

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,

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Elizabeth A. Brown
Clerk of Supreme Court

Appellants,

vs.

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

Respondents.

_____ /

APPENDIX TO APPELLANTS' OPENING BRIEFS

VOLUME 2 OF 19

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¹ This document was inadvertently omitted earlier. It was added here because all of the other papers in the 19-volume appendix had already been numbered.

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20 EDWARD C. WOOLEY, and JUDITH A. WOOLEY

21 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
22 **IN AND FOR THE COUNTY OF WASHOE**

23 LARRY J. WILLARD, individually and as
24 trustee of the Larry James Willard Trust Fund;
25 OVERLAND DEVELOPMENT
26 CORPORATION, a California corporation;
27 EDWARD C. WOOLEY AND JUDITH A.
28 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

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

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

4 **FIRST CAUSE OF ACTION**

(Breach of Lease Agreement)

5 *By the Willard Plaintiffs Against Berry-Hinckley Industries*

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

8 9. On November 18, 2005, BHI entered into a lease agreement (the "Willard
9 Lease") on the property owned by the Willard Plaintiffs located at 7695-7699 S. Virginia Street,
10 Reno, Nevada (the "Willard Property"). Under the Willard Lease, BHI agreed to lease the
11 Virginia Street Property from January 2006 through January 2026 at a monthly rental rate of
12 \$122,031.25, said rental rate increasing by 2% per month through the lease term. A true and
13 correct copy of the Willard Lease is attached hereto as Exhibit 1.

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

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

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

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

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

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

13 15. As a further direct and proximate result of BHI breaching the Willard Lease, the
14 Willard Plaintiffs were forced to sell the Willard Property in March 2014 in a short sale, thereby
15 losing \$4,437,500.00 of earnest money invested in the Willard Property and incurring at least
16 \$3,000,000.00 in tax consequences and \$549,852.00 in closing costs.

17 16. As a further direct and proximate result of BHI breaching the Willard Lease, the
18 Willard Plaintiffs were forced to purchase insurance on the Willard Property at a cost of
19 \$4,554.53, were forced to pay for installation of a security fence for the Willard Property at a
20 cost of \$2,668.62, and were charged \$10,393.35 by Nevada Energy for utility fees rightly owed
21 by BHI.

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

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

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

2 **SECOND CAUSE OF ACTION**

3 (Breach of Personal Guaranty)

4 *By the Willard Plaintiffs Against Jerry Herbst*

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

6 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.

7 21. Under the terms of the Herbst-Willard Guaranty, Herbst guaranteed
8 "unconditionally, absolutely and irrevocably" the timely payment and performance of each of
9 BHI's obligations arising out of and under the Willard Lease. This guaranty was "a guaranty of
10 timely payment and performance of the Guaranteed Obligations and not merely of collectability
11 or enforceability of such obligations." Herbst agreed to be "directly responsible for the full
12 extent of any unsatisfied Guarantee Obligations." Herbst further agreed that his guaranty "is an
13 unconditional, absolute, present and continuing guaranty of payment and performance, and will
14 remain in full force and effect without regard to, and the obligations of [Herbst] hereunder shall
15 not be impaired, affected or released by, any of the following: (i) any modification, supplement,
16 extension or amendment of any of the Guaranteed Obligations or the Lease; (ii) any extension,
17 indulgence or other action in respect thereto or therefor; (iii) any failure or delay by the Lessor
18 or BHI in exercising any right or power under the Lease; (iv) any invalidity or unenforceability
19 in any respect of, or any irregularity or other defect in any of, the Lease or Guaranteed
20 Obligations; (v) any exercise or non-exercise of any right, remedy, power or privilege in respect
21 of this Agreement or any of the Guaranteed obligations; (vi) any transfer of the assets of Lessor
22 to, or any consolidation or merger of the Lessor with or into, any other entity; (vii) any voluntary
23 or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of the
24 assets, receivership, insolvency, bankruptcy, reorganization or similar proceeding affecting BHI
25 or any of its assets; (viii) any allegation or contest of the validity of the Lease or this
26 Agreement."
27
28

1 22. In the Herbst-Willard Guaranty, Herbst expressly waived "any defense to its
2 obligations . . . that might arise as a result of any of the" contingencies articulated in Paragraph
3 20, and further waived "the effect of any fact, circumstance or event of any nature whatsoever
4 that would exonerate, or would constitute or give rise to a defense to, the obligation of a surety
5 or guarantor."

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

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

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

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

23 **THIRD CAUSE OF ACTION**

24 (Breach of Lease Agreement)

25 *By the Wooley Plaintiffs Against Berry-Hinckley Industries*

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

28 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,

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

5 29. On June 6, 2006, BHI entered into a lease agreement ("Wooley Lease #2") on the
6 property owned by the Wooley Plaintiffs located at 1365 Baring Boulevard, Sparks, Nevada (the
7 "Sparks Property"). Under Wooley Lease #2, BHI agreed to lease the Sparks Property from
8 June 6, 2006 through September 30, 2025 at a monthly rental rate of \$19,856.25, said rental rate
9 increasing by 2% per month through the lease term. A true and correct copy of Wooley Lease
10 #2 is attached hereto as Exhibit 7.

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

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

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

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

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

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

10 36. As a further direct and proximate result of BHI breaching Wooley Lease #1, the
11 Wooley Plaintiffs were forced to purchase insurance on the Highway 50 Property at a cost of
12 \$3,840.00.

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

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

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

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

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

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

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

2 **FOURTH CAUSE OF ACTION**

3 (Breach of Personal Guaranty)

4 *By the Wooley Plaintiffs Against Jerry Herbst*

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

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

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

1 46. In the Herbst-Wooley Guaranty, Herbst expressly waived "any defense to its
2 obligations . . . that might arise as a result of any of the" contingencies articulated in Paragraph
3 44, and further waived "the effect of any fact, circumstance or event of any nature whatsoever
4 that would exonerate, or would constitute or give rise to a defense to, the obligation of a surety
5 or guarantor."

6 47. As a direct and proximate result of Herbst breaching the Herbst-Wooley
7 Guaranty, the Wooley Plaintiffs were deprived of rental income in the amount of \$4,420,244.00
8 that they otherwise would have received. The net present value of the remaining lease payments
9 using a discount rate of 4% as specified in the Wooley Leases was \$3,323,543.49 as of March 1,
10 2013.

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

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

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

19 51. As a further direct and proximate result of Herbst breaching the Herbst-Wooley
20 Guaranty, the Wooley Plaintiffs incurred maintenance costs on the Highway 50 Property of
21 \$4,000.00.

22 52. As a further direct and proximate result of Herbst breaching the Herbst-Wooley
23 Guaranty, the Wooley Plaintiffs incurred management fee costs on the Highway 50 Property of
24 \$2,500.00.

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

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

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

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

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

11 **FIFTH CAUSE OF ACTION**

12 (Attachment)

13 *By All Plaintiffs Against All Defendants*

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

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

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

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

26 61. These allegations are further based on the fact that on March 28, 2013,
27 Defendants attorney, Gerald M. Gordon of Gordon Silver, sent a letter to Plaintiffs' attorney
28 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

1 Plaintiffs rejected.

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

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

14 • the estate located at 1701 Enclave Court, Las Vegas, Nevada 89134, Parcel No.
15 138-20-416-003;

16 • the property located at 1001 South California Avenue, Parker, Arizona 85334,
17 Parcel No. 311-23-031;

18 • the property located at 1005 South California Avenue, Parker, Arizona 85344,
19 Parcel No. 311-23-030;

20 • the property located at 1009 South California Avenue, Parker, Arizona 85334,
21 Parcel No. 311-23-028A;

22 • the property located at 515 Saddle View Way 23, Park City, Utah 84060, Parcel
23 No. 01-923-06; and

24 • such other and further assets and properties owned by Defendants sufficient to
25 secure payment of Plaintiffs' claims against Defendants.

26 64. Pursuant to NRS Chapter 31, Plaintiffs seek issuance of a prejudgment writ of
27 attachment upon the assets of Defendant Berry-Hinckley Industries and Defendant Jerry Herbst,
28 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.

///

1 ON THE SECOND CAUSE OF ACTION:

- 2 1. For direct damages in the discounted amount of \$15,766,991.73;
- 3 2. For consequential damages in the amount of \$8,080,856.50;
- 4 3. For late payment penalties of \$25,630.98 for the period of March 2013 through
- 5 May 2013;
- 6 4. For interest at a rate of 18% per annum as provided for under the Willard Lease
- 7 from March 1, 2013 through entry of judgment; and
- 8 5. For reasonable attorney's fees as provided for under the Willard Lease.

9 ON THE THIRD CAUSE OF ACTION:

- 10 1. For direct damages in the discounted amount of \$3,323,543.49;
- 11 2. For consequential damages in an amount to be proven at trial but which is at least
- 12 \$2,809,600.30;
- 13 3. For interest at a rate of 18% per annum as provided for under the Wooley Leases
- 14 from March 1, 2013 through entry of judgment; and
- 15 4. For reasonable attorney's fees as provided for under the Wooley Leases.

16 ON THE FOURTH CAUSE OF ACTION:

- 17 1. For direct damages in the discounted amount of \$3,323,543.49;
- 18 2. For consequential damages in an amount to be proven at trial but which is at least
- 19 \$2,809,600.30;
- 20 3. For interest at a rate of 18% per annum as provided for under the Wooley Leases
- 21 from March 1, 2013 through entry of judgment; and
- 22 4. For reasonable attorney's fees as provided for under the Wooley Leases.

23 ON THE FIFTH CAUSE OF ACTION:

- 24 1. For issuance of a writ of attachment to impress a lien upon the assets of
- 25 Defendants, and each of them, in order to secure judgment in favor of Plaintiffs, which,
- 26 including interest accrued through October 2014, will exceed \$ 38,480,184.14. Such assets
- 27 include the following:
- 28 • the estate located at 1701 Enclave Court, Las Vegas, Nevada 89134, Parcel No.

1 138-20-416-003;

2 • the property located at 1001 South California Avenue, Parker, Arizona 85334,
3 Parcel No. 311-23-031;

4 • the property located at 1005 South California Avenue, Parker, Arizona 85344,
5 Parcel No. 311-23-030;

6 • the property located at 1009 South California Avenue, Parker, Arizona 85334,
7 Parcel No. 311-23-028A;

8 • the property located at 515 Saddle View Way 23, Park City, Utah 84060, Parcel
9 No. 01-923-06; and

10 • such other and further assets and properties owned by Defendants sufficient to
11 secure payment of Plaintiffs' claims against Defendants.

12 ON THE SIXTH CAUSE OF ACTION:

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

16 ON ALL CAUSES OF ACTION:

17 1. For pre-judgment interest upon such damages through entry of judgment at the
18 rate of 18 percent per annum as provided for under the Lease Agreements;

19 2. For costs of suit;

20 3. For such other orders and further relief as the Court deems just and proper.

21 Respectfully submitted,

22 THE O'MARA LAW FIRM, P.C.

23
24 DATED: January 20, 2015

By: 

25 DAVID C. O'MARA

26 Nevada Bar No. 8599

27 311 East Liberty Street

28 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
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(408) 300-0022
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Attorneys for Plaintiffs

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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.


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.

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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,

CASE NO.: CV14-01712

Plaintiff,

DEPT. NO.: 6

vs.

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

Defendants.

DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT

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

4 **JURISDICTION**

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

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

10 **PARTIES**

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

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

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

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

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

24 **FIRST CAUSE OF ACTION**
(Breach of Lease Agreement)

25 8. Paragraphs 1 through 7 above are hereby incorporated by reference as if fully set
26 forth at this point.
27
28

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

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

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

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

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

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

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

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

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

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

25 **SECOND CAUSE OF ACTION**
26 **(Breach of Personal Guaranty)**

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

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

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

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

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

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

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

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

12 **THIRD CAUSE OF ACTION**
13 **(Breach of Lease Agreement)**

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

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

21 29. To the extent Plaintiffs purport to quote or paraphrase from a document, the
22 document speaks for itself. Defendants deny any statements inconsistent with the document.
23 Additionally, Defendants are without knowledge or information sufficient to form a belief as to
24 the truthfulness of the remaining allegations contained in Paragraph 29 of Plaintiffs' Complaint,
25 and thus deny the same.

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

1 the truthfulness of the remaining allegations contained in Paragraph 30 of Plaintiffs' Complaint,
2 and thus deny the same.

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

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

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

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

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

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

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

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

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

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

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

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

19 **FOURTH CAUSE OF ACTION**
20 **(Breach of Personal Guaranty)**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 **FIFTH CAUSE OF ACTION**
15 **(Attachment)**

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

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

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

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

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

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

28 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

1 Defendants are excused from performance.

2 **FIFTH AFFIRMATIVE DEFENSE**

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

5 **SIXTH AFFIRMATIVE DEFENSE**

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

8 **SEVENTH AFFIRMATIVE DEFENSE**

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

10 **EIGHTH AFFIRMATIVE DEFENSE**

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

13 **NINTH AFFIRMATIVE DEFENSE**

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

16 **TENTH AFFIRMATIVE DEFENSE**

17 Plaintiffs are not contractually entitled to accelerated rent.

18 **ELEVENTH AFFIRMATIVE DEFENSE**

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

20 **TWELFTH AFFIRMATIVE DEFENSE**

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

23 **THIRTEENTH AFFIRMATIVE DEFENSE**

24 Plaintiffs' Complaint fails to state sufficient facts or claims to support punitive damages
25 against Defendants.

26 **FOURTEENTH AFFIRMATIVE DEFENSE**

27 It has been necessary for Defendants to employ the services of an attorney to defend this
28 action and a reasonable sum should be allowed Defendants as and for attorney's fees, together

1 with their costs expended in this action.

2 **FIFTEENTH AFFIRMATIVE DEFENSE**

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

5 **PRAYER FOR RELIEF**

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

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

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

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

13 **AFFIRMATION**

14 **Pursuant to NRS 239B.030**

15 The undersigned does hereby affirm that the preceding document does not contain the
16 social security number of any person.

17 DATED this 2nd day of February, 2015.

18 GORDON SILVER

19
20 By: /s/ Brian R. Irvine

21 JOHN P. DESMOND

22 Nevada Bar No. 5618

23 BRIAN R. IRVINE

24 Nevada Bar No. 7758

25 KATHLEEN M. BRADY

26 Nevada Bar No. 11525

27 100 West Liberty Street, Suite 940

28 Reno, Nevada 89501

Tel: (775) 343-7500

Fax: (775) 786-0131

Email: jdesmond@gordonsilver.com

Email: birvine@gordonsilver.com

Email: kbrady@gordonsilver.com

*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** 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 2nd day of February, 2015.

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

1085
GORDON SILVER
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
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Email: kbrady@gordonsilver.com

*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.

CASE NO.: CV14-01712

DEPT. NO.: 6

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

1 vs.

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

5
6 Counter-defendants

7 **DEFENDANTS' AMENDED ANSWER TO PLAINTIFFS' AMENDED COMPLAINT**
8 **AND COUNTERCLAIM**

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

11 **JURISDICTION**

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

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

17 **PARTIES**

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

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

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

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

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

3 **FIRST CAUSE OF ACTION**
4 **(Breach of Lease Agreement)**

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

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

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

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

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

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

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

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

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

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

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

3 **SECOND CAUSE OF ACTION**
4 **(Breach of Personal Guaranty)**

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

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

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

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

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

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

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

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

18 **THIRD CAUSE OF ACTION**
19 **(Breach of Lease Agreement)**

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

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

27 29. To the extent Plaintiffs purport to quote or paraphrase from a document, the
28 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 **FOURTH CAUSE OF ACTION**
25 **(Breach of Personal Guaranty)**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 **FIFTH CAUSE OF ACTION**
18 **(Attachment)**

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

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

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

23 60. To the extent Plaintiffs purport to quote or paraphrase from a document, the
24 document speaks for itself. Defendants deny any statements inconsistent with the document.
25 Additionally, Defendants are without knowledge or information sufficient to form a belief as to
26 the truthfulness of the remaining allegations contained in Paragraph 60 of Plaintiffs' Complaint,
27 and thus deny the same.
28

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

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

2 **THIRD AFFIRMATIVE DEFENSE**

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

4 **FOURTH AFFIRMATIVE DEFENSE**

5 Defendants are excused from performance.

6 **FIFTH AFFIRMATIVE DEFENSE**

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

9 **SIXTH AFFIRMATIVE DEFENSE**

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

12 **SEVENTH AFFIRMATIVE DEFENSE**

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

14 **EIGHTH AFFIRMATIVE DEFENSE**

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

17 **NINTH AFFIRMATIVE DEFENSE**

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

20 **TENTH AFFIRMATIVE DEFENSE**

21 Plaintiffs are not contractually entitled to accelerated rent.

22 **ELEVENTH AFFIRMATIVE DEFENSE**

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

24 **TWELFTH AFFIRMATIVE DEFENSE**

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

27 **THIRTEENTH AFFIRMATIVE DEFENSE**

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

1 against Defendants.

2 **FOURTEENTH AFFIRMATIVE DEFENSE**

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

6 **FIFTEENTH AFFIRMATIVE DEFENSE**

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

9 **PRAAYER FOR RELIEF**

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

- 12 1. That Plaintiffs take nothing by way of their Complaint and that the same be
13 dismissed with prejudice.
- 14 2. For costs of suit and reasonable attorneys' fees; and
- 15 3. For such other and further relief as the Court deems just and proper in the
16 circumstances.

17 **COUNTERCLAIM**

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

20 **PARTIES**

- 21 1. Berry-Hinckley Industries ("BHI") is a Nevada corporation.
- 22 2. Jerry Herbst ("Herbst," and collectively with BHI, "Counterclaimants") is an
23 individual and a resident of the State of Nevada.
- 24 3. Counter-defendant Larry J. Willard ("Willard") is, on information and belief, a
25 resident of California, and at all relevant times herein was trustee of the Larry James Willard
26 Trust Fund (the "Willard Trust").
- 27 4. Counter-defendant Overland Development Corporation, Inc., dba LJW
28 Enterprises, Inc. ("Overland"), is, on information and belief, a California corporation.

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

3 **GENERAL ALLEGATIONS**

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

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

12 In consideration of Operator performing the Services and other mutual covenants
13 set forth herein, Owner shall pay to Operator the sum of Ten Thousand and
14 No/100ths Dollars (\$10,000.00) per month (the “Fee”), and Owner then shall be
15 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.

16 Operator shall have fifty (50) days from the end of each month to tender the Net
17 Profits to Owner and provide Owner with an accounting of the subject month’s
18 Net Profits. Based thereon, commencing on July 20, 2013, and continuing no later
19 than the twentieth (20th) day of each month thereafter as necessary depending on
20 the length of the term of this Agreement, Operator shall tender to Owner the
21 subject month’s Net Profits attributable to the Location, minus the Fee, which
22 such Fee shall be retained by Operator. In the event that the Net Profits for any
23 given month are negative or otherwise not sufficient to pay the Fee, Owner shall
24 not be entitled to any payment and shall instead pay to Operator the amount of the
25 negative Net Profits (if applicable) plus the balance of the Fee within three (3)
26 days of receipt of written demand therefore. As used herein, the term Net Profits
27 shall mean the gross receipts collected by Operator in operating the Location in
28 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.

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

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

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

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

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

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

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

27 13. Counter-defendants have also brought suit against Herbst, claiming, *inter alia*,
28 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

1 Counterclaim as though set forth fully herein.

2 15. The Operation Agreement constitutes a binding legal contract.

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

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

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

9 **SECOND CLAIM FOR RELIEF**
10 **(DECLARATORY RELIEF)**

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

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

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

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

25 23. While BHI and Herbst deny any liability under the Willard Lease and Willard
26 Guaranty, BHI and Herbst request a declaration that BHI and Herbst are not responsible for any
27 of the rental payments that Counter-defendants claim were incurred during the term of the
28 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

JOHN P. DESMOND

Nevada Bar No. 5618

BRIAN R. IRVINE

Nevada Bar No. 7758

KATHLEEN M. BRADY

Nevada Bar No. 11525

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Email: kbrady@gordonsilver.com

*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

1650

GORDON SILVER
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
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Email: kbrady@gordonsilver.com

*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

ERRATA

vs.

