EXHIBIT “18”

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FILED
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2535
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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.

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.

_____/

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

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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 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.

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EXHIBIT 1

EXHIBIT 1

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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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Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

EXHIBIT “17”

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Jacqueline Bryant
Clerk of the Court
Transaction # 7002654

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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.

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.

_____/

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
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Reno, Nevada 89501
Attorneys for Plaintiffs/Counterdefendants

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
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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.

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Transaction # 7002654

EXHIBIT 1

EXHIBIT 1

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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.

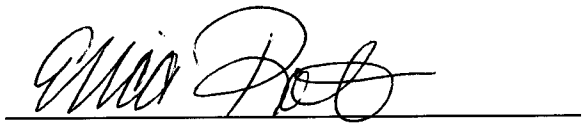
JONATHAN TEW, ESQ.

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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DICKINSON WRIGHT
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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 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 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 April 13, 2018, an Order was entered in the above-captioned matter dismissing the claims of Wooley plaintiffs 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 16th day of April, 2018.

DICKINSON WRIGHT

/s/ Brian R. Irvine

DICKINSON WRIGHT
JOHN P. DESMOND
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Email: Awebster@dickinsonwright.com

Attorney for Defendants Berry Hinckley Industries, and Jerry Herbst

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** on the parties as set forth below:

X Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices.

addressed as follows:

Edward C. and Judith A. Wooley
1173 Via Casa Palermo
Henderson, NV 89011

X By electronic service by filing the foregoing with the Clerk of Court using the E

Flex system, which will electronically mail the filing to the following individuals.

addressed as follows:

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

DATED this 16th day of April, 2018.

/s/ Mina Reel
An employee of Dickinson Wright, PLLC

EXHIBIT LIST

Exhibit	Description	Pages[1]
1	Order dismissing the claims of Wooley plaintiffs with prejudice, April 13, 2018	2

[1] Exhibit page count is exclusive of exhibit slip sheet.

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Transaction # 6630140

EXHIBIT 1

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DICKINSON WRIGHT, PLLC
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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]~~ ORDER OF DISMISSAL WITH PREJUDICE OF CLAIMS OF WOOLEY PLAINTIFFS

Pursuant to the Stipulation for Dismissal with Prejudice of the parties and other good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all of the claims of Plaintiffs EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 asserted in the above-entitled action are dismissed with prejudice, the parties to bear their own costs and attorney's fees.

IT IS SO ORDERED this 13 day of April, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

JOHN P. DESMOND
Nevada Bar No. 5618
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Attorneys for Defendants Berry Hinckley Industries, and Jerry Herbst

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EXHIBIT “15”

EXHIBIT “15”

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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.
_____/

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

Counterclaimants,

vs

CASE NO. CV14-01712

DEPT. 6

NOTICE OF ENTRY OF 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 April 13, 2018, an Order was entered in the above-captioned matter granting Defendants/Counterclaimants' Motion to Dismiss Counterclaims. 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 16th day of April, 2018.

DICKINSON WRIGHT

/s/ Brian R. Irvine

DICKINSON WRIGHT
JOHN P. DESMOND
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Email: Awebster@dickinsonwright.com

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 ORDER** on the parties through the Second Judicial District Court's EFlex 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

DATED this 16th day of April, 2018.

/s/ Mina Reel
An employee of DICKINSON WRIGHT

EXHIBIT LIST

Exhibit	Description	Pages[1]
1	Order Granting Defendants/Counterclaimants' Motion to Dismiss Counterclaims, April 13, 2018	3

[1] Exhibit page count is exclusive of exhibit slip sheet.

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EXHIBIT 1

EXHIBIT 1

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Jacqueline Bryant
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DICKINSON WRIGHT, PLLC
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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] ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS

Before this Court is Defendants/Counterclaimants' Motion to Dismiss Counterclaims, filed on March 8, 2018. No opposition was ever filed.

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. DCR 13(3). Thus, the Court finds that Plaintiffs' failure to file an opposition to Defendants' Motion constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting said Motion.

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Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss ALL JAS Counterclaims is granted.

DATED this 13th day of ~~March~~ April, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

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Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

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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 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

DICKINSON WRIGHT
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Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

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:

Brian P. Moquin
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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EXHIBIT 1

EXHIBIT 1

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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).

---

[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.

<u>The Parties' December 2016 Correspondence</u>

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.").

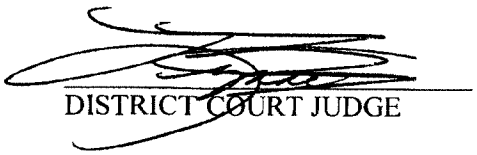
174. Indeed, this Court held a hearing on December 12, 2017, which was attended by both of Plaintiffs' counsel. As Plaintiffs have not filed anything with this Court since that hearing, or otherwise provided any new information, there would be nothing new to discuss at another hearing. *See* DCR 13(3).

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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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:

_____

EXHIBIT “13”

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EXHIBIT “13”

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Attorney for Defendants
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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 **NOTICE OF ENTRY OF ORDER**

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.

_____/

PLEASE TAKE NOTICE that on January 4, 2018, an Order Granting Defendants' Motion for Partial Summary Judgment [Oral Argument Requested]. 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 5th day of January, 2018.

DICKINSON WRIGHT

/s/ Brian R. Irvine

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Email: Awebster@dickinsonwright.com

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 ORDER** on the parties through the Second Judicial District Court's EFlex filing system to the following:

Brian P. Moquin
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 5th day of January, 2018.

/s/ Cindy S. Grinstead
An employee of DICKINSON WRIGHT

EXHIBIT LIST

Exhibit	Description	Pages[1]
1	Order Granting Defendants' Motion for Partial Summary Judgment [Oral Argument Requested], January 4, 2018	5

[1] Exhibit page count is exclusive of exhibit slip sheet.

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EXHIBIT 1

EXHIBIT 1

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Transaction # 6466867

CODE NO. 3370

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,

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;

Counter-defendants.

_____/

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT REQUESTED]

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT REQUESTED]

Before this Court is *Defendants' Motion for Partial Summary Judgment [Oral Argument Requested]* ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motio*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

I. FACTUAL AND PROCEDURAL HISTORY

This case arises out of two commercial lease agreements entered into between Plaintiffs, as lessors, and Defendants, as lessees, for the Subject Properties located at 1820 East U.S. Highway 50, Carson City, Nevada (the "Highway 50 Property") and 7605 – 7699 S. Virginia Street, Reno, Nevada (the "Virginia Property"). See *Complaint*, pp. 3-7. On November 15, 2017, Defendants filed their *Motion*, seeking an *Order* of this Court granting summary judgment for Defendants with respect to Plaintiffs' claim for "diminution in value" damages arising out of Defendants' alleged breach of the lease agreements. See *Motion*, generally. Plaintiffs failed to oppose the *Motion*. As a result, Defendants filed a *Notice of Non-Opposition* and submitted the matter for decision on December 7, 2017.

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On December 6, 2017, Plaintiffs filed *Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions* ("Request for Extension"), by and through their counsel, Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara").[1]

At a Status Hearing on December 12, 2017, the Court granted Plaintiffs' *Request for Extension* and directed Plaintiffs to respond no later than Monday, December 18, 2017 at 10:00 A.M.[2] The Court further directed Defendants to reply no later than January 8, 2018 and set the *Motion* for oral argument on January 12, 2018.

Plaintiffs once again failed to respond to the *Motion* or request an extension. Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

II. LAW AND ANALYSIS

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. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion* constitutes both an admission that the *Motion* is meritorious and Plaintiffs' consent to granting said *Motion*.

However, in light of this Court's *Order Granting Defendants/Counterclaimants' Motion for Sanctions [Oral Argument Requested]*, the Court finds Defendant's *Motion* is moot at this

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[1] Mr. Moquin is a California attorney who has been admitted to practice in Nevada *pro hac vice* and is litigating this case. Mr. O'Mara is serving as local counsel only.

[2] The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

juncture.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED *Defendants' Motion for Partial Summary Judgment* is DENIED as moot.

Dated this 4th day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 4th day of January, 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.
JOHN P. DESMOND, ESQ.
ANJALI D. WEBSTER, ESQ.
BRIAN MOQUIN, ESQ.
DAVID O'MARA, 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:

Bridi Pore

EXHIBIT “12”

EXHIBIT “12”

EXHIBIT “12”

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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 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 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 January 4, 2018, an Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich was entered. 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 5th day of January, 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 ORDER** on the parties through the Second Judicial District Court's EFlex filing system to the following:

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David C. O'Mara
THE O'MARA LAW FIRM
311 E. Liberty Street
Reno, Nevada 89501

DATED this 5th day of January, 2018.

/s/ Cindy S. Grinstead
An employee of DICKINSON WRIGHT

EXHIBIT LIST

Exhibit	Description	Pages[1]
1	Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich, January 4, 2018	5

[1] Exhibit page count is exclusive of exhibit slip sheet.

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EXHIBIT 1

EXHIBIT 1

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Transaction # 6466778

CODE NO. 3370

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,

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;

Counter-defendants.

_____/

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH

Before this Court is *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Motion to Strike"), filed November 14, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed a *Motion to Exceed Page Limit* in conjunction with their *Motion to Strike*. Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motion to Strike*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

On December 6, 2017, Plaintiffs filed *Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions* ("Request for Extension"), by and through their counsel, Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara").[1]

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[1] Mr. Moquin is a California attorney who has been admitted to practice in Nevada *pro hac vice* and is litigating this case. Mr. O'Mara is serving as local counsel only.

At a Status Hearing on December 12, 2017, the Court granted Plaintiffs' *Request for Extension* and directed Plaintiffs to respond no later than Monday, December 18, 2017 at 10:00 A.M.[2] The Court further directed Defendants to reply no later than January 8, 2018 and set the *Motion to Strike* for oral argument on January 12, 2018.

