the attached **NOTICE OF ENTRY OF JUDGMENT** on the parties through the Second Judicial District Court's E-Flex filing system to the following:

Richard D. Williamson, Esq.
Jonathan Joel Tew, Esq.
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3287 Ruffino Lane
San Jose, California 95148

DATED this 11th day of December, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

Exhibit	Description	Pages[1]
1	December 11, 2018, Judgment	3

[1] Exhibit page counts are exclusive of exhibit slip sheets.

F I L E D
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Jacqueline Bryant
Clerk of the Court
Transaction # 7019340

EXHIBIT 1

EXHIBIT 1

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2018-12-11 03:23:03 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7018896

1880
DICKINSON WRIGHT, PLLC
JOHN P. DESMOND
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Email: Awebster@dickinsonwright.com

Attorney for Defendants
Berry Hinckley Industries and
Jerry Herbst

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual

Defendants.

CASE NO. CV14-01712

DEPT. 6

_____/

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual;

Counterclaimants,

vs

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation;

Counter-defendants.

_____/

~~[PROPOSED]~~ JUDGMENT

This action, having come before this Court, the Honorable Lynne K. Simons presiding, and all of the claims of Plaintiffs Larry J. Willard, individually and as trustee of the Larry James Willard Trust (the "Willard Plaintiffs"), having been dismissed by this Court with prejudice in its Findings of Fact, Conclusions of Law, and Order on Defendants' Motion for Sanctions filed herein on March 6, 2018, this Court having denied the Willard Plaintiffs' NRCP 60(b) Motion for Relief on November 30, 2018, and all of the counterclaims of Defendants Berry-Hinckley Industries ("BHI") and Jerry Herbst having been dismissed by this Court in its Order granting Defendants' Motion for voluntary dismissal filed herein on April 13, 2018,

IT IS ORDERED AND ADJUDGED that Judgment is entered in favor of Defendants and against the Willard Plaintiffs on all of the Willard Plaintiffs' claims and that such claims are dismissed with prejudice.

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IT IS FURTHER ORDERED AND ADJUDGED that Defendants' counterclaims are dismissed without prejudice.

DATED this 11th day of December, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
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Email: Awebster@dickinsonwright.com

Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

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2015-09-03 10:32:10 AM
Jacqueline Bryant
Clerk of the Court
Transaction #5125808

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES - HEARING	CONT'D TO
8/17/2015 HONORABLE LYNNE SIMONS DEPT. NO. 6 Y. GENTRY (Clerk) Amundson (Reporter) A. Bickerton (Bailiff)	**ORDER TO SHOW CAUSE** Attorney David O'Mara was present on behalf of Plaintiffs. Attorney Brian Moquin was present, via telephone, on behalf of Plaintiffs. Attorney Brian Irvine was present on behalf of Defendants. COURT advised this is the time set for a Status Hearing. Appearances put on the record. COURT advised that it has requested Discovery Commissioner Ayers to be present today. COURT further advised that there are several motions in front of the Court and with lack of opposition: Defendant's second motion to compel discovery responses and a motion for contempt. Counsel O'Mara addressed the Court and advised the Motion for Contempt is for Third Party. COURT GRANTED Second Motion for Discovery; that there was no opposition; no response filed. COURT further advised that the jury trial is approaching in January; that there is not a lot of room regarding production; that Plaintiffs should be in position to file all documents and to go forward with full production. COURT further advised that Commissioner Ayers is going to handle discovery and set scheduling and hearings regarding status. Counsel Moquin addressed the Court and advised that Plaintiffs have not filed an opposition to Defendant's Second Motion to Compel Discovery. Counsel presented argument of why not, personal issues; that there shouldn't be any other issues going forward. COURT GRANTED Second Motion to Compel Discovery Responses. Court read order into record for Counsel Moquin, who was present by phone.	

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES - HEARING	CONT'D TO
8/17/2015 HONORABLE LYNNE SIMONS DEPT. NO. 6 Y. GENTRY (Clerk) Amundson (Reporter) A. Bickerton (Bailiff)	**ORDER TO SHOW CAUSE** COURT further advised it will entertain fees and costs, but Defendants did not file affidavit. Counsel Irvine advised there are several depositions coming up back to back and is requesting response by Noon Wednesday; that another motion to compel has not been filed and counsel does not want to file, but need production of documents. Counsel presented argument regarding four (4) outstanding documents; that counsel just wants discovery pursuant to 16.1. COURT issued general admonishment; that delays have to stop; that consequences will come if further delays. "If you can produce it, you can use it." Counsel O'Mara addressed the Court and requested to keep hearing going with Commissioner Ayers since everyone is present. Counsel Irvin concurred with Counsel O'Mara. COURT closed the hearing before the Court and handed over to Discovery Commission Ayers. COURT and staff left courtroom.	