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

Counter-defendants.

On the 21st day of April, 2015, Defendants/ Counterclaimants Berry-Hinckley Industries and Jerry Herbst filed their Amended Answer to Plaintiffs' Amended Complaint and Counterclaim ("Amended Answer"). The exhibit to the Amended Answer was inadvertently omitted. Defendants' Amended Answer is attached in its entirety, including the exhibit, 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 23rd day of April, 2015.

GORDON SILVER

By: /s/ Brian R. Irvine

JOHN P. DESMOND

Nevada Bar No. 5618

BRIAN R. IRVINE

Nevada Bar No. 7758

KATHLEEN M. BRADY

Nevada Bar No. 11525

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Email: kbrady@gordonsilver.com

*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 **ERRATA** 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 23rd day of April, 2015.

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

EXHIBIT TABLE

Exhibit	Description	Pages¹
1	Defendants' Amended Answer to Plaintiffs' Amended Complaint and Counterclaim	20

¹ Exhibit page counts are exclusive of exhibit slip sheets.

EXHIBIT 1

EXHIBIT 1

1085
 GORDON SILVER
 JOHN P. DESMOND
 Nevada Bar No. 5618
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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,

CASE NO.: CV14-01712

vs.

DEPT. NO.: 6

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

1 vs.

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

5
6 Counter-defendants

7 **DEFENDANTS' AMENDED ANSWER TO PLAINTIFFS' AMENDED COMPLAINT**
8 **AND COUNTERCLAIM**

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

11 **JURISDICTION**

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

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

17 **PARTIES**

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

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

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

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

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

3 **FIRST CAUSE OF ACTION**
4 **(Breach of Lease Agreement)**

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

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

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

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

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

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

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

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

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

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

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

3 **SECOND CAUSE OF ACTION**
4 **(Breach of Personal Guaranty)**

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

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

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

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

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

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

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

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

18 **THIRD CAUSE OF ACTION**
19 **(Breach of Lease Agreement)**

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

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

27 29. To the extent Plaintiffs purport to quote or paraphrase from a document, the
28 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 **FOURTH CAUSE OF ACTION**
25 **(Breach of Personal Guaranty)**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 **FIFTH CAUSE OF ACTION**
18 **(Attachment)**

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

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

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

23 60. To the extent Plaintiffs purport to quote or paraphrase from a document, the
24 document speaks for itself. Defendants deny any statements inconsistent with the document.
25 Additionally, Defendants are without knowledge or information sufficient to form a belief as to
26 the truthfulness of the remaining allegations contained in Paragraph 60 of Plaintiffs' Complaint,
27 and thus deny the same.
28

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

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

2 **THIRD AFFIRMATIVE DEFENSE**

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

4 **FOURTH AFFIRMATIVE DEFENSE**

5 Defendants are excused from performance.

6 **FIFTH AFFIRMATIVE DEFENSE**

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

9 **SIXTH AFFIRMATIVE DEFENSE**

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

12 **SEVENTH AFFIRMATIVE DEFENSE**

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

14 **EIGHTH AFFIRMATIVE DEFENSE**

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

17 **NINTH AFFIRMATIVE DEFENSE**

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

20 **TENTH AFFIRMATIVE DEFENSE**

21 Plaintiffs are not contractually entitled to accelerated rent.

22 **ELEVENTH AFFIRMATIVE DEFENSE**

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

24 **TWELFTH AFFIRMATIVE DEFENSE**

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

27 **THIRTEENTH AFFIRMATIVE DEFENSE**

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

1 against Defendants.

2 **FOURTEENTH AFFIRMATIVE DEFENSE**

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

6 **FIFTEENTH AFFIRMATIVE DEFENSE**

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

9 **PRAAYER FOR RELIEF**

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

- 12 1. That Plaintiffs take nothing by way of their Complaint and that the same be
13 dismissed with prejudice.
- 14 2. For costs of suit and reasonable attorneys' fees; and
- 15 3. For such other and further relief as the Court deems just and proper in the
16 circumstances.

17 **COUNTERCLAIM**

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

20 **PARTIES**

- 21 1. Berry-Hinckley Industries ("BHI") is a Nevada corporation.
- 22 2. Jerry Herbst ("Herbst," and collectively with BHI, "Counterclaimants") is an
23 individual and a resident of the State of Nevada.
- 24 3. Counter-defendant Larry J. Willard ("Willard") is, on information and belief, a
25 resident of California, and at all relevant times herein was trustee of the Larry James Willard
26 Trust Fund (the "Willard Trust").
- 27 4. Counter-defendant Overland Development Corporation, Inc., dba LJW
28 Enterprises, Inc. ("Overland"), is, on information and belief, a California corporation.

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**.

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.

A.App.288

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

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

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

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

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

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

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

27 13. Counter-defendants have also brought suit against Herbst, claiming, *inter alia*,
28 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

1 Counterclaim as though set forth fully herein.

2 15. The Operation Agreement constitutes a binding legal contract.

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

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

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

9 **SECOND CLAIM FOR RELIEF**
10 **(DECLARATORY RELIEF)**

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

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

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

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

25 23. While BHI and Herbst deny any liability under the Willard Lease and Willard
26 Guaranty, BHI and Herbst request a declaration that BHI and Herbst are not responsible for any
27 of the rental payments that Counter-defendants claim were incurred during the term of the
28 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

JOHN P. DESMOND

Nevada Bar No. 5618

BRIAN R. IRVINE

Nevada Bar No. 7758

KATHLEEN M. BRADY

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Email: birvine@gordonsilver.com

Email: kbrady@gordonsilver.com

*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 TABLE

Exhibit	Description	Pages¹
1	Operation Agreement	4

¹ Exhibit page counts are exclusive of exhibit slip sheets.

EXHIBIT 1

EXHIBIT 1

OPERATION AND MANAGEMENT AGREEMENT

THIS OPERATION AND MANAGEMENT AGREEMENT (the "Agreement"), dated the 1st day of May, 2013 (the "Effective Date"), is made and entered into by and between BERRY-HINCKLEY INDUSTRIES, a Nevada corporation (the "Operator"), and OVERLAND DEVELOPMENT CORPORATION INC., D/B/A LJW ENTERPRISES, INC., and LARRY WILLARD AS TRUSTEE OF THE WILLARD FAMILY TRUST DATED NOVEMBER 14, 1987 (collectively, the "Owner") as follows:

RECITALS

- A. Owner is the owner of that certain gas station and convenience store located at 7695 S. Virginia Street, Reno, Nevada (the "Location").
- B. Operator is the tenant, and Owner is the landlord, under that certain Lease Agreement dated November 18, 2005, which encumbers the Location (as amended, the "Lease").
- C. Operator has informed Owner that Operator intends to vacate and cease operations at the Location no later than April 30, 2013. Owner has requested that Operator remain in possession and continue to operate the Location until such time as Owner is able to find a replacement tenant for the Location.
- D. Operator has agreed to remain in possession and continue operating the Location upon the terms and conditions as set forth in this Agreement.

NOW THEREFORE, in consideration of the mutual promises and undertakings contained in this Agreement, the Owner and Operator agree as follows:

1. TERM/TERMINATION.

This Agreement shall be on a month to month basis commencing on the Effective Date. Either party hereto may terminate this Agreement at any time upon seven (7) days advance written notice to the other party. This Agreement shall automatically terminate on the last day of each month in which this Agreement is in effect if both parties do not agree, in writing, to renew this Agreement for an additional one (1) month period prior to the last day of the then current month.

2. GENERAL SCOPE OF SERVICES.

Owner hereby hires Operator as an independent contractor and Operator hereby accepts such engagement to provide for the Location such personnel as shall be required to operate and manage the Location as well as such other duties and responsibilities as are necessary to operate the Location (collectively, the "Services").

3. RELATIONSHIP OF PARTIES.

Nothing in this Agreement shall be construed as reserving to Owner any right to exercise any control over, or to direct in any respect Operator's performance of the Services; the entire control and direction of the Services shall be and remain in Operator, subject only to Operator's performance of the obligations of this Agreement in compliance with all laws and regulations governing the operation of the Location and the Services provided at the Location. It is expressly understood and agreed that it is not the purpose or intention of this Agreement to create between the parties hereto, nor shall the same be construed as creating, nor shall Owner or Operator ever assert that this Agreement creates or created the relation of employer and employee, co-employer or joint employer, any type of partnership relationship, a franchise relationship under the Federal Petroleum Marketing Practices Act or any state franchise laws, or any joint venture. Neither Operator nor any person performing any duties or engaged in any work pursuant to this Agreement for or on behalf of Operator is authorized to impose on Owner any obligations or liability whatsoever except as expressly provided herein.

4. COMPENSATION TO OPERATOR.

In consideration of Operator performing the Services and the 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.

5. RENT.

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 for 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.

6. OPERATOR'S EMPLOYEES.

Operator shall select and maintain the staff of employees for the Location as Operator deems necessary for its performance of the Services hereunder. All personnel furnished by Operator for its performance of the Services hereunder shall be the employees of Operator, and Operator shall have the right, in its sole and absolute discretion, to select, hire, pay, supervise, discipline and discharge such employees. Operator shall be responsible for payment and supervision of personnel at the Location.

7. INSURANCE.

Operator shall at all times during the term of this Agreement maintain insurance in the types and amounts as is required by the Lease.

8. DEFAULT -- REMEDIES.

In the event either Owner or Operator defaults in the performance of any covenant or condition of this Agreement and, as to any such default, fails to remedy the same or fails to implement a corrective action plan acceptable to the non-defaulting Party within three (3) days after the complaining Party gives notice thereof to the other, then the non-defaulting party may, at its option and upon written notice to the other, terminate this Agreement without prejudice to any other rights or remedies such party may have here or by law. Either party's right to require strict performance of the other's obligations under this Agreement shall not be affected by any previous waiver, forbearance, course of dealing, or trade custom or usage.

9. INDEMNIFICATION.

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. **CONFLICTING PROVISIONS.**

Except as otherwise expressly provided herein, Operator's use and occupancy of the Location shall be on the terms and provisions as set forth in the Lease. In the event of a conflict between the terms and provisions set forth in the Lease and the terms and provisions set forth in this Agreement, the terms and provisions of this Agreement shall control.

IN WITNESS WHEREOF, Owner and Operator have executed this Agreement as of the Effective Date.

"OPERATOR"

BERRY-HINCKLEY INDUSTRIES,
a Nevada corporation

By: 

Name: Chris Kemper

Title: V.P. of Admin.

"OWNER"

**OVERLAND DEVELOPMENT
CORPORATION INC., D/B/A LJW
ENTERPRISES, INC., a**
CAUTION corporation

By: 

Name: LARRY WILLARD

Title: President



Trustee, THE WILLARD FAMILY TRUST
DATED NOVEMBER 14, 1987

1 CODE NO.
2 THE O'MARA LAW FIRM, P.C.
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9 LAW OFFICES OF BRIAN P. MOQUIN
10 BRIAN P. MOQUIN, ESQ.
11 Pro Hac Vice Application Pending
12 California Bar No. 247583
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17 bmoquin@lawprism.com

18 Attorneys for Plaintiffs

19 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

20 **IN AND FOR THE COUNTY OF WASHOE**

21 LARRY J. WILLARD, individually and as) Case No. CV14-01712
22 trustee of the Larry James Willard Trust Fund;)
23 OVERLAND DEVELOPMENT) Dept. No. 6
24 CORPORATION, a California corporation;)
25 EDWARD C. WOOLEY AND JUDITH A.) **PLAINTIFFS LARRY J. WILLARD AND**
26 WOOLEY, individually and as trustees of the) **OVERLAND DEVELOPMENT**
27 Edward C. Wooley and Judith A. Wooley) **CORPORATION'S ANSWER TO**
28 Intervivos Revocable Trust 2000,) **DEFENDANTS' COUNTERCLAIM**

Plaintiffs,

vs.

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

Defendants.

1 Plaintiffs and Counter-Defendants LARRY J. WILLARD ("Willard"), individually and
2 as trustee of the Larry James Willard Trust Fund ("the Willard Trust"), and OVERLAND
3 DEVELOPMENT CORPORATION ("Overland") (collectively, "Counter-Defendants"), by
4 and through undersigned attorneys, hereby answer the allegations in the Counterclaim of
5 Defendants BERRY-HINCKLEY INDUSTRIES ("BHI") and JERRY HERBST ("Herbst")
6 (collectively, "Defendants") as follows:

- 7 1. The allegations contained in Paragraph 1 are ADMITTED.
- 8 2. The allegations contained in Paragraph 2 are ADMITTED.
- 9 3. The allegations contained in Paragraph 3 are ADMITTED.
- 10 4. The allegations contained in Paragraph 4 are ADMITTED.
- 11 5. The allegations contained in Paragraph 5 are ADMITTED.
- 12 6. The allegations contained in Paragraph 6 are ADMITTED.
- 13 7. The allegations contained in Paragraph 7 are ADMITTED.
- 14 8. The allegations contained in Paragraph 8 are ADMITTED.
- 15 9. The allegations contained in Paragraph 9 are ADMITTED.
- 16 10. Counter-Defendants do not have sufficient knowledge or information upon
17 which to base a belief as to the truth of the allegations contained in Paragraph 10, and therefore
18 DENY each and every allegation contained therein.
- 19 11. The allegations contained in Paragraph 11 are DENIED.
- 20 12. The allegations contained in Paragraph 12 are ADMITTED.
- 21 13. The allegations contained in Paragraph 13 are ADMITTED.

22 **FIRST CLAIM FOR RELIEF**
23 **(Breach of Contract)**

24 14. Paragraph 14 incorporates by reference prior paragraphs, and therefore requires
25 no response. Counter-Defendants incorporate by reference the answers to Paragraphs 1
26 through 13 above as though set forth fully herein.

- 27 15. The allegations contained in Paragraph 15 are DENIED.
- 28 16. The allegations contained in Paragraph 16 are DENIED.
17. The allegations contained in Paragraph 17 are DENIED.

19. Paragraph 19 incorporates by reference all allegations previously stated, and therefore requires no response. Counter-Defendants incorporate by reference the answers to Paragraphs 1 through 18 above as though set forth fully herein.

21. Answering Paragraph 2I, Counter-Defendants ADMIT that they brought suit against BHI seeking, *inter alia*, rental payments under the Willard Lease that they claim were incurred during the term of the Operation Agreement, but DENY that a controversy exists.

23. Paragraph 23 contains a request for declaratory relief, to which no response is required. To the extent that a response is required, such allegations are DENIED.

Defendants' Counterclaim, and each and every allegation contained therein, fails to state a claim upon which relief may be granted.

Defendant Herbst is estopped from bringing the Counterclaim, and each and every allegation contained therein, and has waived any and all rights to pursue the claims alleged in the Counterclaim by virtue of Section 2 of the Guaranty executed by Defendant Herbst, which reads as follows:

A.App.301

1 receiving written notice from the Lessor of such failure, or (b) is subject to a
 2 pending petition for relief under Chapter 7 or Chapter 11 of Title 11 of the
 3 United States Code, the Guarantor will be directly responsible for the full extent
 4 of any unsatisfied Guaranteed Obligations. **This Agreement is an**
 5 **unconditional, absolute, present and continuing guaranty of payment and**
 6 **performance, and will remain in full force and effect without regard to,**
 7 **and the obligations of the Guarantor hereunder shall not be impaired,**
 8 **affected or released by, any of the following: (i) any modification,**
 9 **supplement, extension or amendment of any of the Guaranteed Obligations**
 10 **or the Lease; (ii) any extension, indulgence or other action in respect**
 11 **thereto or therefor; (iii) any failure or delay by the Lessor or BHI in**
 12 **exercising any right or power under the Lease; (iv) any invalidity or**
 13 **unenforceability in any respect of, or any irregularity or other defect in any of,**
 14 **the Lease or Guaranteed Obligations; (v) any exercise or non-exercise of any**
 15 **right, remedy, power or privilege in respect of this Agreement or any of the**
 16 **Guaranteed Obligations; (vi) any transfer of the assets of Lessor to, or any**
 17 **consolidation or merger of the Lessor with or into, any other entity; (vii) any**
 18 **voluntary or involuntary liquidation, dissolution, sale or other disposition of all**
 19 **or substantially all of the assets, receivership, insolvency, bankruptcy,**
 20 **reorganization or similar proceeding affecting BHI or any of its assets; or (viii)**
 21 **any allegation or contest of the validity of the Lease or this Agreement. The**
 22 **Guarantor hereby waives any defense to its obligations hereunder that**
 23 **might arise as a result of any of the foregoing, and hereby waives the effect**
 24 **of any fact, circumstance or event of any nature whatsoever that would**
 25 **exonerate, or constitute or give rise to a defense to, the obligation of a**
 26 **surety or guarantor.** Without limitation, except to the extent specifically
 27 provided in Paragraph 2 hereof, the Guarantor waives any right it may have to
 28 require the Lessor, and any obligation the Lessor may have, to proceed first
 against BHI or exhaust any remedies that it may have against BHI in respect of
 non-payment or non-performance of the Guaranteed Obligations, before
 demand for payment or performance by the Guarantor under this Agreement.
 The Guarantor acknowledges that the rights and remedies herein provided are
 not exclusive of any other rights or remedies that the Lessor may otherwise
 have at law or in equity, and shall not prejudice the Lessor's right to assert any
 other claim under the Lease.

(Emphasis added.)

THIRD AFFIRMATIVE DEFENSE

Counter-Defendants allege that Defendants obtained Counter-Defendants' consent to
 enter into the Operation Agreement through fraud, deceit, or misrepresentation and that as a
 result the Operation Agreement is invalid.

FOURTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that Defendants waived each purported cause of action in Defendants' Counterclaim.

FIFTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that their performance arising under the Operation Agreement was conditioned upon Defendants first performing, or another act or condition to occur, that such performance, act, or condition never took place, and that as a result Counter-Defendants were never obligated to perform. Specifically, Defendants failed to satisfy the conditions precedent to Counter-Defendants' performance in failing to provide Counter-Defendants with a certified accounting and supporting documents of Defendants' Net Profits on July 20, 2013 as required under Section 4 of the Operation Agreement, failing to provide Counter-Defendants with a certified accounting and supporting documents of the subject month's Net Profits within fifty (50) days from the end of the subject month as required under Section 4 of the Operation Agreement, and failing to make a demand to Counter-Defendants for the alleged negative Net Profits as required under Section 4 of the Operation Agreement.

SIXTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that Defendants failed to comply with the terms of the Operation Agreement by breaching the implied warranty of good faith and fair dealing by acting unreasonably, denying the benefits of the Operation Agreement to Counter-Defendants.

SEVENTH AFFIRMATIVE DEFENSE

Counter-Defendants are informed and believe, and based upon such information and belief allege that Defendants are barred by the Equitable Doctrine of Unclean Hands from obtaining the relief requested in the Counterclaim.

EIGHTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that Defendants owe money to Counter-Defendants and that as a result if any amount is owed, which Counter-Defendants deny, Counter-Defendants owe less than the amount claimed by Defendants.

NINTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that even if Defendants' other allegations are true, Defendants did not suffer any damages.

TENTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that they performed all duties owed under the Operation Agreement other than any duties that were prevented or excused, and therefore Counter-Defendants never breached the Operation Agreement.

ELEVENTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that Defendants failed to take reasonable steps to reduce or minimize the damages alleged. Specifically, Defendants failed to exercise reasonable diligence in d the Location during the effective period of the Operation Agreement.

TWELFTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that Defendants acted in bad faith in failing to perform the duties required of them under the Operation Agreement and therefore Defendants should be barred from recovery in any amount.

THIRTEENTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that Defendants are not entitled to an award of attorneys' fees under the Operation Agreement nor at law for Counter-Defendants' alleged breach.

FOURTEENTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that the injuries, if any, suffered by Defendants as alleged in the Counterclaim were caused in whole or in part by the acts or omissions of Defendants, reducing the amount of recovery, if any, available to Defendants.

FIFTEENTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that the injuries, if any, suffered by Defendants as alleged in the Counterclaim were caused in whole or in part by the acts or omissions of a third party over which Counter-Defendants had no control.

SIXTEENTH AFFIRMATIVE DEFENSE

Counter-Defendants allege that the injuries, if any, suffered by Defendants as alleged in

1 the Counterclaim were caused in whole or in part by the acts or omissions of a third party over
2 which Counter-Defendants had no control.

3 **SEVENTEENTH AFFIRMATIVE DEFENSE**

4 Counter-Defendants allege that Defendants brought this Counterclaim without
5 reasonable cause and without a good faith belief that there was a justifiable controversy under
6 the facts or the law which warranted the filing of the Counterclaim against Counter-Defendants.
7 Defendants should therefore be responsible for and reimburse Counter-Defendants all of
8 Counter-Defendants necessary and reasonable attorney's fees and defense costs.

9 **EIGHTEENTH AFFIRMATIVE DEFENSE**

10 Counter-Defendants allege that Defendants have suffered no damage and are not
11 entitled to the relief sought, and that any claim for damages are speculative in nature.

12 **NINETEENTH AFFIRMATIVE DEFENSE**

13 Pursuant to NRCP 11, all possible affirmative defenses and/or counterclaims may not
14 have been fully alleged herein, in so far as sufficient facts were not available after reasonable
15 inquiry upon the filing of this Answer and, therefore, Counter-Defendants reserve the right to
16 amend this Answer to allege additional affirmative defenses and counterclaims if subsequent
17 investigation warrants.

18 **TWENTIETH AFFIRMATIVE DEFENSE**

19 Counter-Defendants deny each and every allegation of the Counterclaim not specifically
20 admitted or otherwise pled to herein.

21 **WHEREFORE**, Counter-Defendants pray for judgment on Defendants' Counterclaim
22 as follows:

- 23 1. That Defendants take nothing by their Counterclaim and that the Counterclaim
24 be dismissed with prejudice in its entirety;
 - 25 2. For costs incurred in defense of Defendants' Counterclaim;
 - 26 3. For reasonable attorney's fees incurred in defense of this action;
 - 27 4. For such other relief as this Court may deem just and proper.
- 28

AFFIRMATION

(Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document filed in the above-referenced matter does not contain the Social Security Number of any person.

Respectfully submitted,
THE O'MARA LAW FIRM, P.C.

DATED: May 27, 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: May 26, 2015

By: 

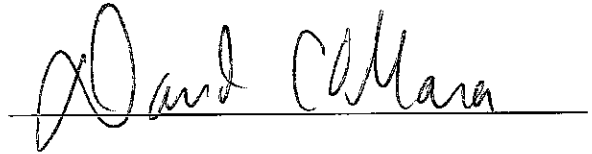
BRIAN P. MOQUIN
Admitted *Pro Hac Vice*
California Bar No. 257583
3506 La Castellet Court
San Jose, CA 95148
(408) 300-0022
(408) 843-1678 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The O'Mara Law Firm, P.C., 311 E. Liberty Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing document on all parties to this action electronically through the Court's ECF system to the following parties:

John Desmond, Esq.
100 W. Liberty St., Ste. 940
Reno, NV 89501
Telephone: 775.343.7500
Fax: 775.786.0131

DATED: May 27, 2015.

A handwritten signature in cursive script, appearing to read "David O'Mara", is written over a horizontal line.

1 **2045/2185**
2 DICKINSON WRIGHT PLLC
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16 *Attorneys for Defendants*
17 *Berry Hinckley Industries, and*
18 *Jerry Herbst*

19
20 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
21 **IN AND FOR THE COUNTY OF WASHOE**

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

CASE NO. CV14-01712
DEPT. 6

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST, an
individual; and JH, INC., a Nevada
Corporation,

Defendants.

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

Counterclaimants,

vs

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

4 Counter-defendants.

5 _____ /
6
7 **MOTION TO FOR CONTEMPT PURSUANT TO NRCP 45(e) AND MOTION FOR**
8 **SANCTIONS AGAINST PLAINTIFFS' COUNSEL PURSUANT TO NRCP 37**

9 Defendants Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants"), by
10 and through their attorneys of record, Dickinson Wright PLLC, hereby respectfully submit this
11 Motion for Contempt and/or Motion for Sanctions, seeking to compel third-party Daniel
12 Gluhaich to comply with the Subpoena Duces Tecum with which he was served, and seeking
13 sanctions against counsel for the Plaintiffs in this case, Brian P. Moquin. This Motion is based
14 upon NRCP 37 and NRCP 45, the following memorandum of points and authorities and
15 declaration of Brian R. Irvine, attached hereto as **Exhibit 1**, all pleadings and papers on file
16 herein, and any other material that this Court may choose to consider.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **FACTS AND PROCEDURAL HISTORY**

19 While this Motion concerns the failure of third-party Daniel Gluhaich to respond to
20 Defendants' Subpoena Duces Tecum with which he was served, Defendants respectfully submit
21 that Mr. Gluhaich's failure to respond to the Duces Tecum appears largely to be a result of Mr.
22 Moquin's dilatory conduct.

23 On June 11, 2015, counsel for Defendants wrote to counsel for Plaintiffs regarding a
24 Subpoena Duces Tecum for Mr. Gluhaich (the "Subpoena," attached hereto as **Exhibit 2**), and
25 inquired (1) whether Mr. Gluhaich or his company would be the more appropriate recipient of
26 such a subpoena; and (2) whether Mr. Moquin would accept service of the Subpoena on behalf
27 of Mr. Gluhaich. (June 11, 2015, email exchange, **Exhibit 3**.) Mr. Moquin responded that Mr.
28

1 Gluhaich was the proper recipient of the Subpoena and that Mr. Moquin had authority to accept
2 service on Mr. Gluhaich's behalf. *Id.*

3 On June 29, 2015, counsel for Defendants sent to Mr. Gluhaich and Plaintiffs' counsel
4 the following: (1) the Subpoena; (2) a form for acceptance of service; and (3) a cover letter
5 listing the deadlines to respond. (June 29, 2015, email, **Exhibit 4.**) Specifically, the cover letter
6 stated, in pertinent part, that Mr. Gluhaich was required to (1) produce true, legible, and durable
7 copies of the documents identified in the Subpoena at the office of Talty Court Reporters, 2131
8 The Alameda, San Jose, CA 95126, on **July 20, 2015, at 9:00 a.m.**; or (2) in lieu of his personal
9 appearance on that date, to deliver copies of the documents to the office of Defendants' counsel
10 on or before **July 15, 2015, at 9:00 a.m.**, along with a Certificate of Authenticity.¹ (Cover Letter,
11 **Exhibit 4.**) Mr. Moquin acknowledged receipt of the Subpoena and signed the acceptance of
12 service. (June 29, 2015, email response, **Exhibit 5.**)

13 On July 17, 2015, Defendants' counsel informed Mr. Moquin that Defendants had not yet
14 received any responses from Mr. Gluhaich. (July 17, 2015, email exchange, **Exhibit 6.**) Mr.
15 Moquin responded that responses would be tendered at Talty Court Reporters on July 20, 2015.
16 *Id.* Mr. Moquin subsequently represented that, in lieu of having Mr. Gluhaich appear at the San
17 Jose court reporter's office, he would place the responsive documents, along with a Certification
18 of Authenticity from Mr. Gluhaich, into an emailed Dropbox file on July 20, 2015,
19 notwithstanding that the deadline for providing documents other than a personal appearance at
20 Talty Court Reports was **July 15, 2015**. *Id.* Importantly, based on Mr. Moquin's representation
21 that he would submit Mr. Gluhaich's response via Dropbox, Defendants' counsel took the
22 records deposition off calendar and did not require Mr. Gluhaich's personal appearance at Talty
23 Court Reporters on July 20, 2015. (Decl. of B. Irvine, **Exhibit 1.**)

24 On July 20, 2015, Mr. Moquin informed Defendants' counsel that he had "been working
25 for 20 hours straight on the Gluhaich subpoena response," and "should have it to [Defendants']

26
27 ¹The responsive deadlines reflected in the cover letter are slightly later than those
28 reflected in the Subpoena because Defendants extended the deadlines based on a slight delay in
the issuance of the Subpoena.

1 counsel] sometime [that night].” (July 20, 2015, email, **Exhibit 7.**) Mr. Moquin also assured
2 Defendants’ counsel that he would provide documents to supplement Plaintiffs’ wholly deficient
3 discovery responses by July 21, 2015. *Id.*

4 Mr. Moquin did not provide any documents to Defendants’ counsel by the dates specified
5 in his email. (Decl. of B. Irvine, **Exhibit 1.**) On July 21, 2015, Defendants’ counsel informed Mr.
6 Moquin that they had still not received a response to the Subpoena. (July 21, 2015, email,
7 **Exhibit 7.**) Defendants’ counsel admonished Mr. Moquin that “[a]s of [July 22, 2015, the next
8 day], that response will be one-week late and we will have no choice but to file another motion.
9 Please advise as to the status of that response.” *Id.*

10 On July 23, 2015, Defendants’ counsel informed Mr. Moquin that Defendants still did not
11 have responses from Mr. Gluhaich, stating as follows:

12 [W]e still do not have a response to our subpoena to Mr. Gluhaich.
13 The response is now eight days late, and you have fallen into a
14 pattern of ignoring discovery deadlines. We intend to file a motion
15 tomorrow and seek relief on shortened time unless I have a
16 response by morning. I am truly not trying to be difficult, but these
continued delays are not allowing us to conduct the discovery we
need to prepare this case for our clients.

17 (July 23, 2015, email, **Exhibit 8.**) Mr. Moquin did not provide a substantive response indicating
18 when documents responsive to the subpoena to Mr. Gluhaich would be produced. (Decl. of B.
19 Irvine, **Exhibit 1.**) And, as of today’s date, Defendants have not received any documents
20 responsive to the Subpoena. *Id.*

21 DISCUSSION

22 Pursuant to NRCP 45(e), “[f]ailure by any person without adequate excuse to obey a
23 subpoena served upon that person may be deemed a contempt of the court from which the
24 subpoena issued.” Here, Mr. Gluhaich has failed to timely respond to the Subpoena: his delivery
25 of documents, along with a Certificate of Authenticity, is already nine days late. (Cover Letter,
26 **Exhibit 4.**) Thus, Defendants respectfully request that this Court compel Mr. Gluhaich to
27 produce all documents responsive to the Subpoena.

1 Additionally, as noted herein, Mr. Gluhaich's failure to timely comply with the subpoena
2 appears to be attributable to Mr. Moquin. Mr. Moquin appears to have an established relationship
3 with Mr. Gluhaich, and it is clear that Mr. Gluhaich has a long-standing relationship with each of
4 the Plaintiffs as their real estate broker. Mr. Moquin certainly represented that he was authorized
5 to accept service on Mr. Gluhaich's behalf and assured Defendants that he would timely provide
6 the documents responsive to the subpoena directed at Mr. Gluhaich on behalf of Mr. Gluhaich.
7 (July 17, 2015, email exchange, **Exhibit 6**.) Based on Mr. Moquin's representation that he would
8 facilitate Mr. Gluhaich's response via Dropbox, Defendants' counsel did not require Mr.
9 Gluhaich's personal appearance at Talty Court Reporters on July 20, 2015. (Decl. of B. Irvine,
10 **Exhibit 1**.) In other words, but for Mr. Moquin's representations, Defendants would have taken
11 steps to procure the responsive documents from Mr. Gluhaich on July 20, 2015, at Talty Court
12 Reporters.

13 Indeed, according to Mr. Moquin, Mr. Gluhaich has already provided Mr. Moquin with
14 responsive documents on or before July 20, 2015, as Mr. Moquin purportedly "work[ed] for 20
15 hours straight on the Gluhaich subpoena response" on July 20, 2015. (July 20, 2015, email,
16 **Exhibit 7**.) In fact, Mr. Moquin represented in June that Mr. Gluhaich provided Mr. Moquin
17 with "162,000 e-mail messages" in response to Defendants' discovery requests to Plaintiffs.
18 (June 23, 2015, email, **Exhibit 9**.) If Mr. Moquin had responsive documents as of the Subpoena
19 deadline, the delay in responding to the Subpoena is attributable to Mr. Moquin.

20 Defendants also note that Mr. Moquin's repeated—but empty—reassurances of
21 forthcoming documents have become a pattern. As this Court is aware, Plaintiffs' first round of
22 discovery responses in this matter were more than 20 days late (following several extensions),
23 resulting in this Court compelling Plaintiffs to produce their responses and awarding Defendants
24 their fees. (Order Granting Motion to Compel, on file herein.) Since that time, Mr. Moquin has
25 not only delayed in providing responses to the Subpoena, he has also delayed in providing
26 supplemental responses to Plaintiffs' deficient discovery responses. (*See, e.g.*, July 20, 2015,
27 email, **Exhibit 7**.) Defendants have heard excuses ranging from business trips to India, to
28 potential eviction, to last-minute hearings or trials, to ignorance of the fact that verification of

1 discovery responses must be notarized. Defendants are certainly sympathetic to any justified
2 requests for extensions, but Mr. Moquin's repeated failure to provide Defendants with responsive
3 documents is severely hampering Defendants' ability to conduct the discovery necessary to
4 defend this case.

5 Plaintiffs' unjustifiable and continual failure to provide Defendants with responses to
6 Defendants' discovery requests has left Defendants with no choice but to file the present Motion.
7 Further, Defendants have made repeated efforts to obtain documents responsive to the subpoena
8 from Mr. Moquin. (*See, e.g.*, July 17, 2015, email exchange, **Exhibit 6**; July 21, 2015, email,
9 **Exhibit 7**; July 23, 2015, email, **Exhibit 9**.) Defendants have also notified Mr. Moquin on two
10 occasions that absent a response to the Subpoena, Defendants would file a motion for relief. (*See,*
11 *e.g.*, July 21, 2015, email, **Exhibit 7**; July 23, 2015, email, **Exhibit 9**.) Thus, Defendants
12 respectfully request that this Court award Defendants the fees and costs associated with the filing
13 of this Motion against Mr. Moquin. Pursuant to NRCP 37(a)(4)(A):

14
15 If the motion is granted or if the disclosure or requested discovery
16 is provided after the motion was filed, the court shall, after
17 affording an opportunity to be heard, require the party or deponent
18 whose conduct necessitated the motion or the party or attorney
19 advising such conduct or both of them to pay to the moving party
20 the reasonable expenses incurred in making the motion, including
21 attorney's fees, unless the court finds that the motion was filed
22 without the movant's first making a good faith effort to obtain the
23 disclosure or discovery without court action, or that the opposing
24 party's nondisclosure, response or objection was substantially
25 justified, or that other circumstances make an award of expenses
26 unjust.

27 Defendants also note that Defendants have propounded additional discovery requests to
28 Plaintiffs, responses to which are due by August 6, 2015. (Decl. of B. Irvine, **Exhibit 1**.)
Defendants have also scheduled three depositions, at least one of which Mr. Moquin has already
attempted to reschedule. *Id.* Defendants fear that, absent affirmative relief against Mr. Moquin, a
pattern of obstructive conduct will continue and Defendants will continue to be severely
prejudiced in their attempt to defend this case.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court compel responses to the Subpoena and award sanctions against Mr. Moquin in the form of Defendants' fees and costs associated with the filing of this Motion.

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 24th day of July, 2015.

DICKINSON WRIGHT PLLC

By: /s/ Brian Irvine

JOHN P. DESMOND

Nevada Bar No. 5618

BRIAN R. IRVINE

Nevada Bar No. 7758

ANJALI D. WEBSTER

Nevada Bar No. 11525

100 West Liberty Street, Suite 940

Reno, NV 89501

Tel: (775) 343-7500

Fax: (775) 786-0131

Email: Jdesmond@dickinsonwright.com

Email: Brivine@dickinsonwright.com

Email: Awebster@dickinsonwright.com

*Attorneys 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 the attached **MOTION TO FOR CONTEMPT PURSUANT TO NRCP 45(e) AND MOTION FOR SANCTIONS AGAINST PLAINTIFFS' COUNSEL PURSUANT TO NRCP 37** on the party(s) set forth below by:

- ☒ (BY MAIL) on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of DICKINSON WRIGHT PLLC, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.
- ☐ 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.
- ☒ Certified Mail
- ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the addressee(s) at the addressees) set forth below.
- ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the addressees) noted below, addressed as follows:
- ☒ By email
- ☐ Federal Express (or other overnight delivery)

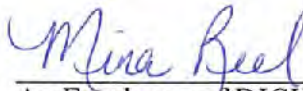
Addressed as follows:

Daniel Gluhaich
Intero Real Estate Services
175 East Main Avenue Suite 130
Morgan Hill, CA 95037

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

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3506 La Castellet Court
San Jose, California 95148

DATED this 24th day of July, 2015.



An Employee of DICKINSON WRIGHT PLLC

EXHIBIT TABLE

Exhibit	Description	Pages ²
1	Declaration of Brian R. Irvine	
2	Subpoena Duces Tecum to Dan Gluhaich	16
3	June 11, 2015, email exchange	2
4	June 29, 2015, email attaching the Subpoena, a form for acceptance of service, and a cover letter listing the deadlines to respond	23
5	June 29, 2015, email response	5
6	July 17, 2015, email exchange	4
7	July 20 and July 21 2015, email	2
8	July 23, 2015 email	1
9	June 23, 2015 email	1

² Exhibit page counts are exclusive of exhibit slip sheets.

EXHIBIT 1

EXHIBIT 1

DICKINSON WRIGHT
 JOHN P. DESMOND
 Nevada Bar No. 5618
 BRIAN R. IRVINE
 Nevada Bar No. 7758
 ANJALI D. WEBSTER
 Nevada Bar No. 12515
 100 West Liberty Street, Suite 940
 Reno, NV 89501
 Tel: (775) 343-7500
 Fax: (775) 786-0131
 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 E. WOOLEY AND JUDITH A.
 WOOLEY, individually and as trustees of the
 Edward C. Wooley and Judith A. Wooley
 Intervivos Revocable Trust 2000,

CASE NO. CV14-01712
 DEPT. 6

Plaintiff,
 vs.
 BERRY-HINCKLEY INDUSTRIES, a Nevada
 corporation; and JERRY HERBST, an
 individual; and JH, INC., a Nevada
 Corporation,

**DECLARATION OF BRIAN R. IRVINE
 IN SUPPORT OF DEFENDANTS'
 MOTION FOR CONTEMPT PURSUANT
 TO NRCP 45(e) AND MOTION FOR
 SANCTIONS PURSUANT TO NRCP 37**

Defendants.

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

Counterclaimants,

vs

LARRY J. WILLARD, individually and as

1 trustee of the Larry James Willard Trust Fund;
2 OVERLAND DEVELOPMENT
3 CORPORATION, a California corporation;

4 Counter-defendants.

5 I, BRIAN R. IRVINE, do hereby declare as follows:

6 1. I am an attorney of record for Defendants Berry-Hinckley Industries ("BHI") and
7 Jerry Herbst in the above-captioned matter. I am an attorney duly licensed to practice law in the
8 State of Nevada and before this Court, and I have personal knowledge of and am competent to
9 testify concerning the facts stated herein, except for those matters stated upon information and
10 belief, and as to those matters, I believe them to be true.

11 2. Based on Brian Moquin's representation to me that he would submit Daniel
12 Gluhaich's response via Dropbox, I took the records deposition off calendar and did not require
13 Mr. Gluhaich's personal appearance at Talty Court Reporters on July 20, 2015.

14 3. Although Mr. Moquin represented to me that he would provide me with
15 documents responsive to the subpoena duces tecum by July 20, 2015, I did not receive any such
16 documents by that date.