Plaintiffs once again failed to respond to the *Motion to Strike* or request an extension. Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

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. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion to Strike* constitutes both an admission that the *Motion to Strike* is meritorious and Plaintiffs' consent to granting said motion. In addition, the Court finds Defendants' *Motion to Strike* has merit. As such, the Court finds both the *Motion to Strike* and the *Motion to Exceed Page Limit* are granted.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

1. *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* is GRANTED. The testimony of Daniel Gluhaich will be excluded.

---

[2] The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

2. Defendants' *Motion to Exceed Page Limit* is GRANTED.

Dated this 16th day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 4th day of January, 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.
JOHN P. DESMOND, ESQ.
ANJALI D. WEBSTER, ESQ.
BRIAN MOQUIN, ESQ.
DAVID O'MARA, 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:

Heidi Brew

EXHIBIT “11”

EXHIBIT “11”

EXHIBIT “11”

FILED
Electronically
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2018-01-05 01:46:18 PM
Jacqueline Bryan
Clerk of the Court
Transaction # 6468357

2540
DICKINSON WRIGHT
JOHN P. DESMOND
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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 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 **NOTICE OF ENTRY OF ORDER**

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.

_____/

PLEASE TAKE NOTICE that on January 4, 2018, an Order Granting Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested]. 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 5th day of January, 2018.

DICKINSON WRIGHT

/s/ Brian R. Irvine

DICKINSON WRIGHT
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Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
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100 West Liberty Street, Suite 940
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Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

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 ORDER** on the parties through the Second Judicial District Court's EFlex filing system to the following:

Brian P. Moquin
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 5th day of January, 2018.

/s/ Cindy S. Grinstead
An employee of DICKINSON WRIGHT

EXHIBIT LIST

Exhibit	Description	Pages[1]
1	Order Granting Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested], January 4, 2018	5

[1] Exhibit page count is exclusive of exhibit slip sheet.

FILED
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2018-01-05 01:46:18 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6468357

EXHIBIT 1

EXHIBIT 1

FILED
Electronically
CV14-01712
2018-01-04 05:30:42 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6466861

CODE NO. 3370

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,

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;

Counter-defendants.

_____/

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS [ORAL ARGUMENT REQUESTED]

ORDER GRANTING DEFENDANTS'/
COUNTERCLAIMANTS' MOTION FOR SANCTIONS

Before this Court is *Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested]* ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed *Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions* ("Motion to Exceed Page Limit"). Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motion to Strike*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

On December 6, 2017, Plaintiffs filed *Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions* ("Request for Extension"), by and through their counsel, Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara").[1]

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//

[1] Mr. Moquin is a California attorney who has been admitted to practice in Nevada *pro hac vice* and is litigating this case. Mr. O'Mara is serving as local counsel only.

At a Status Hearing on December 12, 2017, the Court granted Plaintiffs' *Request for Extension* and directed Plaintiffs to respond no later than Monday, December 18, 2017 at 10:00 A.M.[2] The Court further directed Defendants to reply no later than January 8, 2018 and set the *Motion* for oral argument on January 12, 2018.

Plaintiffs once again failed to respond to the *Motion* or request an extension. Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

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. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion* constitutes both an admission that the *Motion* is meritorious and Plaintiffs' consent to granting said motion.

In addition, the Court finds Defendants' *Motion* has merit due to Plaintiffs' egregious discovery violations throughout the pendency of this litigation and repeated failure to comply with this Court's orders. As such, the Court finds both the *Motion* and the *Motion to Exceed Page Limit* should be granted. The Court further finds Plaintiffs' conduct warrants dismissal of this action under NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and the Nevada Supreme Court's decision in Blanco v. Blanco, 129 Nev. Adv. Op. 77, 311 P.3d 1170.

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[2] The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

1. *Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested]* is GRANTED.

2. *Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions* is GRANTED.

3. Defendants shall 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.

Dated this 11th day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 4th day of January, 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.
JOHN P. DESMOND, ESQ.
ANJALI D. WEBSTER, ESQ.
BRIAN MOQUIN, ESQ.
DAVID O'MARA, 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:

Heidi Brew

EXHIBIT “10”

EXHIBIT “10”

EXHIBIT “10”

FILED
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2018-12-11 03:23:03 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 7018896

1880
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Email: Jdesmond@dickinsonwright.com
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
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Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

EXHIBIT “9”

EXHIBIT “9”

EXHIBIT “9”

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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 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:

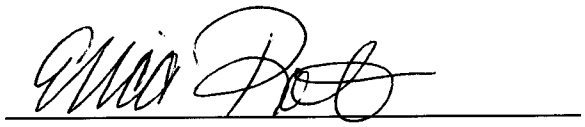

EXHIBIT “8”

EXHIBIT “8”

EXHIBIT “8”

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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 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.

<u>The Parties' December 2016 Correspondence</u>

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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Nevada Bar No. 5618
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Email: Awebster@dickinsonwright.com

Attorneys for Defendants
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:

_____

EXHIBIT “7”

EXHIBIT “7”

EXHIBIT “7”

FILED
Electronically
CV14-01712
2018-01-04 05:32:39 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6466867

CODE NO. 3370

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,

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;

Counter-defendants.

_____/

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT REQUESTED]

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT [ORAL ARGUMENT REQUESTED]

Before this Court is *Defendants' Motion for Partial Summary Judgment [Oral Argument Requested]* ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motio*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

I. FACTUAL AND PROCEDURAL HISTORY

This case arises out of two commercial lease agreements entered into between Plaintiffs, as lessors, and Defendants, as lessees, for the Subject Properties located at 1820 East U.S. Highway 50, Carson City, Nevada (the "Highway 50 Property") and 7605 – 7699 S. Virginia Street, Reno, Nevada (the "Virginia Property"). See *Complaint*, pp. 3-7. On November 15, 2017, Defendants filed their *Motion*, seeking an *Order* of this Court granting summary judgment for Defendants with respect to Plaintiffs' claim for "diminution in value" damages arising out of Defendants' alleged breach of the lease agreements. See *Motion*, generally. Plaintiffs failed to oppose the *Motion*. As a result, Defendants filed a *Notice of Non-Opposition* and submitted the matter for decision on December 7, 2017.

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On December 6, 2017, Plaintiffs filed *Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions* ("Request for Extension"), by and through their counsel, Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara").[1]

At a Status Hearing on December 12, 2017, the Court granted Plaintiffs' *Request for Extension* and directed Plaintiffs to respond no later than Monday, December 18, 2017 at 10:00 A.M.[2] The Court further directed Defendants to reply no later than January 8, 2018 and set the *Motion* for oral argument on January 12, 2018.

Plaintiffs once again failed to respond to the *Motion* or request an extension. Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Partial Summary Judgment* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

II. LAW AND ANALYSIS

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. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion* constitutes both an admission that the *Motion* is meritorious and Plaintiffs' consent to granting said *Motion*.

However, in light of this Court's *Order Granting Defendants/Counterclaimants' Motion for Sanctions [Oral Argument Requested]*, the Court finds Defendant's *Motion* is moot at this

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[1] Mr. Moquin is a California attorney who has been admitted to practice in Nevada *pro hac vice* and is litigating this case. Mr. O'Mara is serving as local counsel only.

[2] The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

juncture.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED *Defendants' Motion for Partial Summary Judgment* is DENIED as moot.

Dated this 4th day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 4th day of January, 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.
JOHN P. DESMOND, ESQ.
ANJALI D. WEBSTER, ESQ.
BRIAN MOQUIN, ESQ.
DAVID O'MARA, 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:

Heidi Pore

EXHIBIT “6”

EXHIBIT “6”

EXHIBIT “6”

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CV14-01712
2018-01-04 04:53:56 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6466778

CODE NO. 3370

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,

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;

Counter-defendants.

_____/

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION TO STRIKE AND/OR MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF DANIEL GLUHAICH

Before this Court is *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Motion to Strike"), filed November 14, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed a *Motion to Exceed Page Limit* in conjunction with their *Motion to Strike*. Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motion to Strike*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

On December 6, 2017, Plaintiffs filed *Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions* ("Request for Extension"), by and through their counsel, Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara").[1]

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//

[1] Mr. Moquin is a California attorney who has been admitted to practice in Nevada *pro hac vice* and is litigating this case. Mr. O'Mara is serving as local counsel only.

At a Status Hearing on December 12, 2017, the Court granted Plaintiffs' *Request for Extension* and directed Plaintiffs to respond no later than Monday, December 18, 2017 at 10:00 A.M.[2] The Court further directed Defendants to reply no later than January 8, 2018 and set the *Motion to Strike* for oral argument on January 12, 2018.

Plaintiffs once again failed to respond to the *Motion to Strike* or request an extension. Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

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. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion to Strike* constitutes both an admission that the *Motion to Strike* is meritorious and Plaintiffs' consent to granting said motion. In addition, the Court finds Defendants' *Motion to Strike* has merit. As such, the Court finds both the *Motion to Strike* and the *Motion to Exceed Page Limit* are granted.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

1. *Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich* is GRANTED. The testimony of Daniel Gluhaich will be excluded.

[2] The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

2. Defendants' *Motion to Exceed Page Limit* is GRANTED.

Dated this 4th day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 4th day of January, 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.
JOHN P. DESMOND, ESQ.
ANJALI D. WEBSTER, ESQ.
BRIAN MOQUIN, ESQ.
DAVID O'MARA, 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:

Heidi Brew

EXHIBIT “5”

EXHIBIT “5”

EXHIBIT “5”

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2018-01-04 05:30:42 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6466861

CODE NO. 3370

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,

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;

Counter-defendants.