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Clerk of the Court
Transaction # 5926360

CASE NO. CV14-01712 LARRY WILLARD ET AL V BERRY-HINCKLEY ETAL

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES - HEARING	CONT'D TO
1/10/17 HONORABLE LYNNE SIMONS DEPT. NO. 6 Y. GENTRY (Clerk) Eisenberg (Reporter) Masters (Bailiff)	ORAL ARGUMENTS RE: MOTION FOR PARTIAL SUMMARY JUDGMENT Attorneys David O'Mara and Brian Moquin were present on behalf of Plaintiffs. Plaintiffs Larry Willard and Edward Wooley were present. Attorney Brian Irvine was present on behalf of Defendants, Berry-Hinckley et al. Appearances put on the record. COURT advised it has read pleadings. Counsel may proceed with arguments. Counsel Irvine addressed the Court regarding filing motion for summary judgment; that counsel would like to focus remaining issues to streamline presentation regarding future motions for summary judgments and trial. Counsel presented argument regarding Plaintiffs seeking damages for future restitution and unforeseeable damages in the future; damages are overreaching and Plaintiffs are not entitled. Counsel argued Willard Plaintiffs are seeking 4.4 million in earnest money; 3 million in tax consequences; and $500k in closing costs; that Willard Plaintiffs are also seeking attorney fees damages. Counsel presented further argument regarding fee damages associated with Plaintiff's bankruptcy. Counsel presented further argument regarding Plaintiff's Baring Boulevard claim of damages; that all damages are precluded under Nevada law. Counsel cited Hilton Hotel case. Discussion ensued between Court and Counsel Irvine regarding Hilton case. Counsel presented further argument requesting partial summary judgment; that burden has not been met by Plaintiffs. Counsel cited Margolese, Enak Realty, and Boise cases regarding rents/leases; that summary judgment should be granted under Rule 56e. Counsel presented argument regarding claim of damages for Baring Boulevard property and when lease was executed; that Wooley Plaintiffs did not own property at time of executed lease. Counsel Irvine presented argument regarding attorney fees damages; cited Homes v Liu. Counsel reiterated that all damages are precluded as a matter of law under Nevada law. Discussion ensued regarding Margolese case being binding on this case. Counsel Irving further addressed the Court regarding section 20b (of the lease) is sole source of remedy. Further discussion ensued. Counsel Moquin addressed the Court and presented argument in opposition of section 20b; that it is not the sole source of remedy; that section 15 also applies. Discussion ensued between Court and Counsel Moquin regarding language in agreements and damages. Counsel Moquin advised Court that Plaintiffs are withdrawing on closing costs and cost associated with short sale. Counsel argued further regarding tax consequences and earnest monies.	

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES - HEARING	CONT'D TO
1/10/17 HONORABLE LYNNE SIMONS DEPT. NO. 6 Y. GENTRY (Clerk) Eisenberg (Reporter) Masters (Bailiff)	ORAL ARGUMENTS RE: MOTION FOR PARTIAL SUMMARY JUDGMENT Discussion between Court and Counsel Moquin regarding withdrawing of claims and diminution of value claim. Counsel Moquin presented further argument opposing summary judgment and argued further regarding indemnification clause. 10:53 a.m. Court recessed for morning break. 11:25 a.m. Court reconvened. All parties present. Counsel Moquin advised that Plaintiff Wooley paid taxes. Counsel presented further argument regarding lease agreements; subrogation agreement; damages provisions. Counsel Irvine further addressed the Court and argued further for summary judgment; argued concept of foreseeability; that Plaintiffs didn't argue attorney fees. Counsel Irvine argued regarding indemnity provision regarding third party claims and damages. Cited Boise, May Department Store, Pacificorp, and Kmart cases. Counsel argued further opposing attorney fees; that they can only be recovered as special damages; that plaintiff should be precluded from seeking; that all damages sought by Plaintiffs are all precluded as a matter of law. Counsel further argued regarding Plaintiffs claims and 16.1 issues. COURT advised it has applied Rule 56 standards. COURT FOUND Motion for summary Judgment should be GRANTED: As to Willard Plaintiffs, short sale damages incurred as a result of selling property, tax consequence because of canceling mortgage debt and closing costs, and attorney fees because of voluntary bankruptcy and California action. As to Wooley Plaintiffs, the Court is considering Summary Judgment as it relates to $600,000.00 in damages because of selling of Baring property and attorney fees in California action. COURT FOUND Christopher Holmes v Liu case applies regarding special damages regarding attorney fees. COURT ORDERED Counsel Irvine to prepare proposed order with conclusions of law and applicable authority. Proposed order is to be prepared within 15 days. COURT FURTHER ORDERED Plaintiffs to serve within 15 days an entry of Summary Judgment and an updated 16.1 disclosure. Court adjourned.	