17 4. In fact, as of today's date, I still have not received any documents responsive to
18 the subpoena duces tecum to Daniel Gluhaich.

19 5. Defendants have propounded additional discovery requests to Plaintiffs.
20 Responses are due by August 6, 2015.

21 6. Attached as **Exhibit 2** to the Motion is the Subpoena Duces Tecum to Daniel
22 Gluhaich.

23 7. Attached as **Exhibit 3** to the Motion is an email exchange from June 11, 2015,
24 between Plaintiffs' counsel and Defendants' counsel.

25 8. Attached as **Exhibit 4** to the Motion is an email dated June 29, 2015, from the
26 office of Defendants' counsel, including a Cover Letter to Mr. Gluhaich, the Subpoena Duces
27 Tecum, and a form for Acceptance of Service.

1 9. Attached as **Exhibit 5** to the Motion is a June 29, 2015, email from Mr. Moquin
2 regarding acceptance of service.

3 10. Attached as **Exhibit 6** to the Motion is an email exchange from July 17, 2015,
4 between Plaintiffs' counsel and Defendants' counsel.

5 11. Attached as **Exhibit 7** to the Motion is an email exchange between Defendants'
6 counsel and Mr. Moquin dated July 20-21, 2015.

7 12. Attached as **Exhibit 8** to the Motion is an email from Defendants' counsel dated
8 July 23, 2015.

9 13. Attached as **Exhibit 9** to the Motion is an email from Mr. Moquin dated June 23,
10 2015.

11 I declare under penalty of perjury that the foregoing is true and correct.

12 DATED this 24th day of July, 2015.

13
14 
15 _____
16 BRIAN R. IRVINE
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EXHIBIT 2

EXHIBIT 2

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Brian R. Irvine (NV 7758) John P. Desmond (NV 5618, CA 176430) Dickinson Wright PLLC 100 W. Liberty Street, Suite 940 Reno, NV 89501 TELEPHONE NO.: 775-343-1500 FAX NO. (Optional): 775-786-0131 E-MAIL ADDRESS (Optional): birvine@dickinsonwright.com ATTORNEY FOR (Name): Berry Hinckley Industries, Jerry Herbst, JH, Inc.		SUBP-030 FOR COURT USE ONLY ENDORSED FILED 2015 JUN 23 P 2:2 David H. Yarnall, Clerk of the Superior Court County of Santa Clara, California S. Smith
Court for county in which discovery is to be conducted: SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara STREET ADDRESS: 191 North First Street MAILING ADDRESS: 191 North First Street CITY AND ZIP CODE: San Jose, CA 95113 BRANCH NAME: Downtown Superior Court		
Court in which action is pending: Second Judicial District Court Name of Court: Second Judicial District Court, County of Washoe STREET ADDRESS: 75 Court Street MAILING ADDRESS: 75 Court Street CITY, STATE, AND ZIP CODE: Reno, NV 89501 COUNTRY: USA		
PLAINTIFF/PETITIONER: Larry J. Willard, et al. DEFENDANT/RESPONDENT: Berry Hinckley Industries, et al.		CALIFORNIA CASE NUMBER (if any assigned by court) 115 CV 282238
APPLICATION FOR DISCOVERY SUBPOENA IN ACTION PENDING OUTSIDE CALIFORNIA		CASE NUMBER (of action pending outside California): CV14-01712

1. Applicant (name): Berry Hinckley Industries; Jerry Herbst; JH, Inc. is (check one):
☐ Plaintiff ☐ Petitioner ☒ Defendant ☐ Respondent ☐ Other (specify):
 in the above action.

2. Applicant requests that this court issue a subpoena for discovery under Code of Civil Procedure sections 2029.100 – 2029.900 to (name and address of deponent or person in control of property):
 Daniel Gluhaich; 175 East Main Ave., Suite 130; Morgan Hill, CA 95037

3. Attached is (check one): ☐ the original ☒ a true and correct copy of the document from the court in which the action is pending that requires the person in 2 to (check all that apply):
 a. ☐ attend and give testimony at a deposition;
 b. ☒ produce and permit inspection and copying of designated materials, information, or tangible things in the possession, custody, or control of the deponent;
 c. ☐ permit the inspection of premises under the control of the deponent.

4. Applicant submits with this application a proposed subpoena that includes terms identical to those in the document from the out-of-state court. (Code of Civil Procedure section 2029.300(d).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 6/17/2015

Brian R. Irvine

(TYPE OR PRINT NAME)

(SIGNATURE OF ATTORNEY OR PARTY WITHOUT ATTORNEY)

Note: This application must be accompanied by the fee specified in Government Code section 70826. A discovery subpoena must be personally served on the deponent in compliance with California law, including Code of Civil Procedure section 1985.

ORIGINAL

4065
 DICKINSON WRIGHT
 JOHN P. DESMOND
 Nevada Bar No. 5618
 BRIAN R. IRVINE
 Nevada Bar No. 7758
 ANJALI D. WEBSTER
 Nevada Bar No. 12515
 100 West Liberty Street, Suite 940
 Reno, NV 89501
 Tel: (775) 343-7500
 Fax: (775) 786-0131
 Email: Jdesmond@dickinsonwright.com
 Email: Brvine@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 E. WOOLEY AND JUDITH A.
 WOOLEY, individually and as trustees of the
 Edward C. Wooley and Judith A. Wooley
 Intervivos Revocable Trust 2000,

CASE NO. CV14-01712

DEPT. 6

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a
 Nevada corporation; and JERRY HERBST, an
 individual; and JH, INC., a Nevada
 Corporation,

Defendants.

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

Counterclaimants,

vs

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

5 Counter-defendants.

6 **SUBPOENA DUCES TECUM**

7 THE STATE OF NEVADA SENDS GREETINGS TO:

8 Daniel Gluhaich
9 Intero Real Estate Services
10 175 East Main Avenue Suite 130
11 Morgan Hill, CA 95037

12 You are required, pursuant to Nevada Rule of Civil Procedure 45, to produce true,
13 legible, and durable copies of the documents identified in Exhibit A attached hereto at the office
14 of TALTY COURT REPORTERS, 2131 The Alameda, San Jose, CA 95126 on July 10,
15 2015 at 9:00 a.m. If you fail to attend, you may be deemed guilty of contempt of Court and
16 liable to pay all losses and damages caused by your failure to appear.

17 In lieu of your personal appearance on July 10, 2015, at 9:00 a.m., you may deliver
18 copies of the documents to be provided to DICKINSON WRIGHT, 100 W. Liberty Street,
19 Suite 940, Reno, NV 89501 on or before July 15, 2015, at 9:00 a.m. If documents are
20 produced in lieu of appearance, please execute the attached certification (Certificate of
21 Authenticity) that the records produced are true, accurate and complete copies of all responsive
22 records in your possession or under your control.

23 DATED this 17 day of June, 2015.

24 JACQUELINE BRYANT, CLERK OF THE COURT

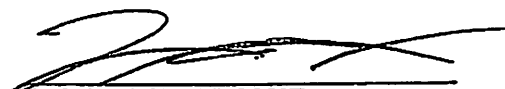
25
26 By: 
27 DEPUTY CLERK
28

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 17th day of June, 2015.

DICKINSON WRIGHT



DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: Jdesmond@dickinsonwright.com
Email: Birvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

*Attorney for Defendants
Berry Hinckley Industries, and
Jerry Herbst*

1 STATE OF CALIFORNIA)
2)ss.
3 COUNTY OF SANTA CLARA)

4 I hereby certify that I am over 18 years of age and not a party to nor interested in the proceeding
5 in which this service is made. That I received this Subpoena on the ____ day of ____
6 2015, and personally served the same by delivering a copy to the witness at (state address)
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9 on this ____ day of ____ 2015.
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13 Signature of person making service
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16 Print name here
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EXHIBIT "A"**DEFINITIONS**

The following preliminary definitions and instructions apply to each of the requests hereinafter set forth, and Defendants incorporate the same herein by reference.

1. When used herein, the term "BHI" means Berry-Hinckley Industries, a Nevada corporation.

2. When used herein, the term "Defendants" means BHI and Jerry Herbst.

3. When used herein, the term "Willard" means Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund.

4. When used herein, the term "Overland" means Overland Development Corporation, a California corporation.

5. When used herein, the term "Willard Plaintiffs" means Willard and Overland.

6. When used herein, the term "Willard Property" means the real property located at 7695-77699 S. Virginia Street, Reno, Nevada (APN 043-011-48).

7. When used herein, the term "Wooley Plaintiffs" means Edward C. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000.

8. When used herein, the term "Highway 50 Property" means the real property located at 1820 Highway 50 East, Carson City, Nevada (APN 002-368-27).

9. When used herein, the term "Baring Property" means the real property located at 1365 Baring Boulevard, Sparks, Nevada (APN 030-041-08).

10. When used herein, the terms "You" and "Your" and their plural, or any synonym thereof means Daniel Gluhaich, in an individual capacity and/or in his capacity as a realtor and/or broker and/or real estate agent, and/or any agent, employee, or representative of Daniel Gluhaich who is purporting to act on his behalf, or who are in possession of, or may have obtained information for or on behalf of Daniel Gluhaich.

1 11. When used herein, the terms "Document" and "Writing" and the plural forms
2 thereof, shall mean all written, typewritten, printed, recorded, or graphic matters, however
3 produced or reproduced, of every kind and description, pertaining to the subject matter of this
4 action. The terms "Document" and "Writing" shall include, but are not limited to, any books,
5 pamphlets, periodicals, memoranda, letters, correspondence, telegrams, applications, leases,
6 memoranda of understanding, agreements, contracts, permits, articles, bylaws, financial records,
7 security instruments, checks, bank statements, receipts, invoices, bids, proposals, offers,
8 counteroffers, time records, accounting records, minutes, records of meetings, reports, notes,
9 diaries, logs, tapes, transcripts, recordings, records of phone calls, work papers, charts, faxes,
10 drawings, photographs, films, medical and hospital reports and records, x-ray photographs, or
11 any other handwritten, recorded, transcribed, punched, taped, filmed, or graphic matter, however
12 produced or reproduced, in Your possession, custody, or control, or to which you have had
13 access. Documents shall also include any drafts or variations or markings to original Documents.

14 12. When used herein, the terms "Communication" or "Communications" shall mean
15 (a) any form of data transmission, including letters, faxes, emails, and other transmission of data
16 via telecommunications, (b) all meetings of two or more persons and all documents describing
17 such meetings, (c) all telephone conversations and telephone conferences, and (d) all situations
18 in which ideas are discussed, interpreted or exchanged among two or more persons.

19 13. When used herein, the term "Correspondence" shall mean any writing or
20 document relating to any communication, including but not limited to letters, emails, notes,
21 telephone message pads, text messages, transcriptions, faxes, and memoranda.

22 14. When used herein, the term "Person" shall mean natural persons, firms,
23 proprietorships, associations, partnerships, corporations, governmental entities, and every other
24 type of organization or entity.

25 15. When used herein, the terms "Relate to," "related to," or "relating to" shall mean
26 constituting, pertaining to, referring to, alluding to, responding to, elaborating upon, concerning,
27 memorializing, supporting, refuting, evidencing, connected with, commenting on, regarding,
28

1 discussing, showing, describing, reflecting, analyzing, recording, including, mentioning, in
2 respect of, analyzing or bearing on any logical or factual connection with the matter discussed.

3 16. In the event you withhold from identification any document as privileged, you are
4 requested to provide a list of documents withheld and state the following information with
5 respect to each document withheld:

- 6 a. The date appearing on the document and, if it has no date, the date, or
7 approximate date, on which it was prepared;
- 8 b. The title, label, code number or file number of the document;
- 9 c. The name and current address of the person(s) who signed the document and, if it
10 was not signed, the name and current address of the person(s) who prepared it;
- 11 d. The name and current address of the person(s) to whom the document was
12 directed and the person(s) to whom a copy of the document was directed;
- 13 e. A general description of the subject matter(s) to which the document relates;
- 14 f. The name and current address of the person(s) having present possession,
15 custody, or control of the document;
- 16 g. The grounds on which the document has been withheld.

17 17. If you object to any portion of this Subpoena, state the specific ground for such
18 objection and respond to the request to the extent to which there is no objection.

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INSTRUCTIONS

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2 1. You are requested to produce all Documents and tangible things in Your
3 possession, custody or control, which have not been previously produced.

4 2. You are requested to produce Documents in the form in which they are kept in the
5 usual course of Your business, or to organize and label them to correspond with the categories in
6 this request.

7 3. If You claim that the attorney-client privilege, the attorney work-product rule, or
8 any other privilege is applicable to any Document, production of which is sought by this request,
9 the substance of that Document need not be disclosed in Your answers, but You shall, with
10 respect to that Document:

11 a. State the date of the Document;

12 b. Identify each and every author of the Document;

13 c. Identify each and every person who prepared or participated in the preparation of
14 the Document;

15 d. Identify each and every person who received the Document;

16 e. Identify each and every person from whom the Document was received;

17 f. State the present location of the Document and all copies thereof;

18 g. Identify each and every person having custody or control of the Document and all
19 copies thereof; and

20 h. Provide sufficient further information concerning the Document and the
21 circumstances thereof to explain the claim of privilege and to permit the
22 adjudication of the propriety of that claim.

23 4. In the event You are able to produce only some of the Documents called for in a
24 particular request, please produce all the Document You are able to and state the reasons for
25 Your inability to produce the remainder.

26 5. If You object to a portion of a request, please produce all Documents called for by
27 that portion of the request to which You do not object.

REQUESTS FOR PRODUCTIONS OF DOCUMENTS

REQUEST NO. 1: Please produce any and all Documents You sent to or received from the Willard Plaintiffs, Willard, and/or Overland, or any employees, representatives, or agents of the Willard Plaintiffs, Willard, and/or Overland relating to the Willard Property from January 2005 through present.

REQUEST NO. 2: Please produce any and all Documents You sent to or received from BHI or any employees, representatives, agents, or successors of BHI relating to the Willard Property from January 2005 to present.

REQUEST NO. 3: Please produce any and all Documents You sent to or received from Jerry Herbst or any employees, representatives, or agents of Jerry Herbst relating to the Willard Property from January 2005 to present.

REQUEST NO. 4: Please produce any and all Documents You sent to or received from any other person or entity relating to the Willard Property from January 2005 to present.

REQUEST NO. 5: Please produce any and all Documents You have prepared or authorized or directed preparation of relating to the Willard Property from January 2005 to present.

REQUEST NO. 6: Please produce each and every contract to which you are a party that is related to the Willard Property.

REQUEST NO. 7: Please produce any and all marketing or promotional materials in your possession, custody, or control for the lease or sale of the Willard Property.

REQUEST NO. 8: Please produce any and all Documents You sent to or received from the Wooley Plaintiffs or any employees, representatives, or agents of the Wooley Plaintiffs relating to the Highway 50 Property from January 2005 through present.

REQUEST NO. 9: Please produce any and all Documents You sent to or received from BHI or any employees, representatives, agents, or successors of BHI relating to the Highway 50 Property from January 2005 through present.

1 **REQUEST NO. 10:** Please produce any and all Documents You sent to or received from
2 Jerry Herbst or any employees, representatives, or agents of Jerry Herbst relating to the Highway
3 50 Property from January 2005 to present.

4 **REQUEST NO. 11:** Please produce any and all Documents You sent to or received from
5 any other person or entity relating to the Highway 50 Property from January 2005 to present.

6 **REQUEST NO. 12:** Please produce any and all Documents You have prepared or
7 authorized or directed preparation of relating to the Highway 50 Property from January 2005 to
8 present.

9 **REQUEST NO. 13:** Please produce each and every contract to which you are a party
10 that is related to the Highway 50 Property.

11 **REQUEST NO. 14:** Please produce any and all marketing or promotional materials in
12 your possession, custody, or control for the lease or sale of the Highway 50 Property.

13 **REQUEST NO. 15:** Please produce any and all Documents You sent to or received from
14 the Wooley Plaintiffs or any employees, representatives, or agents of the Wooley Plaintiffs
15 related to the Baring Property from January 2005 through present.

16 **REQUEST NO. 16:** Please produce any and all Documents You sent to or received from
17 BHI or any employees, representatives, agents, or successors of BHI related to the Baring
18 Property from January 2005 through present.

19 **REQUEST NO. 17:** Please produce any and all Documents You sent to or received from
20 Jerry Herbst or any employees, representatives, or agents of Jerry Herbst related to the Baring
21 Property from January 2005 to present.

22 **REQUEST NO. 18:** Please produce any and all Documents You sent to or received from
23 any person or entity related to the Baring Property from January 2005 to present.

24 **REQUEST NO. 19:** Please produce any and all Documents You have prepared or
25 authorized or directed preparation of relating to the Baring Property from January 2005 to
26 present.

27

28

1 **REQUEST NO. 20:** Please produce each and every contract to which you are a party
2 that is related to the Baring Property.

3 **REQUEST NO. 21:** Please produce any and all marketing or promotional materials in
4 your possession, custody, or control for the lease or sale of the Baring Property.

5 **REQUEST NO. 22:** Please produce documents sufficient to identify any and all
6 commissions or other compensation that you have earned performing work for the Willard
7 Plaintiffs and/or the Wooley Plaintiffs from 2005 through present.

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CERTIFICATE OF AUTHENTICITY

1 State of California)
 2) ss.
 3 County of Santa Clara)

4 I, _____, do hereby declare as follows:

5
 6 1. I am a duly authorized Custodian of Records for **Daniel Gluhaich**, and I have the
 7 authority to certify said records.

8 2. The attached records are true, accurate and complete copies of the original
 9 records responsive to the Subpoena Duces Tecum dated June __, 2015, and are kept in the
 10 regular course and scope of my business.

11 3. The attached records constitute all records responsive to the Subpoena Duces
 12 Tecum dated June __, 2015.

13
 14 I declare under penalty of perjury under the laws of the State of Nevada that the
 15 foregoing is true and correct to the best of my knowledge.

16 Executed this ____ day of June, 2015.

17
 18
 19 By: _____
 20 Custodian of Records

21
 22
 23 SUBSCRIBED and SWORN to before me this
 24 ____ day of _____, 2015.

25
 26
 27 _____
 28 NOTARY PUBLIC

EXHIBIT "B"
NEVADA RULES OF CIVIL PROCEDURE

RULE 45

(c) Protection of Persons Subject to Subpoena.

1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The Court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

2. (A) Person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

3. (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

1 (B) If a subpoena

2 (i) requires disclosure of a trade secret or other confidential research,
3 development, or commercial information, or

4 (ii) requires disclosure of an unretained expert's opinion or information not
5 describing specific events or occurrences in dispute and resulting from the expert's study made
6 not at the request of any party, the court may, to protect a person subject to or affected by the
7 subpoena, quash or modify the subpoena or, if the party in whose behalf is issued shows a
8 substantial need for the testimony or material that cannot be otherwise met without undue
9 hardship and assures that the person to whom the subpoena is addressed will be reasonably
10 compensated, the court may order appearance or production only upon specified conditions.

11 (d) Duties in Responding to Subpoena.

12 1. A person responding to a subpoena to produce documents shall produce them as
13 they are kept in the usual course of business or shall organize and label them to
14 correspond with the categories in the demand.

15 2. When information subject to a subpoena is withheld on a claim that it is
16 privileged or subject to protection as trial preparation materials, the claim shall be made
17 expressly and shall be supported by a description of the nature of the documents,
18 communications, or things not produced that is sufficient to enable the demanding party
19 to contest the claims.
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CERTIFICATE OF SERVICE

I certify that I am an employee of DICKINSON WRIGHT, and that on this date, pursuant to NRC 5(b); I am serving a true and correct copy of the attached SUBPOENA DUCES TECUM on the parties as set forth below:

☒ 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)

☐ EM/ECF Electronic Notification

Addressed as follows:

Daniel Gluhaich
Intero Real Estate Services
175 East Main Avenue Suite 130
Morgan Hill, CA 95037

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

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3506 La Castellet Court
San Jose, California 95148

DATED this 17th day of June, 2015



An employee of DICKINSON WRIGHT

EXHIBIT 3

EXHIBIT 3

Mina Reel

From: Brian Moquin <bmoquin@lawprism.com>
Sent: Friday, June 12, 2015 10:05 AM
To: Anjali D. Webster
Cc: david@omaralaw.net; Brian R. Irvine; Mina Reel
Subject: Re: Willard et al. v. BHI et al., Case No. CV14-01712

I have confirmed that Dan Gluhaich is the proper target for a subpoena and I can accept service on his behalf.