_____/

Case No. CV14-01712

Dept. No. 6

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS [ORAL ARGUMENT REQUESTED]

ORDER GRANTING DEFENDANTS'/ COUNTERCLAIMANTS' MOTION FOR SANCTIONS

Before this Court is *Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested]* ("Motion"), filed November 15, 2017 by Defendants/Counterclaimants BERRY-HINCKLEY INDUSTRIES ("Berry-Hinckley") and JERRY HERBST ("Mr. Herbst") (collectively, "Defendants") by and through their counsel Brian Irvine, Esq. Also on November 14, 2017, Defendants filed *Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions* ("Motion to Exceed Page Limit"). Plaintiffs LARRY J. WILLARD, OVERLAND DEVELOPMENT CORPORATION, EDWARD C. WOOLEY and JUDITH WOOLEY (collectively, "Plaintiffs" unless individually referenced) failed to file an opposition to the *Motion to Strike*. As a result, Defendants filed a *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions* ("Notice of Non-Opposition") on December 7, 2017 and submitted the matter for decision thereafter.

On December 6, 2017, Plaintiffs filed *Plaintiffs' Request for a Brief Extension of Time to Respond to Defendants' Three Pending Motions, and to Extend the Deadline for Submission of Dispositive Motions* ("Request for Extension"), by and through their counsel, Brian P. Moquin, Esq. ("Mr. Moquin") and David C. O'Mara, Esq ("Mr. O'Mara").[1]

//

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//

//

[1] Mr. Moquin is a California attorney who has been admitted to practice in Nevada *pro hac vice* and is litigating this case. Mr. O'Mara is serving as local counsel only.

At a Status Hearing on December 12, 2017, the Court granted Plaintiffs' *Request for Extension* and directed Plaintiffs to respond no later than Monday, December 18, 2017 at 10:00 A.M.[2] The Court further directed Defendants to reply no later than January 8, 2018 and set the *Motion* for oral argument on January 12, 2018.

Plaintiffs once again failed to respond to the *Motion* or request an extension. Defendants then filed a second *Notice of Non-Opposition to Defendants'/Counterclaimants' Motion for Sanctions* ("Second Notice of Non-Opposition") and subsequent request for submission on December 18, 2017.

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. DCR 13(3). Thus, the Court finds Plaintiffs' failure to file an opposition to Defendants' *Motion* constitutes both an admission that the *Motion* is meritorious and Plaintiffs' consent to granting said motion.

In addition, the Court finds Defendants' *Motion* has merit due to Plaintiffs' egregious discovery violations throughout the pendency of this litigation and repeated failure to comply with this Court's orders. As such, the Court finds both the *Motion* and the *Motion to Exceed Page Limit* should be granted. The Court further finds Plaintiffs' conduct warrants dismissal of this action under NRCP 16.1(e)(3), NRCP 37(b)(2), NRCP 41(b), and the Nevada Supreme Court's decision in Blanco v. Blanco, 129 Nev. Adv. Op. 77, 311 P.3d 1170.

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[2] The Court inquired as to why Plaintiffs' failed to oppose the *Motion to Strike*. Mr. Moquin informed the Court that his computer had malfunctioned, and his drafts of Plaintiffs' oppositions could not be recovered. Mr. Moquin further explained he is a sole practitioner without access to an IT department.

Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

1. *Defendants'/Counterclaimants' Motion for Sanctions [Oral Argument Requested]* is GRANTED.

2. *Defendants/Counterclaimants' Motion to Exceed Page Limit on Defendants/Counterclaimants' Motion for Sanctions* is GRANTED.

3. Defendants shall 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.

Dated this 17th day of January, 2018.

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT; that on the 4th day of January, 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.
JOHN P. DESMOND, ESQ.
ANJALI D. WEBSTER, ESQ.
BRIAN MOQUIN, ESQ.
DAVID O'MARA, 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:

Heidi Brew

EXHIBIT “4”

EXHIBIT “4”

EXHIBIT “4”

FILED
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2018-04-13 11:12:19 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6628513

3105
DICKINSON WRIGHT, PLLC
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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]~~ ORDER OF DISMISSAL WITH PREJUDICE OF CLAIMS OF WOOLEY PLAINTIFFS

Pursuant to the Stipulation for Dismissal with Prejudice of the parties and other good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all of the claims of Plaintiffs EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 asserted in the above-entitled action are dismissed with prejudice, the parties to bear their own costs and attorney's fees.

IT IS SO ORDERED this 13 day of April, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

JOHN P. DESMOND
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BRIAN R. IRVINE
Nevada Bar No. 7758
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Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

EXHIBIT “3”

EXHIBIT “3”

EXHIBIT “3”

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CV14-01712
2018-04-13 11:09:14 AM
Jacqueline Bryant
Clerk of the Court
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3105
DICKINSON WRIGHT, PLLC
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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] ORDER GRANTING DEFENDANTS/COUNTERCLAIMANTS' MOTION TO DISMISS COUNTERCLAIMS

Before this Court is Defendants/Counterclaimants' Motion to Dismiss Counterclaims, filed on March 8, 2018. No opposition was ever filed.

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. DCR 13(3). Thus, the Court finds that Plaintiffs' failure to file an opposition to Defendants' Motion constitutes both an admission that the Motion is meritorious and Plaintiffs' consent to granting said Motion.

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Accordingly, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss ALL 3rd Counterclaims is granted.

DATED this 13th day of ~~March~~ April, 2018.

DISTRICT COURT JUDGE

Respectfully submitted by:

DICKINSON WRIGHT, PLLC

/s/ Brian R. Irvine

JOHN P. DESMOND
Nevada Bar No. 5618
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Nevada Bar No. 7758
ANJALI D. WEBSTER
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Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Attorneys for Defendants
Berry Hinckley Industries, and
Jerry Herbst

EXHIBIT “2”

EXHIBIT “2”

EXHIBIT “2”

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2015-04-21 03:40:56 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 4916942 : csulezic

1085
GORDON SILVER
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Attorneys 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; JERRY HERBST, an individual; and JH, INC., a Nevada corporation,

Defendants.

_____/

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

Counterclaimants

CASE NO.: CV14-01712

DEPT. NO.: 6

vs.

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

Counter-defendants

DEFENDANTS' AMENDED ANSWER TO PLAINTIFFS' AMENDED COMPLAINT AND COUNTERCLAIM

DEFENDANTS BERRY HINCKLEY INDUSTRIES and JERRY HERBST (collectively, "Defendants"), by and through their attorneys of record, GORDON SILVER, answer Plaintiffs' Amended Complaint as follows:

JURISDICTION

1. Defendants admit the allegations contained in Paragraph 1 of Plaintiffs' Complaint.

2. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Defendants admit the remaining allegations contained in Paragraph 2 of Plaintiffs' Complaint.

PARTIES

3. Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained in Paragraph 3 of Plaintiffs' Complaint, and thus deny the same.

4. Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained in Paragraph 4 of Plaintiffs' Complaint, and thus deny the same.

5. Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the allegations contained in Paragraph 5 of Plaintiffs' Complaint, and thus deny the same.

6. Defendants admit the allegations contained in Paragraph 6 of Plaintiffs' Complaint.

7. Defendants admit the allegations contained in Paragraph 7 of Plaintiffs' Complaint.

FIRST CAUSE OF ACTION
(Breach of Lease Agreement)

8. Paragraphs 1 through 7 above are hereby incorporated by reference as if fully set forth at this point.

9. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 9 of Plaintiffs' Complaint, and thus deny the same.

10. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 10 of the Complaint.

11. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 11 of Plaintiffs' Complaint, and thus deny the same.

12. Defendants deny the allegations contained in Paragraph 12 of the Complaint.

13. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 13 of Plaintiffs' Complaint, and thus deny the same.

14. Defendants deny the allegations contained in Paragraph 14 of the Complaint.

15. Defendants deny the allegations contained in Paragraph 15 of the Complaint.

16. Defendants deny the allegations contained in Paragraph 16 of the Complaint.

17. Defendants deny the allegations contained in Paragraph 17 of the Complaint.

18. Defendants deny the allegations contained in Paragraph 18 of the Complaint.

SECOND CAUSE OF ACTION
(Breach of Personal Guaranty)

19. Paragraphs 1 through 18 above are hereby incorporated by reference as if fully set forth at this point.

20. Defendants deny the allegations contained in Paragraph 20 of the Complaint.

21. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 21 of the Complaint.

22. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 22 of the Complaint.

23. Defendants deny the allegations contained in Paragraph 23 of the Complaint.

24. Defendants deny the allegations contained in Paragraph 24 of the Complaint.

25. Defendants deny the allegations contained in Paragraph 25 of the Complaint.

26. Defendants deny the allegations contained in Paragraph 26 of the Complaint.

THIRD CAUSE OF ACTION
(Breach of Lease Agreement)

27. Paragraphs 1 through 26 above are hereby incorporated by reference as if fully set forth at this point.

28. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 28 of Plaintiffs' Complaint, and thus deny the same.

29. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to

the truthfulness of the remaining allegations contained in Paragraph 29 of Plaintiffs' Complaint, and thus deny the same.

30. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 30 of Plaintiffs' Complaint, and thus deny the same.

31. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 31 of Plaintiffs' Complaint, and thus deny the same.

32. Defendants deny the allegations contained in Paragraph 32 of the Complaint.

33. Defendants deny the allegations contained in Paragraph 33 of the Complaint.

34. Defendants deny the allegations contained in Paragraph 34 of the Complaint.

35. Defendants deny the allegations contained in Paragraph 35 of the Complaint.

36. Defendants deny the allegations contained in Paragraph 36 of the Complaint.

37. Defendants deny the allegations contained in Paragraph 37 of the Complaint.

38. Defendants deny the allegations contained in Paragraph 38 of the Complaint.

39. Defendants deny the allegations contained in Paragraph 39 of the Complaint.

40. Defendants deny the allegations contained in Paragraph 40 of the Complaint.

41. Defendants deny the allegations contained in Paragraph 41 of the Complaint.

42. Defendants deny the allegations contained in Paragraph 42 of the Complaint.

FOURTH CAUSE OF ACTION
(Breach of Personal Guaranty)

43. Paragraphs 1 through 42 above are hereby incorporated by reference as if fully set forth at this point.

44. Defendants deny the allegations contained in Paragraph 44 of the Complaint.

45. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 45 of the Complaint.

46. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document and deny any remaining allegations contained in Paragraph 46 of the Complaint.

47. Defendants deny the allegations contained in Paragraph 47 of the Complaint.

48. Defendants deny the allegations contained in Paragraph 48 of the Complaint.

49. Defendants deny the allegations contained in Paragraph 49 of the Complaint.

50. Defendants deny the allegations contained in Paragraph 50 of the Complaint.

51. Defendants deny the allegations contained in Paragraph 51 of the Complaint.

52. Defendants deny the allegations contained in Paragraph 52 of the Complaint.

53. Defendants deny the allegations contained in Paragraph 53 of the Complaint.

54. Defendants deny the allegations contained in Paragraph 54 of the Complaint.

55. Defendants deny the allegations contained in Paragraph 55 of the Complaint.

56. Defendants deny the allegations contained in Paragraph 56 of the Complaint.

FIFTH CAUSE OF ACTION
(Attachment)

57. Paragraphs 1 through 56 above are hereby incorporated by reference as if fully set forth at this point.

58. Defendants deny the allegations contained in Paragraph 58 of the Complaint.

59. Defendants deny the allegations contained in Paragraph 59 of the Complaint.

60. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document. Additionally, Defendants are without knowledge or information sufficient to form a belief as to the truthfulness of the remaining allegations contained in Paragraph 60 of Plaintiffs' Complaint, and thus deny the same.

61. To the extent Plaintiffs purport to quote or paraphrase from a document, the document speaks for itself. Defendants deny any statements inconsistent with the document.

62. Defendants deny the allegations contained in Paragraph 62 of the Complaint.

63. Defendants deny the allegations contained in Paragraph 63 of the Complaint.

64. Defendants deny the allegations contained in Paragraph 64 of the Complaint.

EIGHTH CAUSE OF ACTION
(Temporary Restraining Order)

65. Paragraphs 1 through 64 above are hereby incorporated by reference as if fully set forth at this point.

66. Defendants deny the allegations contained in Paragraph 66 of the Complaint.

67. Defendants deny the allegations contained in Paragraph 67 of the Complaint.

68. Defendants deny the allegations contained in Paragraph 68 of the Complaint.

69. Defendants deny the allegations contained in Paragraph 69 of the Complaint.

AFFIRMATIVE DEFENSES

In accordance with Nevada Rule of Civil Procedure 11, all possible affirmative defenses may or may not have been asserted herein insofar as sufficient facts were not available to Defendants after reasonable inquiry upon the filing of this pleading and therefore Defendants assert the following defenses based in fact or upon reasonable belief and hereby reserve the right to amend this Answer to allege appropriate or additional defenses, if subsequent investigation or discovery so warrants:

FIRST AFFIRMATIVE DEFENSE

Defendants hereby incorporate by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further investigation or discovery reveals the applicability of any such defenses, Defendants reserve the right to seek leave of the court to amend this Answer to specifically assert any such defense. Such defenses are herein incorporated by reference for the specific purpose of not waiving any such defense.

SECOND AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' claims are contrary to the terms of the agreement(s) between the parties.

FOURTH AFFIRMATIVE DEFENSE

Defendants are excused from performance.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches, waiver, equitable estoppel, and ratification.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, because Plaintiff failed to adequately mitigate any injuries and damages that it allegedly suffered.

SEVENTH AFFIRMATIVE DEFENSE

Defendants are entitled to set-off, should any damages be awarded against them.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs may not recover on the claims pled in the Complaint because the damages sought are too speculative and remote.

NINTH AFFIRMATIVE DEFENSE

Plaintiff has contractually waived the right to seek consequential, special, and indirect damages.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs are not contractually entitled to accelerated rent.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, by the applicable statutes of limitation.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or in part, for failure to provide reasonable and adequate notice of any claimed breach.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state sufficient facts or claims to support punitive damages

against Defendants.

FOURTEENTH AFFIRMATIVE DEFENSE

It has been necessary for Defendants to employ the services of an attorney to defend this action and a reasonable sum should be allowed Defendants as and for attorney's fees, together with their costs expended in this action.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to allege facts, or a cause of action, sufficient to support a claim for attorney's fees, costs, or interest.

PRAYER FOR RELIEF

WHEREFORE, Defendants BERRY HINCKLEY INDUSTRIES and JERRY HERBST hereby pray for judgment against Plaintiffs as follows:

1. That Plaintiffs take nothing by way of their Complaint and that the same be dismissed with prejudice.

2. For costs of suit and reasonable attorneys' fees; and

3. For such other and further relief as the Court deems just and proper in the circumstances.

COUNTERCLAIM

Counterclaimants Berry-Hinckley Industries and Jerry Herbst, by and through their counsel of record, Gordon Silver, allege as follows:

PARTIES

1. Berry-Hinckley Industries ("BHI") is a Nevada corporation.

2. Jerry Herbst ("Herbst," and collectively with BHI, "Counterclaimants") is an individual and a resident of the State of Nevada.

3. Counter-defendant Larry J. Willard ("Willard") is, on information and belief, a resident of California, and at all relevant times herein was trustee of the Larry James Willard Trust Fund (the "Willard Trust").

4. Counter-defendant Overland Development Corporation, Inc., dba LJW Enterprises, Inc. ("Overland"), is, on information and belief, a California corporation.

5. On information and belief, Willard is the president of Overland. Willard, the Willard Trust, and Overland are collectively referred to hereinafter as "Counter-defendants."

GENERAL ALLEGATIONS

6. On May 1, 2013, BHI entered into an Operation and Management Agreement (the "Operation Agreement") with Counter-defendants related to the real property located at 7695 S. Virginia Street in Reno, Nevada, which BHI had occupied pursuant to a Lease Agreement by and between BHI and Counter-defendants (the "Willard Lease"). A true and correct copy of the Operation Agreement is attached hereto as **Exhibit 1**.

7. Pertinent to this Counterclaim, Section 4 of the Operation Agreement provided the following with respect to compensation to BHI, who is defined in the Operation Agreement as the "Operator":

> In consideration of Operator performing the Services and other mutual covenants set forth herein, Owner shall pay to Operator the sum of Ten Thousand and No/100ths Dollars ($10,000.00) per month (the "Fee"), and Owner then shall be entitled to all Net Profits (below defined) generated at the Location during each month of the term of this Agreement. The Fee and Net Profits payment shall be payable as set forth below.
>
> Operator shall have fifty (50) days from the end of each month to tender the Net Profits to Owner and provide Owner with an accounting of the subject month's Net Profits. Based thereon, commencing on July 20, 2013, and continuing no later than the twentieth (20th) day of each month thereafter as necessary depending on the length of the term of this Agreement, Operator shall tender to Owner the subject month's Net Profits attributable to the Location, minus the Fee, which such Fee shall be retained by Operator. In the event that the Net Profits for any given month are negative or otherwise not sufficient to pay the Fee, Owner shall not be entitled to any payment and shall instead pay to Operator the amount of the negative Net Profits (if applicable) plus the balance of the Fee within three (3) days of receipt of written demand therefore. As used herein, the term Net Profits shall mean the gross receipts collected by Operator in operating the Location in any given month, minus any and all expenses incurred by Operator in operating the Location during such month including, but not limited to, the cost of all insurance required to be carried by Operator as well as the actual cost to Operator of all inventory sold during such month (regardless of whether Operator purchased such inventory during the subject month, or any previous month). Each payment of Net Profits to Owner hereunder (or alternatively, demand by Operator for payment of the Fee and/or negative Net Profits) shall be accompanied by documentation, certified by an officer of Operator to be accurate, supporting Operator's calculation of Net Profits for the subject month.

8. Section 5 of the Operation Agreement also provided that BHI had no obligation to make the rent payments set forth in the Willard Lease. Specifically:

> During the term of this Agreement, Operator shall have no obligation to make the rent payments set forth in the Lease. Owner hereby acknowledges and agrees that the continuous operation of the Location by Operator and the payment of the Net Profits to Owner (if any) constitutes sufficient consideration of Operator's occupation of the Location and shall be in lieu of any obligation to pay rent under the Lease during the term of this Agreement.

9. Further, Section 9 of the Operation Agreement provides that Counter-defendants must indemnify BHI as follows:

> Owner shall indemnify and defend Operator, and its officers, directors, owners, employees, affiliates and agents against, and hold them harmless from, any and all costs, expenses, claims, suits, liabilities, loss and damages, including attorneys' fees arising out of or relating to this Agreement and/or the services provided by Operator under this Agreement, excepting therefrom costs, expenses, claims, suits, liabilities, loss and damages arising as a result of Operator's gross negligence. The indemnification obligations set forth herein shall survive the expiration or earlier termination of this Agreement.

10. BHI incurred a negative Net Profit during the term of the Operation Agreement, which was also insufficient to pay the Fee contemplated in Section 4 of the Operation Agreement.

11. However, Counter-defendants have failed to pay to BHI the amount of negative Net Profits plus the balance of the Fee as was required by Section 4 of the Operation Agreement.

12. Further, Counter-defendants have brought suit against BHI, seeking, *inter alia*, rental payments under the Willard Lease that Counter-defendants claim were incurred during the term of the Operation Agreement.

13. Counter-defendants have also brought suit against Herbst, claiming, *inter alia*, that Herbst is liable for rental payments under the Willard Lease that Counter-defendants claim were incurred during the term of the Operation Agreement by virtue of a guaranty between Herbst and Counter-defendants (the "Willard Guaranty").

FIRST CLAIM FOR RELIEF
(BREACH OF CONTRACT)

14. Counterclaimants incorporate by reference all allegations previously stated in this

Counterclaim as though set forth fully herein.

15. The Operation Agreement constitutes a binding legal contract.

16. BHI performed under the terms of the Operation Agreement.

17. Counter-defendants' failure to pay to BHI the amount of negative Net Profits plus the balance of the Fee as was required by Section 4 of the Operation Agreement constitutes a breach of the Operation Agreement.