CASE NO. CV14-01712 **LARRY J. WILLARD, ETAL VS. BERRY HINCKLEY, ETAL**

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Jacqueline Bryant
Clerk of the Court
Transaction # 6572395

DATE, JUDGE OFFICERS OF COURT PRESENT	APPEARANCES-HEARING	CONT'D TO
12/12/17 HONORABLE LYNNE K. SIMONS DEPT. NO. 6 J. Martin (Clerk) D. Cecere (Reporter)	**PRE-TRIAL CONFERENCE** David O'Mara, Esq. was present on behalf of the Plaintiffs. Brian Moquin, Esq. was present on behalf of the Plaintiffs. Brian Irvine, Esq. was present on behalf of the Defendants, Berry Hinckley and Jerry Herbst. **COURT** directed respective counsel to submit proposed orders to the Court; discussed Oral Arguments; and inquired as to the expected length of Trial. Counsel O'Mara discussed late filing of the oppositions. Counsel Irvine argued the Plaintiff's lack of compliance should result in dismissal of the matter. Counsel Irvine argued in opposition to a 4th continuance of the Trial date. Counsel Irvine indicated the Motion for Contempt filed July 24, 2015, was never submitted and he will withdraw that Motion. Discussion ensued regarding the procedural history of the matter. **COURT** granted Defendant extension to reply to the Motion for Summary Judgment until this Friday. Counsel O'Mara requested subsequent time to file oppositions to pending motions. Counsel Irvine argued against any extensions of time as the deadlines have passed. Counsel Moquin stated that the morning the oppositions were due he had computer issues and all of his work was lost. Counsel Moquin requested until Monday or Friday to respond. Counsel Irvine discussed the upcoming holidays and argued that there has been no compliance with rules or Court orders through this matter by Plaintiff. **COURT** indicated it is not inclined to continue the current Trial date; Plaintiff granted extension to oppose Defendant's three Motions; Plaintiff shall respond no later than December 18, 2017, at 10:00 a.m.; Defendant shall reply no later than January 8, 2018; Oral Arguments set for January 12, 2018, at 1:00 p.m.; Court further indicated there will be no further extensions of time granted; Court directed respective counsel to file Trial Statements no later than five judicial days prior to Trial and to include proposed findings of fact and conclusions of law.	

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2018-12-28 02:43:49 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7043398

Code 1350

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation; EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000,

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual ,

Defendants.

_____/

Case No. CV14-01712

Dept. No. 6

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual,

Counterclaimants,

vs.

LARRY J. WILLARD, individually and as trustee of the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION, a California corporation,

Counter-defendants.

_____/

CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 28th day of December, 2018, I electronically filed the Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court.

Dated this 28th day of December, 2018

Jacqueline Bryant
Clerk of the Court
By /s/ Yvonne Viloria
Yvonne Viloria
Deputy Clerk

HOLD TO LIGHT TO VIEW TRUE WATERMARK IN PAPER HEAT SENSITIVE RED LOCK DISAPPEARS WHEN HEATED

27726

ROBERTSON LAW FIRM, INC.
DBA ROBERTSON, JOHNSON, MILLER & WILLIAMSON
ACCOUNT # 1
50 W. LIBERTY, SUITE 600
RENO, NV 89501
(775) 329-5600

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DATE Dec 28, 2018

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*** Two Hundred Fifty ********** 00/100

PAY TO THE ORDER OF

Nevada Supreme Court
201 South Carson Street, Suite 201
Carson City, NV 89701-4702

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CV14-01712

Notes: Filing fee - Notice of appeal

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