Brian

Sent from my iPhone

On Jun 12, 2015, at 9:33 AM, Anjali D. Webster <AWebster@dickinson-wright.com> wrote:

Great, thank you. I appreciate your input on to whom to address the subpoena and look forward to hearing from you regarding service.

From: Brian Moquin [<mailto:bmoquin@lawprism.com>]
Sent: Thursday, June 11, 2015 6:57 PM
To: Anjali D. Webster; david@omaralaw.net
Cc: Brian R. Irvine; Mina Reel
Subject: Re: Willard et al. v. BHI et al., Case No. CV14-01712

I represent Dan Gluhaich in another matter, will check with him to see whether he will authorize me to accept service of a subpoena issued in this case. He is the proper target for the subpoena, not Intero.

I'll let you know by tomorrow.

Best,
 Brian

Brian P. Moquin, Esq.
 Law Offices of Brian P. Moquin
 3506 La Castellet Court
 San Jose, CA 95148

skype: brianmoquin
 408.300.0022
 408.460.7787 cell
 408.843.1678 fax

On 6/11/15 4:48 PM, Anjali D. Webster wrote:

Dear Messrs. Moquin and O'Mara:

We plan to serve a document-only subpoena duces tecum for Mr. Daniel Gluhaich. We know that Mr. Gluhaich is employed at Intero Real Estate Services; do you know if we should issue the subpoena to Mr. Gluhaich, Intero, or to both? We want to ensure that the recipient of the subpoena has the appropriate authority to provide us with our requested documents, whether that be Mr. Gluhaich or Intero.

Additionally, are you authorized to accept service of the subpoena?

Thank you, and I look forward to hearing from you.

Anjali

Anjali D. Webster Associate Attorney

100 West Liberty Street
Suite 940
Reno NV 89501-1991

Phone 775-343-7498
Fax 775-786-0131
Email AWebster@dickinsonwright.com

EXHIBIT 4

EXHIBIT 4

Mina Reel

From: Stephanie J. Glantz
Sent: Monday, June 29, 2015 4:48 PM
To: bmoquin@lawprism.com
Cc: Brian R. Irvine; Anjali D. Webster
Subject: Subpoena to Daniel Gluhaich - Willard, et al. v. BHI, et al.
Attachments: Cover Letter to D. Gluhaich.pdf; [Filed] Gluhaich Subpoena.Santa Clara.pdf; RENO-#150-v2-Acceptance_of_Service_for_Daniel_Gluhaich.pdf

Mr. Moquin,

Attached, please find a Subpoena to Daniel Gluhaich, an accompanying cover letter, and an Acceptance of Service of Subpoena. If everything looks acceptable, please return a signed copy of the Acceptance of Service at your earliest convenience. Thank you in advance, and please do not hesitate to contact our office if you have any questions.

Kind regards,
Stephanie Glantz

Stephanie J. Glantz Legal Secretary

100 West Liberty Street Phone 775-343-7513
Suite 940
Reno NV 89501-1991 Fax 775-786-0131
Email SGlantz@dickinsonwright.com

DICKINSON WRIGHT PLLC

MICHIGAN ARIZONA NEVADA OHIO TENNESSEE WASHINGTON D.C. TORONTO



100 WEST LIBERTY STREET, SUITE 940
 RENO, NV 89501-1991
 TELEPHONE: (775) 343-7500
 FACSIMILE: (775) 786-0131
<http://www.dickinsonwright.com>

BRIAN R. IRVINE
 BIRVINE@DICKINSONWRIGHT.COM
 (775) 343-7507

June 29, 2015

Daniel Gluhaich
 Intero Real Estate Services
 175 East Main Avenue, Suite 130
 Morgan Hill, CA 95037

Dear Mr. Gluhaich:

Please find attached a Subpoena Duces Tecum requiring you to produce certain documents in the case of *Willard et al. v. Berry-Hinckley Industries, et al.*, Case No. CV 14-01712. Brian Moquin, who represents the plaintiffs in this case, has informed us that he is authorized to accept service on your behalf; thus, we have contemporaneously sent Mr. Moquin an acceptance of service and the attached Subpoena.

Please note that the attached subpoena requires you to personally appear on July 10, 2015, at 9:00 a.m. to produce the required documents, or, in lieu of your personal appearance, to deliver copies of the required documents by July 15, 2015. See Subpoena Duces Tecum, attached hereto, at pg. 2. Given a slight delay in issuance of the Subpoena, we will extend those deadlines as follows:

- You are required, pursuant to Nevada Rule of Civil Procedure 45, to produce true, legible, and durable copies of the documents identified in Exhibit A to the Subpoena Duces Tecum at the office of Talty Court Reporters, 2131 The Alameda, San Jose, CA 95126 on July 20, 2015, at 9:00 a.m. If you fail to attend, you may be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear.
- In lieu of your personal appearance on July 20, 2015, at 9:00 a.m., you may deliver copies of the documents to be provided to Dickinson Wright, 100 W. Liberty Street, Suite 940, Reno, NV, 89501, on or before July 15, 2015, at 9:00 a.m. If the documents are produced in lieu of appearance, please execute the Certificate of Authenticity attached to the Subpoena Duces Tecum to certify that the records produced are true, accurate, and complete copies of all records in your possession and under your control.

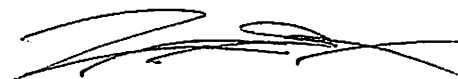
DICKINSON WRIGHT PLLC

Daniel Gluhaich
June 29, 2015
Page 2

Thank you for your cooperation and please do not hesitate to contact me if you have any questions.

Very truly yours,

Dickinson Wright PLLC

A handwritten signature in black ink, appearing to read 'Brian R. Irvine', with a stylized, sweeping flourish at the end.

Brian R. Irvine
Attorney

BRI:sjg
Enclosures

CC: Brian P. Moquin

SUBP-030

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Brian R. Irvine (NV 7758) John P. Desmond (NV 5618, CA 176430) Dickinson Wright PLLC 100 W. Liberty Street, Suite 940 Reno, NV 89501 TELEPHONE NO.: 775-343-7500 FAX NO. (Optional): 775-786-0131 E-MAIL ADDRESS (Optional): birvine@dickinsonwright.com ATTORNEY FOR (Name): Berry Hinckley Industries, Jerry Herbst, JH, Inc.	FOR COURT USE ONLY ENDORSED FILED 2015 JUN 23 P 2:2 Carolyn M. Smith, Clerk of the Superior Court County of Santa Clara, California S. Smith, Deputy Clerk
Court for county in which discovery is to be conducted: SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara STREET ADDRESS: 191 North First Street MAILING ADDRESS: 191 North First Street CITY AND ZIP CODE: San Jose, CA 95113 BRANCH NAME: Downtown Superior Court	
Court in which action is pending: Second Judicial District Court Name of Court: Second Judicial District Court, County of Washoe STREET ADDRESS: 75 Court Street MAILING ADDRESS: 75 Court Street CITY, STATE, AND ZIP CODE: Reno, NV 89501 COUNTRY: USA	
PLAINTIFF/PETITIONER: Larry J. Willard, et al. DEFENDANT/RESPONDENT: Berry Hinckley Industries, et al.	CALIFORNIA CASE NUMBER (if any assigned by court) 15 CV 282238
APPLICATION FOR DISCOVERY SUBPOENA IN ACTION PENDING OUTSIDE CALIFORNIA	CASE NUMBER (if action pending outside California): CV14-01712

1. Applicant (name): **Berry Hinckley Industries; Jerry Herbst; JH, Inc.** is (check one):
☐ Plaintiff ☐ Petitioner ☒ Defendant ☐ Respondent ☐ Other (specify):
 in the above action.

2. Applicant requests that this court issue a subpoena for discovery under Code of Civil Procedure sections 2029.100 – 2029.900 to (name and address of deponent or person in control of property):
Daniel Gluhaich; 175 East Main Ave., Suite 130; Morgan Hill, CA 95037

3. Attached is (check one): ☐ the original ☒ a true and correct copy of the document from the court in which the action is pending that requires the person in 2 to (check all that apply):

- a. ☐ attend and give testimony at a deposition;
 b. ☒ produce and permit inspection and copying of designated materials, information, or tangible things in the possession, custody, or control of the deponent;
 c. ☐ permit the inspection of premises under the control of the deponent.

4. Applicant submits with this application a proposed subpoena that includes terms identical to those in the document from the out-of-state court. (Code of Civil Procedure section 2029.300(d).)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: **6/17/2015**

Brian R. Irvine

(TYPE OR PRINT NAME)

(SIGNATURE OF ATTORNEY OR PARTY WITHOUT ATTORNEY)

Note: This application must be accompanied by the fee specified in Government Code section 70626. A discovery subpoena must be personally served on the deponent in compliance with California law, including Code of Civil Procedure section 1985.

ORIGINAL

4065
 DICKINSON WRIGHT
 JOHN P. DESMOND
 Nevada Bar No. 5618
 BRIAN R. IRVINE
 Nevada Bar No. 7758
 ANJALI D. WEBSTER
 Nevada Bar No. 12515
 100 West Liberty Street, Suite 940
 Reno, NV 89501
 Tel: (775) 343-7500
 Fax: (775) 786-0131
 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 E. WOOLEY AND JUDITH A.
 WOOLEY, individually and as trustees of the
 Edward C. Wooley and Judith A. Wooley
 Intervivos Revocable Trust 2000,

CASE NO. CV14-01712

DEPT. 6

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a
 Nevada corporation; and JERRY HERBST, an
 individual; and JH, INC., a Nevada
 Corporation,

Defendants.

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

Counterclaimants,

vs

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

5 Counter-defendants.

6 **SUBPOENA DUCES TECUM**

7 THE STATE OF NEVADA SENDS GREETINGS TO:

8 Daniel Gluhaich
9 Intero Real Estate Services
10 175 East Main Avenue Suite 130
11 Morgan Hill, CA 95037

12 You are required, pursuant to Nevada Rule of Civil Procedure 45, to produce true,
13 legible, and durable copies of the documents identified in Exhibit A attached hereto at the office
14 of TALTY COURT REPORTERS, 2131 The Alameda, San Jose, CA 95126 on July 10,
15 2015 at 9:00 a.m. If you fail to attend, you may be deemed guilty of contempt of Court and
16 liable to pay all losses and damages caused by your failure to appear.

17 In lieu of your personal appearance on July 10, 2015, at 9:00 a.m., you may deliver
18 copies of the documents to be provided to DICKINSON WRIGHT, 100 W. Liberty Street,
19 Suite 940, Reno, NV 89501 on or before July 15, 2015, at 9:00 a.m. If documents are
20 produced in lieu of appearance, please execute the attached certification (Certificate of
21 Authenticity) that the records produced are true, accurate and complete copies of all responsive
22 records in your possession or under your control.

23 DATED this 17 day of June, 2015.

24 JACQUELINE BRYANT, CLERK OF THE COURT

25
26 By: 
27 DEPUTY CLERK
28

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 17th day of June, 2015.

DICKINSON WRIGHT



DICKINSON WRIGHT
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 12515
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: Jdcsmond@dickinsonwright.com
Email: Brivine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

*Attorney for Defendants
Berry Hinckley Industries, and
Jerry Herbst*

1 STATE OF CALIFORNIA)
2 COUNTY OF SANTA CLARA) ss.

3 I hereby certify that I am over 18 years of age and not a party to nor interested in the proceeding
4 in which this service is made. That I received this Subpoena on the _____ day of _____
5 2015, and personally served the same by delivering a copy to the witness at (state address)
6

7
8
9 on this _____ day of _____ 2015.

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13 Signature of person making service

14
15
16 Print name here

EXHIBIT "A"**DEFINITIONS**

The following preliminary definitions and instructions apply to each of the requests hereinafter set forth, and Defendants incorporate the same herein by reference.

1. When used herein, the term "BHI" means Berry-Hinckley Industries, a Nevada corporation.

2. When used herein, the term "Defendants" means BHI and Jerry Herbst.

3. When used herein, the term "Willard" means Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund.

4. When used herein, the term "Overland" means Overland Development Corporation, a California corporation.

5. When used herein, the term "Willard Plaintiffs" means Willard and Overland.

6. When used herein, the term "Willard Property" means the real property located at 7695-77699 S. Virginia Street, Reno, Nevada (APN 043-011-48).

7. When used herein, the term "Wooley Plaintiffs" means Edward C. Wooley and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000.

8. When used herein, the term "Highway 50 Property" means the real property located at 1820 Highway 50 East, Carson City, Nevada (APN 002-368-27).

9. When used herein, the term "Baring Property" means the real property located at 1365 Baring Boulevard, Sparks, Nevada (APN 030-041-08).

10. When used herein, the terms "You" and "Your" and their plural, or any synonym thereof means Daniel Gluhaich, in an individual capacity and/or in his capacity as a realtor and/or broker and/or real estate agent, and/or any agent, employee, or representative of Daniel Gluhaich who is purporting to act on his behalf, or who are in possession of, or may have obtained information for or on behalf of Daniel Gluhaich.

1 11. When used herein, the terms "Document" and "Writing" and the plural forms
2 thereof, shall mean all written, typewritten, printed, recorded, or graphic matters, however
3 produced or reproduced, of every kind and description, pertaining to the subject matter of this
4 action. The terms "Document" and "Writing" shall include, but are not limited to, any books,
5 pamphlets, periodicals, memoranda, letters, correspondence, telegrams, applications, leases,
6 memoranda of understanding, agreements, contracts, permits, articles, bylaws, financial records,
7 security instruments, checks, bank statements, receipts, invoices, bids, proposals, offers,
8 counteroffers, time records, accounting records, minutes, records of meetings, reports, notes,
9 diaries, logs, tapes, transcripts, recordings, records of phone calls, work papers, charts, faxes,
10 drawings, photographs, films, medical and hospital reports and records, x-ray photographs, or
11 any other handwritten, recorded, transcribed, punched, taped, filmed, or graphic matter, however
12 produced or reproduced, in Your possession, custody, or control, or to which you have had
13 access. Documents shall also include any drafts or variations or markings to original Documents.

14 12. When used herein, the terms "Communication" or "Communications" shall mean
15 (a) any form of data transmission, including letters, faxes, emails, and other transmission of data
16 via telecommunications, (b) all meetings of two or more persons and all documents describing
17 such meetings, (c) all telephone conversations and telephone conferences, and (d) all situations
18 in which ideas are discussed, interpreted or exchanged among two or more persons.

19 13. When used herein, the term "Correspondence" shall mean any writing on
20 document relating to any communication, including but not limited to letters, emails, notes,
21 telephone message pads, text messages, transcriptions, faxes, and memoranda.

22 14. When used herein, the term "Person" shall mean natural persons, firms,
23 proprietorships, associations, partnerships, corporations, governmental entities, and every other
24 type of organization or entity.

25 15. When used herein, the terms "Relate to," "related to," or "relating to" shall mean
26 constituting, pertaining to, referring to, alluding to, responding to, elaborating upon, concerning,
27 memorializing, supporting, refuting, evidencing, connected with, commenting on, regarding,
28

1 discussing, showing, describing, reflecting, analyzing, recording, including, mentioning, in
2 respect of, analyzing or bearing on any logical or factual connection with the matter discussed.

3 16. In the event you withhold from identification any document as privileged, you are
4 requested to provide a list of documents withheld and state the following information with
5 respect to each document withheld:

- 6 a. The date appearing on the document and, if it has no date, the date, or
7 approximate date, on which it was prepared;
- 8 b. The title, label, code number or file number of the document;
- 9 c. The name and current address of the person(s) who signed the document and, if it
10 was not signed, the name and current address of the person(s) who prepared it;
- 11 d. The name and current address of the person(s) to whom the document was
12 directed and the person(s) to whom a copy of the document was directed;
- 13 e. A general description of the subject matter(s) to which the document relates;
- 14 f. The name and current address of the person(s) having present possession,
15 custody, or control of the document;
- 16 g. The grounds on which the document has been withheld.

17 17. If you object to any portion of this Subpoena, state the specific ground for such
18 objection and respond to the request to the extent to which there is no objection.

INSTRUCTIONS

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2 1. You are requested to produce all Documents and tangible things in Your
3 possession, custody or control, which have not been previously produced.

4 2. You are requested to produce Documents in the form in which they are kept in the
5 usual course of Your business, or to organize and label them to correspond with the categories in
6 this request.

7 3. If You claim that the attorney-client privilege, the attorney work-product rule, or
8 any other privilege is applicable to any Document, production of which is sought by this request,
9 the substance of that Document need not be disclosed in Your answers, but You shall, with
10 respect to that Document:

- 11 a. State the date of the Document;
- 12 b. Identify each and every author of the Document;
- 13 c. Identify each and every person who prepared or participated in the preparation of
14 the Document;
- 15 d. Identify each and every person who received the Document;
- 16 e. Identify each and every person from whom the Document was received;
- 17 f. State the present location of the Document and all copies thereof;
- 18 g. Identify each and every person having custody or control of the Document and all
19 copies thereof; and
- 20 h. Provide sufficient further information concerning the Document and the
21 circumstances thereof to explain the claim of privilege and to permit the
22 adjudication of the propriety of that claim.

23 4. In the event You are able to produce only some of the Documents called for in a
24 particular request, please produce all the Document You are able to and state the reasons for
25 Your inability to produce the remainder.

26 5. If You object to a portion of a request, please produce all Documents called for by
27 that portion of the request to which You do not object.

REQUESTS FOR PRODUCTIONS OF DOCUMENTS

REQUEST NO. 1: Please produce any and all Documents You sent to or received from the Willard Plaintiffs, Willard, and/or Overland, or any employees, representatives, or agents of the Willard Plaintiffs, Willard, and/or Overland relating to the Willard Property from January 2005 through present.

REQUEST NO. 2: Please produce any and all Documents You sent to or received from BHI or any employees, representatives, agents, or successors of BHI relating to the Willard Property from January 2005 to present.

REQUEST NO. 3: Please produce any and all Documents You sent to or received from Jerry Herbst or any employees, representatives, or agents of Jerry Herbst relating to the Willard Property from January 2005 to present.

REQUEST NO. 4: Please produce any and all Documents You sent to or received from any other person or entity relating to the Willard Property from January 2005 to present.

REQUEST NO. 5: Please produce any and all Documents You have prepared or authorized or directed preparation of relating to the Willard Property from January 2005 to present.

REQUEST NO. 6: Please produce each and every contract to which you are a party that is related to the Willard Property.

REQUEST NO. 7: Please produce any and all marketing or promotional materials in your possession, custody, or control for the lease or sale of the Willard Property.

REQUEST NO. 8: Please produce any and all Documents You sent to or received from the Wooley Plaintiffs or any employees, representatives, or agents of the Wooley Plaintiffs relating to the Highway 50 Property from January 2005 through present.

REQUEST NO. 9: Please produce any and all Documents You sent to or received from BHI or any employees, representatives, agents, or successors of BHI relating to the Highway 50 Property from January 2005 through present.

1 **REQUEST NO. 10:** Please produce any and all Documents You sent to or received from
2 Jerry Herbst or any employees, representatives, or agents of Jerry Herbst relating to the Highway
3 50 Property from January 2005 to present.

4 **REQUEST NO. 11:** Please produce any and all Documents You sent to or received from
5 any other person or entity relating to the Highway 50 Property from January 2005 to present.