18. As a result of Counter-defendants' breach of the Operation Agreement, BHI has suffered damages in excess of $10,000, plus interest, attorneys' fees, and costs.

SECOND CLAIM FOR RELIEF
(DECLARATORY RELIEF)

19. Counterclaimants incorporate by reference all allegations previously stated in this Counterclaim as though set forth fully herein.

20. Pursuant to NRS 30.040(1) and NRS 30.050, any person interested under a written contract, or whose rights, status, or other legal relations are affected by a contract, may have determined any question of construction or validity arising under the contract and obtain a declaration of rights, status, or other legal relations thereunder, regardless of whether or not a breach has occurred.

21. Here, a controversy exists because Counter-defendants have brought suit against BHI seeking, *inter alia*, rental payments under the Willard Lease that Counter-defendants claim were incurred during the term of the Operation Agreement.

22. Similarly, Counter-defendants have brought suit against Herbst, claiming, *inter alia*, that Herbst is liable for rental payments under the Willard Lease that Counter-defendants claim were incurred during the term of the Operation Agreement by virtue of the Willard Guaranty.

23. While BHI and Herbst deny any liability under the Willard Lease and Willard Guaranty, BHI and Herbst request a declaration that BHI and Herbst are not responsible for any of the rental payments that Counter-defendants claim were incurred during the term of the Operation Agreement, as Section 5 of the Operation Agreement expressly provides that "[d]uring

the term of this Agreement, Operator shall have no obligation to make the rent payments set forth in the Lease."

PRAYER FOR RELIEF

WHEREFORE, Counterclaimants pray for relief as follows against Counter-defendants:

1. Judgment for damages in excess of $10,000 in favor of BHI and against Counter-defendants.

2. A judicial declaration that BHI and Herbst are not responsible for any of the rental payments that Counter-defendants claim were incurred during the term of the Operation Agreement.

3. For all attorneys' fees, costs, and interest according to law; and

4. For such other and further relief as this Court deems just and proper.

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 21st day of April, 2015.

GORDON SILVER

By: /s/ Brian R. Irvine

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Attorneys for Defendants,
Berry Hinckley Industries, and
Jerry Herbst

CERTIFICATE OF SERVICE

I certify that I am an employee of GORDON SILVER, and that on this date, pursuant to NRCP 5(b), I am serving a true and correct copy of the attached **DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT AND COUNTERCLAIM** on the parties as set forth below:

XXX Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, Reno, Nevada, postage prepaid, following ordinary business practices

____ Certified Mail, Return Receipt Requested

____ Via Facsimile (Fax)

____ Via E-Mail

____ Placing an original or true copy thereof in a sealed envelope and causing the same to be personally Hand Delivered

____ Federal Express (or other overnight delivery)

____ Electronic Notification

addressed as follows:

David C. O'Mara
THE O'MARA LAW FIRM, P.C.
311 E. Liberty Street
Reno, Nevada 89501

DATED this 21st day of April, 2015.

/s/ Stephanie J. Glantz
An Employee of GORDON SILVER

EXHIBIT “1”

EXHIBIT “1”

EXHIBIT “1”

FILED
Electronically
2015-01-21 04:28:19 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 4782758 : ylloyd

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Attorneys for Plaintiffs
LARRY J. WILLARD,
OVERLAND DEVELOPMENT CORPORATION,
EDWARD C. WOOLEY, and JUDITH A. WOOLEY

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, Plaintiffs, v. BERRY-HINCKLEY INDUSTRIES, a Nevada corporation; and JERRY HERBST, an individual, Defendants.	Case No. CV14-01712 Dept. No. 6

VERIFIED FIRST AMENDED COMPLAINT

(EXEMPT FROM ARBITRATION—AMOUNT IN EXCESS OF $40,000.00)

Plaintiffs LARRY J. WILLARD ("Willard"), individually and as trustee of the Larry James Willard Trust Fund ("the Willard Trust"), OVERLAND DEVELOPMENT CORPORATION ("Overland"), EDWARD C. WOOLEY and JUDITH A. WOOLEY ("the Wooleys"), individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 ("the Wooley Trust"), by and through undersigned attorneys, hereby allege, aver, and complain of Defendants BERRY-HINCKLEY INDUSTRIES ("BHI") and JERRY HERBST ("Herbst") (collectively, "Defendants") as follows:

JURISDICTION

1. This Court has jurisdiction over Defendants because Defendants are either citizens or residents of the State of Nevada or do business in the State of Nevada, County of Washoe.

2. Venue is proper in this Court because the properties at issue are located in this judicial district and because the leases at issue expressly provide for venue in this Court.

PARTIES

3. Plaintiff Larry J. Willard ("Willard") is, and at all times relevant herein was, a citizen of the United States and a resident of the State of California. At all times relevant herein Willard was trustee of the Larry James Willard Trust Fund ("the Willard Trust").

4. Plaintiff Overland Development Corporation ("Overland") is, and at all times relevant herein was, a corporation organized and existing under the laws of the State of California. Willard is the President of Overland. Willard, the Willard Trust, and Overland are referred to hereinafter as "the Willard Plaintiffs."

5. Plaintiffs Edward C. Wooley and Judith A Wooley (collectively, "the Wooleys") are, and at all times relevant herein were, citizens of the United States of America and are trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000 ("the Wooley Trust") (collectively, "the Wooley Plaintiffs").

6. Defendant Berry-Hinckley Industries ("BHI") is, and at all times relevant herein

was, a corporation organized and existing under the laws of the State of Nevada.

7. Defendant Jerry Herbst ("Herbst") is, and at all times relevant herein was, a citizen of the State of Nevada.

FIRST CAUSE OF ACTION
(Breach of Lease Agreement)
By the Willard Plaintiffs Against Berry-Hinckley Industries

8. Paragraphs 1 through 7 above are hereby incorporated by reference as if fully set forth at this point.

9. On November 18, 2005, BHI entered into a lease agreement (the "Willard Lease") on the property owned by the Willard Plaintiffs located at 7695-7699 S. Virginia Street, Reno, Nevada (the "Willard Property"). Under the Willard Lease, BHI agreed to lease the Virginia Street Property from January 2006 through January 2026 at a monthly rental rate of $122,031.25, said rental rate increasing by 2% per month through the lease term. A true and correct copy of the Willard Lease is attached hereto as Exhibit 1.

10. On February 17, 2007, BHI sent the Willard Plaintiffs a letter indicating Herbst's intent to acquire BHI's convenience store assets. Attached to that letter was a letter from Herbst requesting that the Willard Plaintiffs agree to a modifications of the Willard Lease in return for Herbst personally guaranteeing lease payments by BHI through the duration of the revised lease term. Also attached was a letter from Johnson Jacobson Wilcox dated January 31, 2007 attesting to the fact that Herbst's net worth was in excess of $200 million. A true and correct copy of the February 17, 2007 letter and accompanying attachments is attached hereto as Exhibit 2.

11. On March 9, 2007, the Willard Plaintiffs agreed to amend the Willard Lease, thereby forgoing $5,250,045.20 in rent through the shortening of the lease term by 30 months, in return for Herbst's personally guaranteeing that BHI would make all lease payments through the term of the lease (the "Herbst-Willard Guaranty Agreement"). A true and correct copy of the Herbst-Willard Guaranty Agreement is attached hereto as Exhibit 3. A true and correct copy of the amendment to the Willard Lease is attached hereto as Exhibit 4.

12. In March 2013, BHI defaulted on the Willard Lease. BHI and Herbst negotiated an agreement (the " Operating Agreement") with the Willard Plaintiffs under which BHI would

pay the Willard Plaintiffs 50% of net revenues minus $10,000.00 from continuing to operate at the Willard Property. A true and correct copy of the Interim Operating Agreement is attached hereto as Exhibit 5.

13. BHI failed to tender any payments to the Willard Plaintiffs as required under the Interim Operating Agreement, instead occupying the Willard Property through May 2013 without paying any rent. At the end of May 2013, BHI abandoned the Willard Property leaving it in such a state of dishevelment and disrepair that Willard was fined and continues to be fined by the City of Reno, said fines currently totaling $3,265.00.

14. As a direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs were deprived of rental income in the amount of $19,443,836.94 that they otherwise would have received. The net present value of the remaining lease payments using a discount rate of 4% as specified in the Willard Lease was $15,741.360.75 as of March 1, 2013.

15. As a further direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs were forced to sell the Willard Property in March 2014 in a short sale, thereby losing $4,437,500.00 of earnest money invested in the Willard Property and incurring at least $3,000,000.00 in tax consequences and $549,852.00 in closing costs.

16. As a further direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs were forced to purchase insurance on the Willard Property at a cost of $4,554.53, were forced to pay for installation of a security fence for the Willard Property at a cost of $2,668.62, and were charged $10,393.35 by Nevada Energy for utility fees rightly owed by BHI.

17. As a further direct and proximate result of BHI breaching the Willard Lease, Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000.00 in accounting fees in the process. Six months later, upon the advice of counsel, Willard withdrew his bankruptcy petition but has been rendered insolvent by virtue of the breaches by BHI and Herbst.

18. As a further direct and proximate result of BHI breaching the Willard Lease, the Willard Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County,

California, thereby incurring $35,000.00 in attorney's fees.

SECOND CAUSE OF ACTION
(Breach of Personal Guaranty)
By the Willard Plaintiffs Against Jerry Herbst

19. Paragraphs 1 through 18 above are hereby incorporated by reference as if fully set forth at this point.

20. Upon receiving notice from the Willard Plaintiffs that BHI was in default of the Willard Lease, Herbst breached his duties under the Herbst-Willard Guaranty in failing to tender payment of rent due by BHI to the Willard Plaintiffs.