6 **REQUEST NO. 12:** Please produce any and all Documents You have prepared or
7 authorized or directed preparation of relating to the Highway 50 Property from January 2005 to
8 present.

9 **REQUEST NO. 13:** Please produce each and every contract to which you are a party
10 that is related to the Highway 50 Property.

11 **REQUEST NO. 14:** Please produce any and all marketing or promotional materials in
12 your possession, custody, or control for the lease or sale of the Highway 50 Property.

13 **REQUEST NO. 15:** Please produce any and all Documents You sent to or received from
14 the Wooley Plaintiffs or any employees, representatives, or agents of the Wooley Plaintiffs
15 related to the Baring Property from January 2005 through present.

16 **REQUEST NO. 16:** Please produce any and all Documents You sent to or received from
17 BHI or any employees, representatives, agents, or successors of BHI related to the Baring
18 Property from January 2005 through present.

19 **REQUEST NO. 17:** Please produce any and all Documents You sent to or received from
20 Jerry Herbst or any employees, representatives, or agents of Jerry Herbst related to the Baring
21 Property from January 2005 to present.

22 **REQUEST NO. 18:** Please produce any and all Documents You sent to or received from
23 any person or entity related to the Baring Property from January 2005 to present.

24 **REQUEST NO. 19:** Please produce any and all Documents You have prepared or
25 authorized or directed preparation of relating to the Baring Property from January 2005 to
26 present.

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1 **REQUEST NO. 20:** Please produce each and every contract to which you are a party
2 that is related to the Baring Property.

3 **REQUEST NO. 21:** Please produce any and all marketing or promotional materials in
4 your possession, custody, or control for the lease or sale of the Baring Property.

5 **REQUEST NO. 22:** Please produce documents sufficient to identify any and all
6 commissions or other compensation that you have earned performing work for the Willard
7 Plaintiffs and/or the Wooley Plaintiffs from 2005 through present.

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CERTIFICATE OF AUTHENTICITY

1 State of California)
 2) ss.
 3 County of Santa Clara)

4
 5 I, _____, do hereby declare as follows:

6 1. I am a duly authorized Custodian of Records for **Daniel Gluhatch**, and I have the
 7 authority to certify said records.

8 2. The attached records are true, accurate and complete copies of the original
 9 records responsive to the Subpoena Duces Tecum dated June ___, 2015, and are kept in the
 10 regular course and scope of my business.

11 3. The attached records constitute all records responsive to the Subpoena Duces
 12 Tecum dated June ___, 2015.

13
 14 I declare under penalty of perjury under the laws of the State of Nevada that the
 15 foregoing is true and correct to the best of my knowledge.

16 Executed this ___ day of June, 2015.

17
 18
 19 By: _____
 20 Custodian of Records

21
 22
 23 SUBSCRIBED and SWORN to before me this
 24 ___ day of _____, 2015.

25
 26
 27 _____
 28 NOTARY PUBLIC

EXHIBIT "B"
NEVADA RULES OF CIVIL PROCEDURE

RULE 45

(c) Protection of Persons Subject to Subpoena.

1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The Court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

2. (A) Person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

3. (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

1 (B) If a subpoena

2 (i) requires disclosure of a trade secret or other confidential research,
3 development, or commercial information, or

4 (ii) requires disclosure of an unretained expert's opinion or information not
5 describing specific events or occurrences in dispute and resulting from the expert's study made
6 not at the request of any party, the court may, to protect a person subject to or affected by the
7 subpoena, quash or modify the subpoena or, if the party in whose behalf is issued shows a
8 substantial need for the testimony or material that cannot be otherwise met without undue
9 hardship and assures that the person to whom the subpoena is addressed will be reasonably
10 compensated, the court may order appearance or production only upon specified conditions.

11 (d) Duties in Responding to Subpoena.

12 1. A person responding to a subpoena to produce documents shall produce them as
13 they are kept in the usual course of business or shall organize and label them to
14 correspond with the categories in the demand.

15 2. When information subject to a subpoena is withheld on a claim that it is
16 privileged or subject to protection as trial preparation materials, the claim shall be made
17 expressly and shall be supported by a description of the nature of the documents,
18 communications, or things not produced that is sufficient to enable the demanding party
19 to contest the claims.
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21
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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 SUBPOENA DUCES TECUM on the parties as set forth below:

☒ 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)

☐ EM/ECF Electronic Notification

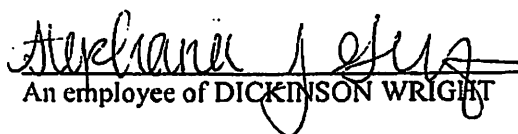
Addressed as follows:

Daniel Gluhaich
Intero Real Estate Services
175 East Main Avenue Suite 130
Morgan Hill, CA 95037

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

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3506 La Castellet Court
San Jose, California 95148

DATED this 17th day of June, 2015


An employee of DICKINSON WRIGHT

1 **1005**
 2 DICKINSON WRIGHT
 3 JOHN P. DESMOND
 Nevada Bar No. 5618
 4 BRIAN R. IRVINE
 Nevada Bar No. 7758
 5 ANJALI D. WEBSTER
 Nevada Bar No. 12515
 100 West Liberty Street, Suite 940
 6 Reno, NV 89501
 Tel: (775) 343-7500
 7 Fax: (775) 786-0131
 Email: Jdesmond@dickinsonwright.com
 8 Email: Brvine@dickinsonwright.com
 Email: Awebster@dickinsonwright.com

9 *Attorneys for Defendants*
 10 *Berry Hinckley Industries, and*
 11 *Jerry Herbst*

12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

13 **IN AND FOR THE COUNTY OF WASHOE**

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

CASE NO. CV14-01712
 DEPT. 6

ACCEPTANCE OF SERVICE FOR
DANIEL GLUHAICH

19 Plaintiff,

20 vs.

21 BERRY-HINCKLEY INDUSTRIES, a Nevada
 corporation; and JERRY HERBST, an
 22 individual; and JH, INC., a Nevada
 Corporation,

23 Defendants.

24 _____/
 25 BERRY-HINCKLEY INDUSTRIES, a
 Nevada corporation; and JERRY HERBST,
 26 an individual;

27 Counterclaimants,

28 vs

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

4 Counter-defendants.

5 _____ /
6
7 BRIAN P. MOQUIN, attorney for LARRY J. WILLARD, individually and as trustee of
8 the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION,;
9 EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the
10 Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2, hereby acknowledges
11 receipt and accept service of process of the Subpoena in the above-referenced matter on behalf of
12 the Daniel Gluhaich.

13 DATED this ____ day of _____, 2015.

14
15 _____
16 LAW OFFICES OF BRIAN P. MOQUIN
17 BRIAN P. MOQUIN
18 California Bar No. 257583
19 Email: bmoquin@lawprism.com
20 3506 La Castellet Court
21 San Jose, California 95148

22 THE O'MARA LAW FIRM
23 DAVID C. O'MARA
24 Nevada Bar No. 8599
25 Email: david@omaralaw.net
26 311 E. Liberty Street
27 Reno, Nevada 89501

28 *Attorneys for Plaintiffs*

///

///

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 ____ day of _____, 2015.

DICKINSON WRIGHT PLLC

By: _____
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 11525
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: jdesmond@dickinsonwright.com
Email: birvine@dickinsonwright.com
Email: awebster@dickinsonwright.com

*Attorneys 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 the attached **NOTICE OF CHANGE OF LAW FIRM**

AFFILIATION on the party(s) set forth below by:

- ☒ (BY MAIL) on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of DICKINSON WRIGHT PLLC, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.
- ☐ 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.
- ☐ Certified Mail
- ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the addressee(s) at the addressees) set forth below.
- ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the addressees) noted below. addressed as follows:
- ☐ By email to the email addresses below.
- ☐ Federal Express (or other overnight delivery)

Addressed as follows:

Daniel Gluhaich
Intero Real Estate Services
175 East Main Avenue Suite 130
Morgan Hill, CA 95037

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

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3506 La Castellet Court
San Jose, California 95148

DATED this ____ day of _____, 2015.

An Employee of DICKINSON WRIGHT PLLC

EXHIBIT 5

EXHIBIT 5

Mina Reel

From: Brian Moquin <bmoquin@lawprism.com>
Sent: Monday, June 29, 2015 7:28 PM
To: Stephanie J. Glantz
Cc: Brian R. Irvine; Anjali D. Webster; David O'Mara, Esq.
Subject: Re: Subpoena to Daniel Gluhaich - Willard, et al. v. BHI, et al.
Attachments: 20150629 RENO-#150-v2-Acceptance_of_Service_for_Daniel_Gluhaich -sBPM.pdf

Receipt acknowledged and Acceptance of Service signed and attached.

Best,
 Brian

Brian P. Moquin, Esq.
 Law Offices of Brian P. Moquin
 3506 La Castellet Court
 San Jose, CA 95148

skype: brianmoquin
 408.300.0022
 408.460.7787 cell
 408.843.1678 fax

On 6/29/15 4:48 PM, Stephanie J. Glantz wrote:

Mr. Moquin,

Attached, please find a Subpoena to Daniel Gluhaich, an accompanying cover letter, and an Acceptance of Service of Subpoena. If everything looks acceptable, please return a signed copy of the Acceptance of Service at your earliest convenience. Thank you in advance, and please do not hesitate to contact our office if you have any questions.

Kind regards,
 Stephanie Glantz

Stephanie J. Glantz Legal Secretary

100 West Liberty Street Phone 775-343-7513
 Suite 940 Fax 775-786-0131
 Reno NV 89501-1991 Email SGlantz@dickinsonwright.com

DICKINSON WRIGHT PLLC
 MICHIGAN ARIZONA NEVADA OHIO TENNESSEE WASHINGTON D.C. TORONTO

The information contained in this e-mail, including any attachments, is confidential, intended only for the named recipient(s), and may be legally privileged. If you are not the intended recipient, please delete the e-mail and any attachments, destroy any printouts that you may have made and notify us immediately by return e-mail.

Neither this transmission nor any attachment shall be deemed for any purpose to be a "signature" or "signed" under any electronic transmission acts, unless otherwise specifically stated herein. Thank you.

1 **1005**

2 **DICKINSON WRIGHT**

3 **JOHN P. DESMOND**

4 Nevada Bar No. 5618

5 **BRIAN R. IRVINE**

6 Nevada Bar No. 7758

7 **ANJALI D. WEBSTER**

8 Nevada Bar No. 12515

9 100 West Liberty Street, Suite 940

10 Reno, NV 89501

11 Tel: (775) 343-7500

12 Fax: (775) 786-0131

13 Email: Jdesmond@dickinsonwright.com

14 Email: Birvine@dickinsonwright.com

15 Email: Awebster@dickinsonwright.com

16 *Attorneys for Defendants*

17 *Berry Hinckley Industries, and*

18 *Jerry Herbst*

19 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

20 **IN AND FOR THE COUNTY OF WASHOE**

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

CASE NO. CV14-01712

DEPT. 6

ACCEPTANCE OF SERVICE FOR
DANIEL GLUHAICH

Plaintiff,

vs.

BERRY-HINCKLEY INDUSTRIES, a Nevada
corporation; and JERRY HERBST, an
individual; and JH, INC., a Nevada
Corporation,

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.

BRIAN P. MOQUIN, attorney for LARRY J. WILLARD, individually and as trustee of
the Larry James Willard Trust Fund; OVERLAND DEVELOPMENT CORPORATION,;
EDWARD C. WOOLEY AND JUDITH A. WOOLEY, individually and as trustees of the
Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2, hereby acknowledges
receipt and accept service of process of the Subpoena in the above-referenced matter on behalf of
the Daniel Gluhaich.

DATED this 29th day of June, 2015.


LAW OFFICES OF BRIAN P. MOQUIN
BRIAN P. MOQUIN
California Bar No. 257583
Email: bmoquin@lawprism.com
3506 La Castellet Court
San Jose, California 95148

THE O'MARA LAW FIRM
DAVID C. O'MARA
Nevada Bar No. 8599
Email: david@omaralaw.net
311 E. Liberty Street
Reno, Nevada 89501

Attorneys for Plaintiffs

///

///

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 ____ day of _____, 2015.

DICKINSON WRIGHT PLLC

By: _____
JOHN P. DESMOND
Nevada Bar No. 5618
BRIAN R. IRVINE
Nevada Bar No. 7758
ANJALI D. WEBSTER
Nevada Bar No. 11525
100 West Liberty Street, Suite 940
Reno, NV 89501
Tel: (775) 343-7500
Fax: (775) 786-0131
Email: Jdesmond@dickinsonwright.com
Email: Brvine@dickinsonwright.com
Email: Awebster@dickinsonwright.com

Text
Text

*Attorneys 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 the attached **NOTICE OF CHANGE OF LAW FIRM**

AFFILIATION on the party(s) set forth below by:

- ☒ (BY MAIL) on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of DICKINSON WRIGHT PLLC, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.
- ☐ 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.
- ☐ Certified Mail
- ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the addressee(s) at the addressees) set forth below.
- ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the addressees) noted below. addressed as follows:
- ☐ By email to the email addresses below.
- ☐ Federal Express (or other overnight delivery)

Addressed as follows:

Daniel Gluhaich
Intero Real Estate Services
175 East Main Avenue Suite 130
Morgan Hill, CA 95037

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

Brian P. Moquin
LAW OFFICES OF BRIAN P. MOQUIN
3506 La Castellet Court
San Jose, California 95148

DATED this ____ day of _____, 2015.

An Employee of DICKINSON WRIGHT PLLC

EXHIBIT 6

EXHIBIT 6

Mina Reel

From: Brian Moquin <bmoquin@lawprism.com>
Sent: Sunday, July 19, 2015 1:49 AM
To: Brian R. Irvine; david@omaralaw.net
Cc: Anjali D. Webster; Mina Reel
Subject: Re: Willard Wooley v. BHI

Sorry, I must have missed the episode of Sesame Street where the definition of the term "deposition" was redefined.

I will place the responsive documents along with a certification from Mr. Gluhaich in the Dropbox share on Monday.

Brian

On 7/17/15 12:07 PM, Brian R. Irvine wrote:

Brian-

You misunderstand me, and how records depositions work. We either need Mr. Gluhaich to sign the custodian of records certificate provided as part of his subpoena packet (which we should have received on July 15, 2015 pursuant to the subpoena), or he needs to appear personally at the Court Reporter's office on Monday and confirm on the record that he is providing documents that are fully responsive to the subpoena.

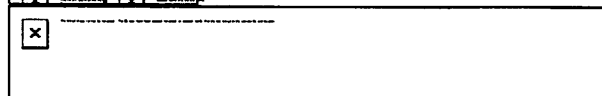
I don't want to come to San Jose on Monday, and I don't want to take Mr. Gluhaich's deposition on Monday. But, I do need him to certify that he is supplying documents that are fully-responsive to the subpoena. I would prefer to use Dropbox again as opposed to taking an unnecessary trip. Please confirm that is how you intend to proceed, and that Mr. Gluhaich will include the custodian of records certificate as part of his production.

Thanks,

Brian

Brian R. Irvine Member

100 West Liberty Street Phone 775-343-7507
 Suite 940 Fax 775-786-0131
 Reno NV 89501-1991 Email BIrvine@dickinsonwright.com



From: Brian Moquin [<mailto:bmoquin@lawprism.com>]
Sent: Friday, July 17, 2015 11:59 AM
To: Brian R. Irvine; david@omaralaw.net
Cc: Anjali D. Webster; Mina Reel
Subject: Re: Willard Wooley v. BHI

Rule 45(c)(2)(A) states: "A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial." The subpoena you served requests that Mr. Gluhaich "produce and permit inspection and copying of designated materials, information, or tangible things in the possession, custody, or control of the deponent," *not* that he "attend and give testimony at a deposition." Your letter stated, "You are required, pursuant to Nevada Rule of Civil Procedure 45, to produce true, legible, and durable copies of the documents identified in Exhibit A to the Subpoena Duces Tecum at the office of Talty Court Reporters, 2131 The Alameda, San Jose, CA 95126 on July 20, 2015, at 9:00 a.m. If you fail to attend, you may be deemed guilty of contempt of Court and liable to pay all losses and damages caused by your failure to appear." Nowhere does it state that Mr. Gluhaich needed to appear to be deposed.

If you prefer, I can deliver the documents on Monday via Dropbox. If not, even if Mr. Gluhaich accompanies me to Talty Court Reporters on Monday to deliver the records, he will not submit to a deposition at that time since he was nowise commanded to do so. You have already noticed Mr. Gluhaich for deposition in late August, and he plans to attend that deposition.

I'll be offline until I land in Hong Kong in about ten hours.

Brian

On 7/17/15 11:11 PM, Brian R. Irvine wrote:

Brian-

Thanks for your response. Does that mean that Mr. Gluhaich intends to appear personally for a duces tecum records deposition on July 20, 2015 at 9:00 a.m. in San Jose? The letter you referenced specified that Mr. Gluhaich could personally appear and produce records on July 20, 2015, or in the alternative, that he could deliver copies to my office in Reno on or before July 15, 2015.

Please clarify, as I do not want to travel to San Jose on Monday for the deposition if the documents will be mailed or provided via Dropbox.

Brian Irvine

From: Brian Moquin [<mailto:bmoquin@lawprism.com>]

Sent: Friday, July 17, 2015 9:47 AM

To: Brian R. Irvine; david@omaralaw.net

Cc: Anjali D. Webster; Mina Reel

Subject: Re: Willard Wooley v. BHI

Per your letter dated June 29, 2015 that accompanied the subpoena *duces tecum* to Mr. Gluhaich, you extended the deadlines to produce copies at Talty Court Reporters in San Jose, California until July 20, 2015. Responsive documents will be tendered as specified on July 20, 2015.

Note that I will be traveling home and most likely unavailable until Saturday, July 18 after 11:30 P.M.

Brian

On 7/17/15 9:30 PM, Brian R. Irvine wrote:

Brian-

Thank you for the email. We will expect your response by Tuesday, July 21, 2015.

Also, Dan Gluhaich's response to the subpoena duces tecum was due on Wednesday, July 15, 2015. We have not received any response or any documents. Can you tell me what the status is on those responses, or should I contact Mr. Gluhiach directly?

Brian Irvine

Brian R. Irvine Member

100 West Liberty Street
Suite 940
Reno NV 89501-1991
Phone 775-343-7507
Fax 775-786-0131
Email BIrvine@dickinsonwright.com



From: Brian Moquin [<mailto:bmoquin@lawprism.com>]

Sent: Thursday, July 16, 2015 10:03 PM

To: Mina Reel; david@omaralaw.net

Cc: Brian R. Irvine; Anjali D. Webster

Subject: Re: Willard Wooley v. BHI

As I mentioned last week, I am working in India this week, returning this Saturday. While I disagree with some of the alleged deficiencies, I will contact my clients when I return and should have supplemental responses to you by this coming Tuesday at the latest.

Brian

On 7/16/15 5:48 AM, Mina Reel wrote:

Good Afternoon,

Please see attached correspondence of today's date from Brian Irvine. If you cannot view the attachment, please let me know.

Thank you.
Mina Reel

Mina Reel Paralegal

100 West Liberty Street
 Suite 940
 Reno NV 89501-1991
 Phone 775-343-7509
 Fax 775-786-0131
 Email MReel@dickinsonwright.com

DICKINSON WRIGHT^{PLLC}

MICHIGAN ARIZONA NEVADA OHIO TENNESSEE WASHINGTON D.C. TORONTO

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EXHIBIT 7

EXHIBIT 7

Mina Reel

From: Brian R. Irvine
Sent: Tuesday, July 21, 2015 4:28 PM
To: Brian Moquin; david@omaralaw.net
Cc: Anjali D. Webster; Mina Reel
Subject: RE: Acceptance of Service

Brian-

I still have not received the response to Mr. Gluhaich's document subpoena. As of tomorrow, that response will be one-week late and we will have no choice but to file another motion. Please advise as to the status of that response.