21. Under the terms of the Herbst-Willard Guaranty, Herbst guaranteed "unconditionally, absolutely and irrevocably" the timely payment and performance of each of BHI's obligations arising out of and under the Willard Lease. This guaranty was "a guaranty of timely payment and performance of the Guaranteed Obligations and not merely of collectability or enforceability of such obligations." Herbst agreed to be "directly responsible for the full extent of any unsatisfied Guarantee Obligations." Herbst further agreed that his guaranty "is an unconditional, absolute, present and continuing guaranty of payment and performance, and will remain in full force and effect without regard to, and the obligations of [Herbst] hereunder shall not be impaired, affected or released by, any of the following: (i) any modification, supplement, extension or amendment of any of the Guaranteed Obligations or the Lease; (ii) any extension, indulgence or other action in respect thereto or therefor; (iii) any failure or delay by the Lessor or BHI in exercising any right or power under the Lease; (iv) any invalidity or unenforceability in any respect of, or any irregularity or other defect in any of, the Lease or Guaranteed Obligations; (v) any exercise or non-exercise of any right, remedy, power or privilege in respect of this Agreement or any of the Guaranteed obligations; (vi) any transfer of the assets of Lessor to, or any consolidation or merger of the Lessor with or into, any other entity; (vii) any voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of the assets, receivership, insolvency, bankruptcy, reorganization or similar proceeding affecting BHI or any of its assets; (viii) any allegation or contest of the validity of the Lease or this Agreement."

22. In the Herbst-Willard Guaranty, Herbst expressly waived "any defense to its obligations . . . that might arise as a result of any of the" contingencies articulated in Paragraph 20, and further waived "the effect of any fact, circumstance or event of any nature whatsoever that would exonerate, or would constitute or give rise to a defense to, the obligation of a surety or guarantor."

23. As a direct and proximate result of Herbst breaching the Herbst-Willard Guaranty Agreement, the Willard Plaintiffs were forced to sell the Willard Property in March 2014 in a short sale, thereby losing $4,437,500.00 of earnest money invested in the Willard Property and incurring at least $3,000,000.00 in tax consequences and $549,852.00 in closing costs.

24. As a direct and proximate result of Herbst breaching the Herbst-Willard Guaranty Agreement, the Willard Plaintiffs were forced to purchase insurance on the Willard Property at a cost of $4,554.53, were forced to pay for installation of a security fence for the Willard Property at a cost of $2,668.62, and were charged $10,393.35 by Nevada Energy for utility fees rightly owed by BHI.

25. As a direct and proximate result of Herbst breaching the Herbst-Willard Guaranty Agreement, Willard filed for bankruptcy protection, incurring $22,623.00 in legal fees and $15,000.00 in accounting fees in the process. Six months later, upon the advice of counsel, Willard withdrew his bankruptcy petition but has been rendered insolvent by virtue of the breaches by BHI and Herbst.

26. As a direct and proximate result of Herbst breaching the Herbst-Willard Guaranty Agreement, the Willard Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring $35,000.00 in attorney's fees.

THIRD CAUSE OF ACTION

(Breach of Lease Agreement)

By the Wooley Plaintiffs Against Berry-Hinckley Industries

27. Paragraphs 1 through 7 above are hereby incorporated by reference as if fully set forth at this point.

28. On December 2, 2005, BHI entered into a lease agreement ("Wooley Lease #1") on the property owned by the Wooley Plaintiffs located at 1820 Highway 50 East, Carson City,

Nevada (the "Highway 50 Property"). Under Wooley Lease #1, BHI agreed to lease the Highway 50 Property from December 1, 2005 through November 30, 2025 at a monthly rental rate of $22,666.67, said rental rate increasing by 2% per month through the lease term. A true and correct copy of Wooley Lease #1 is attached hereto as Exhibit 6.

29. On June 6, 2006, BHI entered into a lease agreement ("Wooley Lease #2") on the property owned by the Wooley Plaintiffs located at 1365 Baring Boulevard, Sparks, Nevada (the "Sparks Property"). Under Wooley Lease #2, BHI agreed to lease the Sparks Property from June 6, 2006 through September 30, 2025 at a monthly rental rate of $19,856.25, said rental rate increasing by 2% per month through the lease term. A true and correct copy of Wooley Lease #2 is attached hereto as Exhibit 7.

30. On February 17, 2007, BHI sent the Wooley Plaintiffs a letter indicating Herbst's intent to acquire BHI's convenience store assets. Attached to that letter was a letter from Herbst requesting that the Wooley Plaintiffs agree to a modifications of Wooley Lease #1 and Wooley Lease #2 in return for Herbst personally guaranteeing lease payments by BHI through the duration of the revised lease terms. Also attached was a letter from Johnson Jacobson Wilcox dated January 31, 2007 attesting to the fact that Herbst's net worth was in excess of $200 million. A true and correct copy of the February 17, 2007 letter and accompanying attachments is attached hereto as Exhibit 2.

31. On March 12, 2007, the Wooley Plaintiffs agreed to amend Wooley Lease #1 and Wooley Lease #2, thereby forgoing $1,834,663.77 in rent through the shortening of the lease terms by 30 months, in return for Herbst's personally guaranteeing that BHI would make all lease payments through the term of the lease (the "Herbst-Wooley Guaranty Agreement"). A true and correct copy of the Herbst-Wooley Guaranty Agreement regarding the Highway 50 Property is attached hereto as Exhibit 8. A true and correct copy of the Herbst-Wooley Guarantee is attached hereto as Exhibit 9. A true and correct copy of the amendment to Wooley Lease #1 is attached hereto as Exhibit 10. A true and correct copy of the amendment to Wooley Lease #2 is attached hereto as Exhibit 11.

32. In March 2013, BHI defaulted on Wooley Lease #1.

33. As a direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs were deprived of rental income in the amount of $4,420,244.00 that they otherwise would have received. The net present value of the remaining lease payments using a discount rate of 4% as specified in Wooley Lease #1 was $3,323,543.49 as of March 1, 2013.

34. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Highway 50 Property suffered a diminution in value in an amount to be proven at trial but which is at least $2,000,000.00.

35. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs incurred property taxes in the amount of $1,500.00.

36. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs were forced to purchase insurance on the Highway 50 Property at a cost of $3,840.00.

37. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs incurred maintenance costs on the Highway 50 Property of $4,000.00.

38. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs incurred management fee costs on the Highway 50 Property of $2,500.00.

39. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs were deprived of the security deposit from the subtenant at the Highway 50 Property in the amount of $2,485.00.

40. As a further direct and proximate result of BHI breaching Wooley Lease #1, because the Sparks Property was cross-collateralized with the Highway 50 Property, the Wooley Plaintiffs were forced to sell the Sparks Property at a loss of $147,847.30.

41. As a further direct and proximate result of BHI breaching Wooley Lease #1, because the Sparks Property was cross-collateralized with the Highway 50 Property and the Wooley Plaintiffs were forced to sell the Sparks Property, the Wooley Plaintiffs incurred tax liabilities in an amount to be proven at trial but which is at least $600,000.00.

42. As a further direct and proximate result of BHI breaching Wooley Lease #1, the Wooley Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County,

California, thereby incurring $45,088.00 in attorney's fees.

FOURTH CAUSE OF ACTION

(Breach of Personal Guaranty)

By the Wooley Plaintiffs Against Jerry Herbst

43. Paragraphs 27 through 42 above are hereby incorporated by reference as if fully set forth at this point.

44. Upon receiving notice from the Wooley Plaintiffs that BHI was in default of the Wooley Leases, Herbst breached his duties under the Herbst-Wooley Guaranty in failing to tender payment of rent due by BHI to the Wooley Plaintiffs.

45. Under the terms of the Herbst-Wooley Guaranty, Herbst guaranteed "unconditionally, absolutely and irrevocably" the timely payment and performance of each of BHI's obligations arising out of and under the Wooley Leases. This guaranty was "a guaranty of timely payment and performance of the Guaranteed Obligations and not merely of collectability or enforceability of such obligations." Herbst agreed to be "directly responsible for the full extent of any unsatisfied Guarantee Obligations." Herbst further agreed that his guaranty "is an unconditional, absolute, present and continuing guaranty of payment and performance, and will remain in full force and effect without regard to, and the obligations of [Herbst] hereunder shall not be impaired, affected or released by, any of the following: (i) any modification, supplement, extension or amendment of any of the Guaranteed Obligations or the Lease; (ii) any extension, indulgence or other action in respect thereto or therefor; (iii) any failure or delay by the Lessor or BHI in exercising any right or power under the Lease; (iv) any invalidity or unenforceability in any respect of, or any irregularity or other defect in any of, the Lease or Guaranteed Obligations; (v) any exercise or non-exercise of any right, remedy, power or privilege in respect of this Agreement or any of the Guaranteed obligations; (vi) any transfer of the assets of Lessor to, or any consolidation or merger of the Lessor with or into, any other entity; (vii) any voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of the assets, receivership, insolvency, bankruptcy, reorganization or similar proceeding affecting BHI or any of its assets; (viii) any allegation or contest of the validity of the Lease or this Agreement."

46. In the Herbst-Wooley Guaranty, Herbst expressly waived "any defense to its obligations . . . that might arise as a result of any of the" contingencies articulated in Paragraph 44, and further waived "the effect of any fact, circumstance or event of any nature whatsoever that would exonerate, or would constitute or give rise to a defense to, the obligation of a surety or guarantor."

47. As a direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs were deprived of rental income in the amount of $4,420,244.00 that they otherwise would have received. The net present value of the remaining lease payments using a discount rate of 4% as specified in the Wooley Leases was $3,323,543.49 as of March 1, 2013.

48. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Highway 50 Property suffered a diminution in value in an amount to be proven at trial but which is at least $2,000,000.00.

49. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs incurred property taxes in the amount of $1,500.00.

50. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs were forced to purchase insurance on the Highway 50 Property at a cost of $3,840.00.

51. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs incurred maintenance costs on the Highway 50 Property of $4,000.00.

52. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs incurred management fee costs on the Highway 50 Property of $2,500.00.

53. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs were deprived of the security deposit from the subtenant at the Highway 50 Property in the amount of $2,485.00.

54. As a further direct and proximate result of Herbst breaching the Herbst-Wooley

Guaranty, because the Sparks Property was cross-collateralized with the Highway 50 Property, the Wooley Plaintiffs were forced to sell the Sparks Property at a loss of $147,847.30.

55. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, because the Sparks Property was cross-collateralized with the Highway 50 Property and the Wooley Plaintiffs were forced to sell the Sparks Property due to the breach of the Herbst-Wooley Guaranty, the Wooley Plaintiffs incurred tax liabilities in an amount to be proven at trial but which is at least $600,000.00.

56. As a further direct and proximate result of Herbst breaching the Herbst-Wooley Guaranty, the Wooley Plaintiffs hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring $45,088.00 in attorney's fees.

FIFTH CAUSE OF ACTION

(Attachment)

By All Plaintiffs Against All Defendants

57. Paragraphs 1 through 56 above are hereby incorporated by reference as if fully set forth at this point.

58. Plaintiffs are informed and believe and on that basis allege that as a result of this action, Defendants will attempt to transfer or otherwise conceal assets in an effort to make it impossible for Plaintiffs to reach the property by execution after judgment is entered.

59. Plaintiffs are informed and believe and on that basis allege that Defendants will move, transfer or otherwise conceal these assets in order to defeat or otherwise hinder Plaintiff's ability to collect after judgment is entered.

60. These allegations are based in part on the fact that on March 18, 2013, Defendants attorney, Gerald M. Gordon of Gordon Silver, sent a letter to Plaintiffs' attorney in which Defendants threatened to declare bankruptcy rather than honor their obligations arising under the leases. A true and correct copy of this letter is attached hereto as Exhibit 12.

61. These allegations are further based on the fact that on March 28, 2013, Defendants attorney, Gerald M. Gordon of Gordon Silver, sent a letter to Plaintiffs' attorney reiterating Defendants' threat of seeking bankruptcy protection and offering to pay a small fraction of the amount due under the leases and Herbst's personal guaranty, an offer which

Plaintiffs rejected.

62. These allegations are further based on the fact that on July 1, 2013, while Plaintiffs had the instant claim pending against Defendants in Santa Clara County, California, Herbst and his wife transferred 100% of their interest in the estate located at 1701 Enclave Court, Las Vegas, Nevada 89134 to their sons, Timothy Paul Herbst and Troy Dederick Herbst, as trustees of the Jerry E. Herbst Residence Trust and the Maryanna Herbst Residence Trust. Plaintiffs are informed and believe and on that basis allege that such transfer was for the purpose of attempting to shelter the estate, which is estimated to be worth at least $18 million, from being attached by Plaintiffs.

63. In this action, Plaintiffs seek an attachment pursuant to NRS 31.013 because extraordinary circumstances exist which will make it improbable for Plaintiffs to reach the property of Defendants by execution after judgment has been entered. Specifically, Plaintiffs seek an attachment of the following property:

- the estate located at 1701 Enclave Court, Las Vegas, Nevada 89134, Parcel No. 138-20-416-003;
- the property located at 1001 South California Avenue, Parker, Arizona 85334, Parcel No. 311-23-031;
- the property located at 1005 South California Avenue, Parker, Arizona 85344, Parcel No. 311-23-030;
- the property located at 1009 South California Avenue, Parker, Arizona 85334, Parcel No. 311-23-028A;
- the property located at 515 Saddle View Way 23, Park City, Utah 84060, Parcel No. 01-923-06; and
- such other and further assets and properties owned by Defendants sufficient to secure payment of Plaintiffs' claims against Defendants.

64. Pursuant to NRS Chapter 31, Plaintiffs seek issuance of a prejudgment writ of attachment upon the assets of Defendant Berry-Hinckley Industries and Defendant Jerry Herbst, to secure payment of Plaintiffs' claims against Defendants.

SIXTH CAUSE OF ACTION

(Temporary Restraining Order)

By All Plaintiffs Against All Defendants

65. Paragraphs 1 through 65 above are hereby incorporated by reference as if fully set forth at this point.

66. If Defendants are permitted the ability to transfer, sell, or otherwise conceal assets during the pendency of this action, Plaintiffs will suffer irreparable harm.

67. If Defendants are permitted to have the ability to transfer, sell, or otherwise conceal assets before this Court can issue a writ of attachment on the assets of Defendants, and each of them, Plaintiffs will be denied the extraordinary relief provided in NRS Chapter 31 to protect their rights.

68. An interlocutory injunction preventing Defendants or any person with actual knowledge of the injunction is necessary to maintain the status quo until this Court can determine whether a writ of attachment should issue and/or until the conclusion of this action after trial.

69. Plaintiffs are entitled to a temporary restraining order and preliminary injunction enjoining Defendants, and each of them, and any other person with notice of the injunction from transferring, selling, or otherwise encumbering any assets or property of Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

ON THE FIRST CAUSE OF ACTION:

1. For direct damages in the discounted amount of $15,766,991.73;

2. For consequential damages in the amount of $8,080,856.50;

3. For late payment penalties of $25,630.98 for the period of March 2013 through May 2013;

4. For interest at a rate of 18% per annum as provided for under the Willard Lease from March 1, 2013 through entry of judgment; and

5. For reasonable attorney's fees as provided for under the Willard Lease.

///

ON THE SECOND CAUSE OF ACTION:

1. For direct damages in the discounted amount of $15,766,991.73;

2. For consequential damages in the amount of $8,080,856.50;

3. For late payment penalties of $25,630.98 for the period of March 2013 through May 2013;

4. For interest at a rate of 18% per annum as provided for under the Willard Lease from March 1, 2013 through entry of judgment; and

5. For reasonable attorney's fees as provided for under the Willard Lease.

ON THE THIRD CAUSE OF ACTION:

1. For direct damages in the discounted amount of $3,323,543.49;

2. For consequential damages in an amount to be proven at trial but which is at least $2,809,600.30;

3. For interest at a rate of 18% per annum as provided for under the Wooley Leases from March 1, 2013 through entry of judgment; and

4. For reasonable attorney's fees as provided for under the Wooley Leases.

ON THE FOURTH CAUSE OF ACTION:

1. For direct damages in the discounted amount of $3,323,543.49;

2. For consequential damages in an amount to be proven at trial but which is at least $2,809,600.30;

3. For interest at a rate of 18% per annum as provided for under the Wooley Leases from March 1, 2013 through entry of judgment; and

4. For reasonable attorney's fees as provided for under the Wooley Leases.

ON THE FIFTH CAUSE OF ACTION:

1. For issuance of a writ of attachment to impress a lien upon the assets of Defendants, and each of them, in order to secure judgment in favor of Plaintiffs, which, including interest accrued through October 2014, will exceed $ 38,480,184.14. Such assets include the following:

- the estate located at 1701 Enclave Court, Las Vegas, Nevada 89134, Parcel No.

138-20-416-003;

- the property located at 1001 South California Avenue, Parker, Arizona 85334, Parcel No. 311-23-031;
- the property located at 1005 South California Avenue, Parker, Arizona 85344, Parcel No. 311-23-030;
- the property located at 1009 South California Avenue, Parker, Arizona 85334, Parcel No. 311-23-028A;
- the property located at 515 Saddle View Way 23, Park City, Utah 84060, Parcel No. 01-923-06; and
- such other and further assets and properties owned by Defendants sufficient to secure payment of Plaintiffs' claims against Defendants.

ON THE SIXTH CAUSE OF ACTION:

1. For a temporary restraining order and preliminary injunction preventing Defendants, and each of them, and any person with knowledge of the injunction from transferring, selling, or otherwise encumbering the assets of Defendants.

ON ALL CAUSES OF ACTION:

1. For pre-judgment interest upon such damages through entry of judgment at the rate of 18 percent per annum as provided for under the Lease Agreements;
2. For costs of suit;
3. For such other orders and further relief as the Court deems just and proper.

Respectfully submitted,

THE O'MARA LAW FIRM, P.C.

DATED: January 20, 2015

By:

DAVID C. O'MARA
Nevada Bar No. 8599
311 East Liberty Street
Reno, Nevada 89501
(775) 323-1321
(775) 323-4082 (facsimile)

LAW OFFICES OF BRIAN P. MOQUIN

DATED: January 20, 2015

By: _____

BRIAN P. MOQUIN
Pro Hac Vice Application Pending
California Bar No. 257583
3506 La Castellet Court
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

Attorneys for Plaintiffs

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the attorney for Larry J. Willard, Overland Development Corporation, Edward C. Wooley, and Judith A. Wooley, Plaintiffs in the foregoing First Amended Complaint and knows the contents thereof, that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true.

Pursuant to NRS 15.010, the undersigned attorney verifies this First Amended Complaint for Plaintiffs Larry J. Willard, Overland Development Corporation, Edward C. Wooley, and Judith A. Wooley because Plaintiffs reside outside this County.

DATED: January 20, 2015

BRIAN P. MOQUIN, ESQ.

AFFIRMATION
(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the above-entitled matter

_X_ Document does not contain the social security number of any person

-OR-

___ Document contains the social security number of a person as required by:

____ A specific state or federal law, to wit:

_____

-or-

____ For the administration of a public program

-or-

____ For an application for a federal or state grant

-or-

____ Confidential Family Court Information Sheet (NRS 125.130, NRS 125.230 and NRS 125B.055)

DATED: January 21, 2015.

THE O'MARA LAW FIRM, PC

BY: _____
DAVID C. O'MARA, ESQ.