Thank you,

Brian Irvine

From: Brian Moquin [<mailto:bmoquin@lawprism.com>]
Sent: Monday, July 20, 2015 6:18 PM
To: Mina Reel; david@omaralaw.net
Cc: Brian R. Irvine; Anjali D. Webster
Subject: Re: Acceptance of Service

Attached, typos corrected.

I've been working for 20 hours straight on the Gluhaich subpoena response, should have it to you sometime tonight. I'm also in touch with Messers. Willard and Wooley and they are searching for additional documents to supplement their responses, which I'm still intending to provide to you sometime tomorrow.

Brian

408.300.0022
 408.460.7787 cell

On 7/20/15 4:51 PM, Mina Reel wrote:

Mr. Moquin,

Attached please find the Acceptance of Service and File Stamped CA Deposition Subpoena for Mr. Daniel Gluhaich.

Please be so kind to execute the Acceptance of Service and return to us as soon as possible.

Thank you.

Mina Reel Paralegal

100 West Liberty Street
 Suite 940
 Reno NV 89501-1991
 Phone 775-343-7509
 Fax 775-786-0131
 Email MReel@dickinsonwright.com

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EXHIBIT 8

EXHIBIT 8

Mina Reel

From: Brian R. Irvine
Sent: Thursday, July 23, 2015 4:11 PM
To: Brian Moquin; david@omaralaw.net
Cc: Anjali D. Webster; Mina Reel
Subject: Willard / Wooley v. BHI, et al.

Dear Brian-

I just listened to your voice message regarding the cancellation of the deposition of Larry Willard set for August 19, 2015. As you know, we have been attempting to conduct written discovery and take several depositions in this matter, all of which needs to be completed well in advance of the September 11, 2015 deadline for the disclosure of initial expert witnesses. The August 19, 2015 date was agreed-upon, and is at the very end of what I consider to be reasonable to allow sufficient time for the preparation of deposition transcripts that could be reviewed and relied upon by potential experts. Is it possible for your co-counsel, Mr. O'Mara, to defend the deposition so we can keep the date? That would be my preference. If that is absolutely not possible, we need an alternative date immediately, and we still intend to take the deposition in Reno so my client does not incur additional expenses.

Also, we still do not have a response to our subpoena to Mr. Gluhaich. The response is now eight days late, and you have fallen into a pattern of ignoring discovery deadlines. We intend to file a motion tomorrow and seek relief on shortened time unless I have a response by morning. I am truly not trying to be difficult, but these continued delays are not allowing us to conduct the discovery we need to prepare this case for our clients.

Sincerely,

Brian Irvine

EXHIBIT 9

EXHIBIT 9

Mina Reel

From: Brian Moquin <bmoquin@lawprism.com>
Sent: Tuesday, June 23, 2015 10:39 AM
To: Anjali D. Webster; david@omaralaw.net
Cc: Brian R. Irvine; Mina Reel
Subject: Re: Willard et al. v. BHI et al.

I called and spoke with Mr. Irvine when the question regarding issuing a subpoena to Mr. Gluhaich arose. I told him that I was going down to retrieve documents from Mr. Gluhaich, which I did. I have been working literally day and night ever since, culling through 162,000 e-mail messages that I received from him to extract messages related to the discovery responses. While it is certainly within your right to file a motion to compel, I will have the responses to you by the end of this week.

Brian

408.300.0022
 408.460.7787 cell

On 6/23/15 10:19 AM, Anjali D. Webster wrote:

Dear Messrs. Moquin and O'Mara:

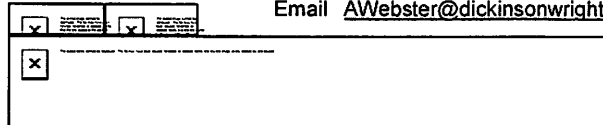
Plaintiffs' responses to Defendants' discovery requests served on April 22, 2015, in the above-referenced case are now **21 days past due**, even with the agreed-upon extension. Based upon Plaintiffs' failure to answer, we are filing a Motion to Compel Discovery Responses and an Ex Parte Motion for an Order Shortening Time on the briefing of the Motion to Compel in Second Judicial District Court today.

Thank you,

Anjali

Anjali D. Webster Attorney

100 West Liberty Street Phone 775-343-7498
 Suite 940 Fax 775-786-0131
 Reno NV 89501-1991 Email AWebster@dickinsonwright.com



1 **4030**

2 DICKINSON WRIGHT, PLLC
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16 *Attorney for Defendants*
17 *Berry Hinckley Industries, and*
18 *Jerry Herbst*

19 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
20 **IN AND FOR THE COUNTY OF WASHOE**

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

CASE NO. CV14-01712
DEPT. 6

Plaintiff,
vs.

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

Defendants.

STIPULATION AND ORDER TO
CONTINUE TRIAL

(FIRST REQUEST)

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

Counterclaimants,
vs.

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

5
6 Counter-defendants.

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STIPULATION AND ORDER TO CONTINUE TRIAL
(FIRST REQUEST)

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, Plaintiffs/ Counter-defendants Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Overland Development Corporation (collectively, "Plaintiffs"); and Defendants/ Counterclaimants Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants," and together with Plaintiffs, "the Parties"), by and through their respective attorneys of record, hereby stipulate and agree that good cause exists for this Court to enter an order continuing the trial scheduled to begin on January 11, 2016 based on the following:

- The Parties need to conduct significant additional discovery, including discovery relating to expert disclosures.

The parties further stipulate and agree that should this Court enter an order continuing the trial, the following deadlines in the Joint Case Conference Report filed on February 4, 2015, shall be amended as follows:

- The discovery deadline shall be extended until sixty (60) days before the first day of the rescheduled trial; provided, however, that if the 60th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.
- The deadline to serve, file, and submit for decision any dispositive motions shall be extended until thirty (30) days before the first day of the rescheduled trial; provided, however, that if the 30th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

- The deadline to serve expert disclosures shall be extended until ninety (90) days before the close of discovery; provided, however, that if the 90th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.
- The deadline to serve rebuttal expert disclosures shall be extended until thirty (30) days after the deadline to file initial expert disclosures; provided, however, that if the 30th day after initial expert disclosures falls on a weekend or holiday, the deadline shall be the following judicial day.


Undersigned counsel certifies that their respective clients have been advised that a stipulation for continuance is to be submitted on their behalf. The parties have no objection thereto.

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.


Attorneys for Plaintiffs

Attorneys for Defendants



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ORDER

This Court, having reviewed the Stipulation to Continue Trial submitted by the parties, and good cause appearing,

IT IS HEREBY ORDERED that good cause exists to continue the trial in the above-referenced matter.

IT IS FURTHER ORDERED that the parties shall reset the trial within five (5) days of this Order, unless this Court waives this requirement.

IT IS FURTHER ORDERED that the discovery deadline shall be extended until 60 days before the first day of the rescheduled trial; provided, however, that if the 60th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline to serve, file, and submit for decision any dispositive motions shall be extended until 30 days before the first day of the rescheduled trial; provided, however, that if the 30th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline to serve expert disclosures shall be extended until ninety (90) days before the close of discovery; provided, however, that if the 90th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

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1 IT IS FURTHER ORDERED that the deadline to serve rebuttal expert disclosures shall
2 be extended until 30 days after the deadline to file initial expert disclosures; provided, however,
3 that if the 30th day after initial expert disclosures falls on a weekend or holiday, the deadline
4 shall be the following judicial day.

5 IT IS SO ORDERED.

6 DATED this 3rd day of Sept., 2015.


DISTRICT COURT JUDGE

7
8 *Respectfully submitted by:*

9 DICKINSON WRIGHT, PLLC

10
11 
12
13 JOHN P. DESMOND
14 Nevada Bar No. 5618
15 BRIAN R. IRVINE
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25 Email: Awebster@dickinsonwright.com

26 *Attorneys for Defendants*
27 *Berry-Hinckley Industries and Jerry Herbst*
28

RENO 65540-1 1624v1

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 the attached **STIPULATION AND ORDER TO CONTINUE TRIAL (FIRST REQUEST)** on the party(s) set forth below by:

- ☒ 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.
- ☐ 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.
- ☐ Certified Mail
- ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the addressee(s) set forth below.
- ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the addressees) noted below. addressed as follows:
- ☒ By email to the email addresses below.
- ☐ Federal Express (or other overnight delivery)

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DATED this 3RD day of September, 2015.



An Employee of DICKINSON WRIGHT, PLLC

1 3980

2 DICKINSON WRIGHT, PLLC

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16 *Attorney for Defendants*

17 *Berry Hinckley Industries, and*

18 *Jerry Herbst*

12 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

13 **IN AND FOR THE COUNTY OF WASHOE**

14
15 LARRY J. WILLARD, individually and as
16 trustee of the Larry James Willard Trust Fund;
17 OVERLAND DEVELOPMENT
18 CORPORATION, a California corporation;
19 EDWARD C. WOOLEY AND JUDITH A.
20 WOOLEY, individually and as trustees of the
21 Edward C. Wooley and Judith A. Wooley
22 Intervivos Revocable Trust 2000,

CASE NO. CV14-01712

DEPT. 6

STIPULATION AND [PROPOSED]
ORDER TO CONTINUE TRIAL

Plaintiff,

vs.

(SECOND REQUEST)

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

Defendants.

24
25 BERRY-HINCKLEY INDUSTRIES, a
26 Nevada corporation; and JERRY HERBST,
27 an individual;

Counterclaimants,

vs.

1
2 LARRY J. WILLARD, individually and as
3 trustee of the Larry James Willard Trust Fund;
4 OVERLAND DEVELOPMENT
5 CORPORATION, a California corporation;

6
7 Counter-defendants.

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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, Plaintiffs/ Counter-defendants Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Overland Development Corporation (collectively, "Plaintiffs"); and Defendants/ Counterclaimants Berry-Hinckley Industries and Jerry Herbst (collectively, "Defendants," and together with Plaintiffs, "the Parties"), by and through their respective attorneys of record, hereby stipulate and agree that good cause exists for this Court to enter an order to vacate the trial date scheduled to begin on August 29, 2016 based on the following:

1. The Parties need to conduct significant additional discovery, including discovery relating to expert disclosures.

2. Specifically, Plaintiffs still need to provide Defendants with (1) Plaintiffs' tax returns that have not yet been provided; (2) any new information relating to the current re-let status of the property located in Carson City, Nevada, owned by the Wooley Plaintiffs; (3) new information relating to the Wooley Plaintiffs' efforts to refinance the Wooley Plaintiffs' loan on the property located in Carson City, Nevada; (4) information relating to Plaintiffs' tax calculations performed by Plaintiffs' accountants and referenced as part of Plaintiffs' responses to Defendants' interrogatories; (5) Plaintiffs' NRCP 16.1 damages calculations; and (6) any other supplemental information requested by Defendants.

3. Accordingly, the Parties stipulate to a short continuance of the trial date, up to and including 180 days beyond the presently scheduled date of August 29, 2016.

4. The Parties agree to appear and reschedule the trial within five (5) days of the date of this Court's Order approving the Parties' stipulation.

1 The parties further stipulate and agree that should this Court enter an order continuing the
2 trial, the following deadlines in the March 14, 2016, Stipulation and Order on file herein shall be
3 amended as follows:

4 1. The discovery deadline shall be extended until sixty (60) days before the first day of
5 the rescheduled trial; provided, however, that if the 60th day before trial falls on a weekend or
6 holiday, the deadline shall be the following judicial day.

7 2. The deadline to serve, file, and submit for decision any dispositive motions shall be
8 extended until thirty (30) days before the first day of the rescheduled trial; provided, however, that if
9 the 30th day before trial falls on a weekend or holiday, the deadline shall be the following judicial
10 day.

11 3. The deadline to serve expert disclosures shall be extended until ninety (90) days
12 before the close of discovery; provided, however, that if the 90th day before the close of discovery
13 falls on a weekend or holiday, the deadline shall be the following judicial day.

14 4. The deadline to serve rebuttal expert disclosures shall be extended until thirty (30)
15 days after the deadline to file initial expert disclosures; provided, however, that if the 30th day after
16 initial expert disclosures falls on a weekend or holiday, the deadline shall be the following judicial
17 day.

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1 Undersigned counsel certifies that their respective clients have been advised that a stipulation
2 for continuance is to be submitted on their behalf. The parties have no objection thereto.

3 **AFFIRMATION**
4 **Pursuant to NRS 239B.030**


5 The undersigned does hereby affirm that the preceding document does not contain the social
6 security number of any person.

7 Dated this 26th day of April, 2016.


Dated this 26th day of April, 2016.

8 Attorneys for Plaintiffs

Attorneys for Defendants

9
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11 LAW OFFICES OF BRIAN P. MOQUIN
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ORDER

This Court, having reviewed the Stipulation to Continue Trial submitted by the parties, and good cause appearing,

IT IS HEREBY ORDERED that good cause exists to vacate the trial date in the above-referenced matter.

IT IS FURTHER ORDERED that the parties shall reset the trial within five (5) days of this Order, unless this Court waives this requirement.

IT IS FURTHER ORDERED that the discovery deadline shall be extended until 60 days before the first day of the rescheduled trial; provided, however, that if the 60th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline to serve, file, and submit for decision any dispositive motions shall be extended until 30 days before the first day of the rescheduled trial; provided, however, that if the 30th day before trial falls on a weekend or holiday, the deadline shall be the following judicial day.

IT IS FURTHER ORDERED that the deadline to serve expert disclosures shall be extended until ninety (90) days before the close of discovery; provided, however, that if the 90th day before the close of discovery falls on a weekend or holiday, the deadline shall be the following judicial day.

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1 IT IS FURTHER ORDERED that the deadline to serve rebuttal expert disclosures shall be
2 extended until 30 days after the deadline to file initial expert disclosures; provided, however, that if
3 the 30th day after initial expert disclosures falls on a weekend or holiday, the deadline shall be the
4 following judicial day.

5 *No further continuances will be*
6 *granted. JPB*

7
8 IT IS SO ORDERED.

9 DATED this 14 day of May, 2016.

10 
11 DISTRICT COURT JUDGE

12 Respectfully submitted by:

13 DICKINSON WRIGHT, PLLC

14 

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26 Email: birvine@dickinsonwright.com
27 Email: awebster@dickinsonwright.com

28 *Attorneys 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 the attached **STIPULATION AND ORDER TO CONTINUE TRIAL (SECOND REQUEST)** on the party(s) set forth below by:

- ☒ 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.
- ☐ 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.
- ☐ Certified Mail
- ☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the addressee(s) set forth below.
- ☐ (BY FACSIMILE) on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the addressees) noted below. addressed as follows:
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- ☐ Federal Express (or other overnight delivery)

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DATED this 26th day of April, 2016.


An Employee of DICKINSON WRIGHT, PLLC

RENO 65540-1 7984v1

1 **\$2160**

2 DICKINSON WRIGHT, PLLC

3 JOHN P. DESMOND

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16 *Attorneys for Defendants*

17 *Berry-Hinckley Industries and*

18 *Jerry Herbst*

19 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

20 **IN AND FOR THE COUNTY OF WASHOE**

21 LARRY J. WILLARD, individually
22 and as trustee of the Larry James Willard
23 Trust Fund; OVERLAND DEVELOPMENT
24 CORPORATION, a California corporation;
25 EDWARD C. WOOLEY AND JUDITH A.
26 WOOLEY, individually and as trustees of
27 the Edward C. Wooley and Judith A.
28 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,

CASE NO. CV14-01712

DEPT. 6

DEFENDANTS/COUNTERCLAIMANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT

1 vs

2
3 LARRY J. WILLARD, individually and as
4 trustee of the Larry James Willard Trust
Fund; OVERLAND DEVELOPMENT
CORPORATION, a California corporation;5 Counter-defendants.
6

7 Defendants/Counterclaimants Berry-Hinckley Industries (“BHI”) and Jerry Herbst
8 (collectively, “Defendants”) hereby bring this Motion for Partial Summary Judgment on certain
9 claims for consequential damages asserted by Plaintiffs Larry J. Willard, individually and as
10 trustee of the Larry James Willard Trust Fund, and Overland Development Corporation
11 (collectively, “Willard”), and Edward C. Wooley and Judith A. Wooley, individually and as
12 trustees of the Edward C. Wooley and Judith A. Wooley Trust 2000 (collectively, “Wooley”).
13 This Motion is made pursuant to NRCP 56, the attached memorandum of points and authorities,
14 the affidavit of Timothy Herbst (**Exhibit 1**), all pleadings and papers on file herein, and any
15 other material that this Court may choose to consider.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**17 **INTRODUCTION**

18 This is an action for breach of lease agreements that were entered into by Defendants
19 and two separate groups of Plaintiffs: Willard and Wooley.¹ The lease agreements were for
20 different parcels of property. This Motion addresses Plaintiffs’ baseless claims for millions of
21 dollars in purported consequential damages to which Plaintiffs are not entitled as a matter of
22 law.

23

¹While two motions could have been filed to address Willard’s Wooley’s claims
24 separately, Defendants chose to file one motion because the legal issues regarding Willard and
25 Wooley’s claims addressed herein greatly overlap and it is therefore more efficient to address
26 both Willard and Wooley’s claims in the same motion. As filing one motion instead of two has
caused Defendants to exceed the page limits set forth in this Court’s Order, Defendants are
contemporaneously filing a motion to exceed page limits.

1 Specifically, well beyond the more than \$20 million cumulatively sought by Plaintiffs as
2 rent-based damages,² Plaintiffs also seek millions of dollars in damages for purported losses that
3 do not result directly from any purported breach and that Plaintiffs have **admitted** were not
4 foreseeable at the time the leases were executed. Plaintiffs' overreaching attempt to hold
5 Defendants liable for costs that Defendants could not foresee and did not agree to is prohibited
6 by Nevada law. Even worse, Plaintiffs **never actually incurred** many of their damages sought.
7 Nevada law does not permit parties to use lawsuits as a means to profit millions of dollars
8 beyond their actual purported losses; thus, Plaintiffs are not entitled to these damages as a
9 matter of law. Finally, even if Plaintiffs incurred some of the unforeseeable damages sought, a
10 review of the purported "damages" demonstrates just how overreaching is Plaintiffs' request for
11 consequential damages. For example, Plaintiffs request attorneys' fees that they incurred in a
12 previous action which they instituted against Defendants in an improper forum and in which
13 Defendants, not Plaintiffs, were the prevailing party, as Defendants successfully obtained
14 dismissal of the entire case in California. Plaintiffs' request for those fees, which is untimely,
15 made in the wrong court, and not recoverable pursuant to prevailing party principles, is an
16 example of how Plaintiffs are using this lawsuit to seek damages well beyond those permitted
17 by law. This conduct should not be permitted and this Court should grant the Motion in order to
18 streamline issues for trial.

19 The undisputed facts demonstrate that Plaintiffs are not entitled to the damages
20 addressed herein as a matter of law. Thus, to streamline this case and eliminate consideration at
21 trial of overreaching and impermissible damages requests which can be resolved in advance,
22 Defendants respectfully request that this Court grant summary judgment in Defendants' favor
23 and preclude Plaintiffs from seeking such damages at trial.

24 ///

25 ²Defendants have numerous defenses to these purported damages which will not be
26 addressed in this Motion but at a later time.

FACTS AND PROCEDURAL BACKGROUND

1. The Willard Lease.

In 2005, Willard and BHI entered into a commercial lease (the “Willard Lease”) for the lease of real property in Reno, Nevada (the “Willard Property”). (Willard Lease, **Exhibit 2**; First Amended Complaint (“FAC”) ¶ 9, on file herein). In 2007, Mr. Herbst entered into a guaranty agreement for the Willard Lease. (Willard Guaranty, **Exhibit 3**; FAC ¶ 11, on file herein).