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

No. 77780
District Court Case No. CV14-01712

Electronically Filed
Jan 16 2019 07:44 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

Docket 77780 Document 2019-02425

1. Judicial District Second Department 6
   County: Washoe Judge Hon. Lynne K. Simons
   District Ct. Case No. CV14-01712

2. **Attorney filing this docketing statement:**

Attorney Richard D. Williamson Telephone (775) 329-5600

Firm Robertson, Johnson, Miller & Williamson

Address 50 West Liberty Street, Suite 600, Reno, Nevada 89501

Clients Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, and Overland Development Corporation

3. **Attorney(s) representing respondents(s):**

Attorney Brian R. Irvine Telephone (775) 343-7507

Firm Dickinson Wright PLLC

Address 100 West Liberty Street, Suite 940, Reno NV 89501

Client(s) Berry-Hinckley Industries and Jerry Herbst

4. **Nature of disposition below (check all that apply):**

☐ Judgment after bench trial
☐ Judgment after jury verdict
☐ Summary judgment
☐ Default judgment
■ Grant/Denial of NRCP 60(b) relief
☐ Grant/Denial of injunction
☐ Grant/Denial of declaratory relief
☐ Review of agency determination

■ Dismissal:
  ☐ Lack of jurisdiction
  ☐ Failure to state a claim
  ☐ Failure to prosecute
  ■ Other (specify): Sanction
☐ Divorce Decree:
  ☐ Original ☐ Modification
☐ Other disposition (specify):

5. **Does this appeal raise issues concerning any of the following?**
   No.

   ☐ Child Custody

   ☐ Venue

   ☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A.

7. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

N/A.

8. **Nature of the action**. Briefly describe the nature of the action and the result below:

This action involved a dispute over the Respondents' guarantee and strategic breach of a lease for Appellants' commercial property in Washoe County. Unfortunately, Appellants' prior counsel allegedly failed to comply with procedural and discovery requirements.. As a result, the district court issued a discovery sanction consisting of dismissal of Appellants' claims. Appellants then retained new counsel to seek relief under NRCP 60(b) in an effort to reach a determination on the merits. The district court denied that motion for relief and then entered judgment.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

A. Did the district court err in choosing to enforce case terminating sanctions rather than awarding a lesser sanction that would address the actual degree of prejudice that Respondents suffered?

B. Did the district court err in failing to assess all of the applicable factors set forth in Young v. Johnny Ribeiro Bldg., 106 Nev. 88, 92-93, 787 P.2d 777

(1990), such as whether sanctions unfairly operate to penalize a party for the misconduct of his attorney?

C. Did the district court err in failing to find that Appellants' prior counsel abandoned them?

D. Did the district court err in excluding admissible evidence supporting relief under NRCP 60(b)?

E. Did the district court err in otherwise denying Appellants' motion for relief under NRCP 60(b)?

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Appellants are not aware of any such proceedings.

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

■ N/A

☐ Yes

■ No

If not, explain:

12. **Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

■ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

Clients rely on their attorneys to guide them through the legal system. When those attorneys utterly fail to do their job despite repeated assurances that they would do so, innocent clients are harmed, guilty defendants are absolved of liability, and public trust in the judicial system weakens. Thus, this case presents an issue of incredibly important public policies.

In addition, although there is no conflict in the current case law, district courts do struggle to reconcile the extent of the recognized exceptions to the attorney agency rule, as discussed in the leading cases: Passarelli v. J-Mar Dev., Inc., 102 Nev. 283, 286, 720 P.2d 1221, 1223-24 (1986); NC-DSH, Inc. v. Garner, 125 Nev. 647, 656, 218 P.3d 853, 860 (2009); Huckabay Props. v. NC Auto Parts, LLC, 130 Nev. 196, 203, 322 P.3d 429, 434 n.4 (2014). A published case affirming the effect and extent of the abandonment exclusion to the rule of attorney agency would provide district courts with important guidance.

13. **Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance (s) that warrant retaining the case, and include an explanation of their importance or significance:

This appeal presents issues of statewide public importance involving clarification of law dealing with sanctions imposed on clients due solely to derelictions of counsel. Please see our answer to Question 12, above. Thus, the case should be retained by the Supreme Court under NRAP 17(a)(12).

14. **Trial.** If this action proceeded to trial, how many days did the trial last? N/A

    Was it a bench or jury trial? _____

15. **Judicial Disqualification**. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. **Date of entry of written judgment or order appealed from:**
December 11, 2018.
If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. **Date written notice of entry of judgment or order was served:**
December 11, 2018.

Was service by:

☐ Delivery

■ Mail/electronic/fax

18. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See AA Primo Builders v. Washington*, 126 Nev. Adv. Rep. 53, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion N/A

(c) Date written notice of entry of order resolving tolling motion was served N/A

Was service by:

☐ Delivery

☐ Mail

19. **Date notice of appeal filed** December 28, 2018.
If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

20. **Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other** NRAP 4(a)(1)

SUBSTANTIVE APPEALABILITY

21. **Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

■ NRAP 3A(b)(1) ☐ NRS 38.205
☐ NRAP 3A(b)(2) ☐ NRS 233B.150
☐ NRAP 3A(b)(3) ☐ NRS 703.376
☐ Other (specify)

(b) Explain how each authority provides a basis for appeal from the judgment or order:

In this case, the judge did deny Appellants' motion for relief under NRCP 60(b), but that occurred prior to the entry of final judgment. As a result, this is an appeal following the entry of a final judgment as authorized by NRAP 3A(b)(1).

22. **List all parties involved in the action or consolidated actions in the district court**:

(a) Parties:

Appellants/ Plaintiffs: Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, and Overland Development Corporation

Respondents/Defendants: Berry-Hinckley Industries and Jerry Herbst.

Additional 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.

Additional Defendant: JH, Inc.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

Edward E. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000, stipulated to a dismissal of their claims on April 12, 2018.

Although Plaintiffs included JH, Inc. as a Defendant in their initial complaint filed on August 8, 2014, they removed JH, Inc. as a party in their amended complaint filed on January 21, 2015.

23. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

All of the Plaintiffs jointly filed a Verified Complaint on August 8, 2014, and then a Verified Complaint on January 21, 2015. The operative complaint included claims for breaches of the Plaintiffs' respective lease agreements with Defendant/Respondent Berry-Hinckley Industries, breaches of the personal guarantees that the Plaintiffs received from with Defendant/Respondent Jerry Herbst, breaches of fiduciary duties owed by Defendant/Respondent Jerry Herbst, claims for attachment, and injunctive relief. On January 4, 2018, the district court entered an order granting Respondents' motion for sanctions. The district court then entered findings of fact and conclusions of law on March 6, 2018, ordering that Plaintiffs' claims against the Defendants/Respondents are dismissed with prejudice. The district court entered final judgment on December 11, 2018.

On April 21, 2015, Defendants/Respondents filed a counterclaim against Plaintiffs/Appellants for breach of contract and declaratory relief. On March 8, 2018, Defendants/Respondents filed a motion to dismiss their own counterclaims. On April 13, 2018, the district court entered an order granting that motion and dismissing the counterclaims. The district court entered final judgment on December 11, 2018.

24. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

■ Yes

☐ No

25. **If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. **If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b))**:

27. **Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Larry J. Willard, individually and as Trustee of the Larry James Willard Trust Fund, and Overland Development Corporation	Richard D. Williamson
Names of Appellants	Name of counsel of record
January 15, 2019	*/s/ Richard D. Williamson*
Date	Signature of counsel of record
State of Nevada, County of Washoe	
State and county where signed	

CERTIFICATE OF SERVICE

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

I further certify that on the 15th day of January, 2019, I electronically filed the foregoing DOCKETING STATEMENT CIVIL APPEALS with the Clerk of the Court by using the electronic filing system, which served the following parties electronically:

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Settlement Judge

/s/ Amy Sprinkle
An Employee of Robertson, Johnson, Miller & Williamson

Index of Exhibits

Exhibit	Description	Pages
	Latest-filed complaint and counterclaim	
1	First Amended Complaint filed on 01/21/15	18
2	Defendants' Amended Answer to Plaintiffs' Amended Complaint and Counterclaim filed on 04/21/15	14
	Orders of NRCP 41(a) voluntary dismissals	
3	Order Granting Defendants'/Counterclaimants' Motion to Dismiss Counterclaims filed on 04/13/18	3
4	Order of Dismissal of Claims of Wooley Plaintiffs with Prejudice filed on 04/13/18	2
	Other orders challenged on appeal	
5	Order Granting Defendants'/Counterclaimants' Motion for Sanctions filed on 01/04/18	5
6	Order Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich filed on 01/04/18	5
7	Order Granting Defendants'/Counterclaimants' Motion for Partial Summary Judgment [Oral Argument Requested] filed on 01/04/18	5
8	Findings of Facts, Conclusions of Law and Order on Defendants' Motion for Sanctions filed on 03/06/18	34
9	Order Denying Plaintiffs' Rule 60(b) Motion for Relief filed on 11/30/18	32
10	Judgment filed on 12/11/18	3

Notices of entry for each attached order

11	Notice of Entry of Order regarding Order Granting Defendants'/Counterclaimants' Motion for Sanctions filed on 01/05/18	10
12	Notice of Entry of Order regarding Granting Defendants'/Counterclaimants' Motion to Strike and/or Motion in Limine to Exclude the Expert Testimony of Daniel Gluhaich filed on 01/05/18	10
13	Notice of Entry of Order regarding Granting Defendants'/Counterclaimants' Motion for Partial Summary Judgment [Oral Argument Requested] filed on 01/05/18	10
14	Notice of Entry of Findings of Facts, Conclusions of Law and Order filed on 030618	39
15	Notice of Entry of Order regarding Order Granting Defendants'/Counterclaimants' Motion to Dismiss Counterclaims filed on 04/16/18	8
16	Notice of Entry of Order regarding Order of Dismissal of Claims of Wooley Plaintiffs with Prejudice filed on 04/16/18	7
17	Notice of Entry of Order regarding Order Denying Plaintiffs' Rule 60(b) Motion for Relief filed on 12/03/18	37
18	Notice of Entry of Judgment filed on 12/11/18	8