Willard claims that BHI breached the Willard Lease in 2013. (FAC ¶ 12, on file herein). As a result of this purported breach, Willard seeks approximately \$15 million in purported future rent. *Id.* ¶ 14. Willard also seeks more than \$10 million in purported consequential damages which will be addressed in this Motion: (1) attorneys’ fees allegedly incurred by Willard in an action Plaintiffs brought against Defendants in California; (2) fees Willard allegedly incurred in his voluntary bankruptcy; and (3) damages related to the short sale of the Willard Property. However, it is undisputed that these damages were not foreseeable and that many of these purported damages were not even actually incurred by Willard or are otherwise not recoverable.

Specifically, with respect to the “attorneys’ fees” damages, upon BHI’s purported breach, Willard (and Wooley) filed a lawsuit in California against Defendants and numerous other individuals and entities who had no relationship to Willard and Wooley, including Maryanne Herbst, JH Inc., Terrible Herbst, and Marc Berger. (Docket Sheet, **Exhibit 4**). Defendants moved to dismiss the California action for lack of personal jurisdiction because, amongst other things, all Defendants reside in Nevada, the leased property is located in Nevada, and the leases contained a forum selection clause that required any action to be filed in Nevada. (Second Amended Motion to Dismiss, **Exhibit 5**). The California court granted Defendants’ motion and dismissed the case. (Docket Sheet p. 11 at 3/18/2014, **Exhibit 4**). Even though Defendants prevailed, and had to incur needless fees defending against this baseless action filed

1 in an improper forum, **Willard** is now requesting his fees incurred in that action. This untimely
2 request, made in the wrong court, is for \$35,000 that Willard purportedly incurred in fees in that
3 action. (FAC ¶ 18, on file herein).

4 With respect to the “bankruptcy fees” damages, Willard filed a voluntary bankruptcy in
5 2013. *Id.* ¶ 17. Willard seeks to recover from Defendants \$22,623 in legal fees and \$15,000 in
6 accounting fees purportedly incurred in connection with this bankruptcy. *Id.* However, there are
7 no facts in the record that demonstrate that this bankruptcy was or would have been foreseeable
8 to Defendants at the time the parties executed the Willard Lease. In fact, Willard has admitted
9 that he never discussed with Defendants that a breach of the Willard Lease could result in him
10 filing bankruptcy. (Deposition of L. Willard at 115, **Exhibit 6**). Further, Willard’s purported
11 need to file bankruptcy at all is questionable, as Willard voluntarily dismissed the bankruptcy a
12 mere six months after filing it. (FAC ¶ 17, on file herein).

13 Finally, with respect to the “short sale” damages, in March 2014, Willard sold the
14 Willard Property in a short sale. *Id.* ¶ 15. Willard’s lenders then forgave any remaining debt
15 owed on the Willard Property after the short sale. (Deposition of L. Willard at 89, **Exhibit 6**).
16 Willard now seeks to hold Defendants liable for more than \$5 million³ of alleged tax
17 consequences that purportedly resulted from the forgiven debt in the short sale, for \$549,852 in
18 closing costs, and for \$4,437,500 of “lost earnest money” that Willard purportedly invested in
19 the Willard Property. (FAC ¶ 15, on file herein). However, there are no facts in the record
20 which demonstrate that this short sale was or would have been foreseeable at the time the
21 parties executed the Willard Lease, nor that resulting tax consequences would have been
22 foreseeable. (Affidavit of T. Herbst, **Exhibit 1**; Deposition of L. Willard p. 117-119, **Exhibit 6**).
23 Further, Willard never actually paid the income tax or closing costs he seeks, and therefore, they
24 are not recoverable as damages. (2014 Federal Tax Return for Overland, **Exhibit 7**; 2013

25 ³Willard has estimated the tax consequences to be \$2,430,000 for Overland and
26 \$3,152,000 for Mr. Willard. (Responses to First Set of Interrogatories at 7, **Exhibit 12**).

1 Federal Tax Return for Overland, **Exhibit 24**; 2014 Federal Tax Return for Mr. Willard,
2 **Exhibit 8**; Seller's Final Closing Statement, **Exhibit 9**).

3 **2. The Wooley Leases.**

4 In 2005, BHI and Wooley entered into a commercial lease for the lease of property on
5 Highway 50 ("Highway 50 Lease"). (Highway 50 Lease, **Exhibit 10**; FAC ¶ 28, on file herein).
6 Mr. Herbst entered into a guaranty agreement on the lease in 2007. (Highway 50 Guaranty,
7 **Exhibit 11**; FAC ¶ 31, on file herein). Wooley claims that BHI breached the Highway 50 Lease
8 in 2013. (FAC ¶ 32, on file herein).

9 In 2006, Wooley bought property on Baring Boulevard (the "Baring Property"), and
10 BHI and Wooley entered into a separate lease for that property (the "Baring Lease"). (Baring
11 Purchase Agreement, **Exhibit 13**; Baring Lease, **Exhibit 14**; FAC ¶ 29, on file herein). Upon
12 Wooley's purchase of the Baring Property, Wooley entered into a mortgage loan for the Baring
13 Property which purportedly contained a clause which "cross-collateralized" the Baring Property
14 and the Highway 50 Property. (Baring Property Loan at ECW78 1.7, **Exhibit 15**). However, it
15 is undisputed that neither BHI nor Mr. Herbst were party to Wooley's mortgage loan, and that
16 neither BHI nor Mr. Herbst knew about the cross-collateralization provisions that are apparently
17 contained in Wooley's financing documents. (Deposition of E. Wooley p. 119, 120, **Exhibit 16**;
18 Affidavit of T. Herbst, **Exhibit 1**).

19 In or about December 2009, BHI assigned its interests and obligations in the Baring
20 Lease to Jacksons Food Stores, Inc. (Assignment, **Exhibit 17**). Wooley subsequently sold the
21 Baring Property while Jacksons was still a tenant in the Baring Property, receiving more than
22 \$870,000 from the sale. (HUD Statement, **Exhibit 18**). BHI was not in breach of the Baring
23 Lease when Wooley sold the Baring Property.⁴ (Deposition of E. Wooley p. 99, 100, **Exhibit**
24 **16**).

25 ⁴It is also undisputed that Jacksons was not in breach of the Baring Lease when Wooley
26 initiated this lawsuit in Nevada. However, despite that fact, Wooley attempted to sue BHI for
27 breach of the Baring Lease, seeking nearly \$4 million in damages. (Initial Complaint at ¶¶ 34,
28

1 Wooley seeks two categories of purported damages which will be addressed in this
 2 Motion. First, even though it is undisputed that Defendants did not know about the cross-
 3 collateralization and were not in breach of the Baring Lease when Wooley sold the Baring
 4 Property, Wooley seeks to recover more than \$600,000 in damages he purportedly incurred
 5 from selling the Baring Property based upon its cross-collateralization with the Highway 50
 6 Property. Specifically, Wooley claims that because the Baring Property was cross-collateralized
 7 with the Highway 50 Property, Defendants' purported breach of the Highway 50 Property
 8 forced Wooley to sell the Baring Property "at a loss" and he "incurred tax liabilities."⁵ (FAC, on
 9 file herein). Second, Wooley seeks \$45,088 in attorneys' fees that he purportedly incurred in the
 10 baseless action that he and Willard improperly initiated against Defendants in California that
 11 was ultimately dismissed. *Id.*

12 **3. Present procedural posture.**

13 The parties have been conducting discovery for more than one year, and the facts
 14 pertinent to the consequential damages addressed in this Motion have been fully developed to
 15 allow this Court to grant summary judgment in Defendants' favor. (Decl. of B. Irvine, **Exhibit**
 16 **25**). Both Mr. Willard and Mr. Wooley have stated that they have produced all pertinent
 17 documents to their counsel, and Mr. Wooley and Mr. Willard have each been deposed.
 18 (Deposition of L. Willard p. 131, **Exhibit 6**; Deposition of E. Wooley p. 14, **Exhibit 16**). No
 19 facts adduced thus far even remotely support an argument that the consequential damages

20 42-44, on file herein.) Defendants were forced to bring this fact to Wooley's attention and
 21 threaten motion practice in this case before Wooley finally agreed to amend his pleading to
 22 remove a claim for breach of the Baring Lease. (November 2014 email exchange, **Exhibit 19**;
 23 January 2015 email exchange, **Exhibit 20**). This is another example of Plaintiffs' over-reaching
 approach to this entire case.

24 ⁵Interestingly, in the original complaint, Wooley attributed BHI's purported breach of
 25 the **Baring Lease** as being the reason for these claimed damages. (Initial Complaint at ¶¶ 42-44,
 26 on file herein.) Upon revising the complaint to remove allegations of BHI's purported breach of
 the Baring Lease, Wooley now attributes these damages to BHI's purported breach of the
 Highway 50 Lease.

sought by Plaintiffs were foreseeable and possibly recoverable. Thus, Defendants are entitled to summary judgment in order to properly focus the issues in this case.

ARGUMENT

1. Legal standard.

“[S]ummary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact remains in dispute, and that the moving party is entitled to judgment as a matter of law.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 1221 P.3d 1026, 1029 (2005). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Butler v. Bogdanovich*, 101 Nev. 449, 451, 705 P.2d 662 (1985). The United States Supreme Court has noted that summary judgment is “properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the determination of every action.” *Celotex Com. v. Catlett*, 477 U.S. 317, 327 (1986). The moving party on a summary judgment motion does not need to negate the opponent’s claim, but rather the opponent needs to make a showing sufficient to establish the existence of those elements necessary and essential to the case against the moving party on which the opponent will bear the burden of proof at trial. *Id.* at 322.

Because this motion addresses Plaintiffs’ requests for consequential damages, one element essential to Plaintiffs’ claims is the foreseeability of the damages sought. Ordinarily, foreseeability “presents a factual issue to be determined by the trier of fact. Only if it can be said that the damages are the direct or natural result of the breach can they be presumed foreseeable as a matter of law.” *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115-16, 642 P.2d 1086, 1087 (1982). Here, however, the damages sought can be presumed unforeseeable as a matter of law. Specifically, discovery is complete with regard to the issues addressed herein, and there are no facts in the record that would support a finding of foreseeability of the damages sought. In fact, Plaintiffs have expressly conceded that many of

the damages sought were not contemplated at the time of entry into the contracts. (Deposition of L. Willard p. 115, 117-119, **Exhibit 6**; Deposition of E. Wooley p. 119, 120, **Exhibit 16**). Further, Defendants are entitled to judgment on other bases in addition to the unforeseeable nature of the damages. Thus, summary judgment on Plaintiffs' request for consequential damages is appropriate. *Jackson v. Roadway Exp., Inc.*, 2007 WL 1875932, at *3 (S.D. Tex. June 27, 2007) (awarding summary judgment where there was no evidence in the record that would support the foreseeability requirement of plaintiff's claims for consequential damages). In fact, summary judgment is necessary to streamline the case and avoid further resources wasted resolving claims that can be decided on the undisputed facts.

2. Willard is not entitled to consequential damages as a matter of law.

As noted, Willard seeks the following damages as a result of Defendants' purported breach:⁶ (1) Willard claims that "[Willard was] 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 consequences⁷ and \$549,852.00 in closing costs," (FAC ¶15, on file herein); (2) "Willard filed for bankruptcy protection, incurring \$22,623.00 in legal fees and \$15,000 in accounting fees in the process," *id.* ¶17; and (3) Willard "hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring \$35,000 in attorney's fees." *Id.* ¶ 18. Willard is not entitled to these damages as a matter of law.

a. Willard is not entitled to any "short sale" damages.

First, Willard seeks three categories of "short sale" damages that he claims to have incurred by being "forced to sell the Willard Property in March 2014 in a short sale" as a result

⁶Certain categories of consequential damages sought by Willard are not addressed in this Motion but will be addressed at a later time.

⁷Willard has since revised that estimate to be \$2,430,000 for Overland and \$3,152,000 for Mr. Willard. (Responses to First Set of Interrogatories at 7, **Exhibit 12**).

of Defendants' purported breach: (1) earnest money invested in the Willard Property; (2) tax consequences resulting from his mortgage debt cancelled by the short sale; and (3) closing costs. (FAC ¶ 15, on file herein). Willard is not entitled to these damages as a matter of law for two independent reasons: (1) the loss and resulting damages were not foreseeable at the time the parties entered into the contracts; and (2) Willard did not actually incur many, if not all, of the damages sought.

i. The loss was not foreseeable at the time the parties entered into the contracts.

As a threshold matter, these damages are categorically not recoverable because the short sale and the resulting claimed damages were not a foreseeable consequence of Defendants' purported breach. There is no allegation by Willard that the short sale damages are direct damages that would necessarily result from a breach of the Willard Lease, such as lost rent. Nor does the Willard Lease address these damages in any way. Thus, Willard's request is properly classified as one for consequential damages.

"Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made." Restatement (Second) of Contracts § 351(1); *Hilton Hotels Corp.*, 98 Nev. at 115, 642 P.2d at 1087 ("There can be no recovery for damages that are not reasonably foreseeable at the time of the contract."). Indeed, a contracting party is not "liable in the event of breach for loss that he did not at the time of contracting have reason to foresee as a probable result of the breach." Restatement (Second) of Contracts § 351at cmt. a.

The only way such damages can be foreseeable is if the loss is a probable result of the breach: "loss may be foreseeable as a probable result of the breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." *Id.* at 351(2); *Margolese v. Bruce*, 902 F.2d 1578 (9th Cir. 1990) ("To recover consequential damages for

breach of contract, plaintiffs must prove either: (1) the losses were reasonably foreseeable by the party to be charged at the time the contract was made; or (2) if the injury was not foreseeable, that the defendant had special knowledge of the risk he was undertaking.”). Unless the loss is probable, “the mere circumstance that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that actually occurred was not foreseeable.” Restatement (Second) of Contracts § 351 at cmt. a. The burden of proving foreseeability is on the plaintiff. *Margolese*, 902 F.2d 1578 (discussing what the plaintiff must prove). Thus, for Willard’s purported short sale damages to be recoverable, Willard must prove that the short sale and the resulting requested damages were a probable result of a breach at the time of the execution of the Willard Lease because they followed from the breach in the ordinary course of events or as a result of special circumstances that Defendants had reason to know.

The undisputed facts demonstrate that Willard cannot satisfy this burden as a matter of law. First, the claimed “forced sale” of a landlord’s property would not occur in the ordinary course of events of a tenant’s breach. Indeed, “[i]n the case of a lessee, **the lessee generally does not expect that the lessor will lose his property if the lease is breached.** Rather, a lessee would expect to be liable for lost rent and any physical damage to the premises.” *Margolese*, 902 F.2d at 1578 (emphasis added); *Enak Realty Corp. v. City of New York*, 109 A.D.2d 814 (N.Y. Sup. 1985) (“We modify Special Term’s order to the extent of striking plaintiff’s demands for damages resulting from the foreclosure inasmuch as such damages were not a foreseeable result of the breach of the lease....”); *Boise Joint Venture v. Moore*, 806 P.2d 707, 710 (Or. Ct. App. 1991) (“To recover its equity as consequential damages, BJV had to prove that, at the time of contracting, the parties contemplated that, as the probable result of defendant’s failing to make lease payments, BJV would allow its interest to be foreclosed and forfeit its equity. We agree with the trial court that BJV failed to prove that, when the parties contracted to lease the motel, they contemplated that defendant would be liable for repayment of BJV’s equity.”).

1 Discovery has revealed no evidence that Defendants knew anything, at the time the Willard
2 Lease was executed, that would lead them to believe that a breach of that Lease would force
3 Willard to sell the property at a short sale.

4 Even less foreseeable in the ordinary course of events are Willard's claimed tax
5 consequences purportedly resulting from the claimed forced sale. *See In re Coombs*, 2012 WL
6 1578756, at *3 (Bankr. D.N.M. May 4, 2012). Even if Defendants had some knowledge that a
7 future breach would have forced Willard to sell the property, they certainly would have had no
8 idea that such sale would have caused income tax damages to Willard. Thus, the claimed
9 damages were not possibly foreseeable in the ordinary course of events.

10 Because the loss claimed by Willard would not be a probable result of the purported
11 breach in the ordinary course of events, Willard cannot recover the requested damages unless
12 Willard can prove that Defendants had actual special knowledge at the time the parties entered
13 into the contracts that it was probable that such a loss could occur in the event of a breach. It is
14 undisputed that Willard cannot meet this burden. (Affidavit of T. Herbst, **Exhibit 1**). It is settled
15 law that foreseeability is measured as of the time the parties enter into a contract. *Hilton Hotels*
16 *Corp.*, 98 Nev. at 115, 642 P.2d at 1087 ("There can be no recovery for damages that are not
17 reasonably foreseeable **at the time of the contract.**"); Restatement (Second) of Contracts § 351
18 at cmt. a ("A contracting party is generally expected to take account of those risks that are
19 foreseeable **at the time he makes the contract.** He is not, however, liable in the event of
20 breach for loss that he did not **at the time of contracting** have reason to foresee as a probable
21 result of such a breach."). Here, the evidence adduced through discovery shows that Willard's
22 claimed loss was not foreseeable at the time the parties entered into the contracts. In fact, Mr.
23 Willard himself testified that he only spoke with Tim Herbst several years **after** the execution
24 of the Lease (in 2008, or possibly 2012). (Willard Deposition at 117, 118:20-25, 119, **Exhibit 6**;
25 Willard Lease, **Exhibit 2**; Willard Guaranty, **Exhibit 3**). Even then, Mr. Willard did not discuss
26 the possibility, much less probability, of a forced sale. *Id.*; Restatement (Second) of Contracts §

351 at cmt. a. Mr. Willard has also not indicated that he spoke with any other representative of Defendants about these topics. Thus, while Defendants dispute ever having any knowledge that such loss or damages would be a probable result of any breach of the Willard Lease, it is undisputed that Defendants did not have any such knowledge at the time of entry into the contracts. Nor were there any objective indicia that the loss would be foreseeable. In other words, it is undisputed Defendants had no “special knowledge of the risk [they were] undertaking” at the time they entered into the contracts, and therefore such a risk cannot be attributed to them. *Margolese*, 902 F.2d at 1578.

Therefore, because the claimed loss was not foreseeable to Defendants at the time they entered into the contracts, either in the ordinary course of events or through special knowledge, the undisputed facts and law demonstrate that Willard is not entitled to recover these damages from Defendants. Defendants respectfully request that this Court deny Willard’s claim for its short sale consequential damages as a matter of law.

ii. Willard did not incur many of the claimed short sale damages.

Further, even if the claimed damages were somehow foreseeable, Willard never actually incurred many, if not all, of the damages sought. Willard is not entitled to damages not incurred: “the party seeking damages has the burden of proving both the fact of damages and the amount thereof.” *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989); 22 Am. Jur. 2d *Damages* § 48 (“As a general rule, a non-breaching party is not entitled, through the award of damages, to achieve a better or superior position to the one it would reasonably have occupied had the breach not occurred.”).

Specifically, with respect to the purported tax consequences, Willard claims to have incurred “at least \$3,000,000 in tax consequences” from the short sale. (FAC ¶ 15, on file herein). Willard has since revised that estimate to be \$2,430,000 for Overland and \$3,152,000 for Mr. Willard. (Responses to First Set of Interrogatories at 7, **Exhibit 12**). Presumably, these “tax consequences” were incurred as a result of mortgage debt forgiven by the lender as part of

1 the short sale. (Deposition of L. Willard at 89, **Exhibit 6**). However, the tax returns for both
2 Overland and Mr. Willard demonstrate that neither Overland nor Mr. Willard ever actually paid
3 income tax on the forgiven debt; in fact, they did not pay any income taxes at all for 2014, when
4 the short sale closed. (2014 Federal Tax Return Overland, **Exhibit 7**; 2014 Federal Tax Return
5 Mr. Willard, **Exhibit 8**). Rather, both Overland and Mr. Willard avoided those taxes entirely by
6 claiming to be insolvent prior to the cancellation of the mortgage debt, relieving their obligation
7 to include the canceled debt in their taxable income. *Id.*; (IRS Publication 4681 at 5, **Exhibit 21**
8 (“Don’t include a canceled debt income to the extent that you were insolvent immediately
9 before the cancellation.”)); IRC 108(a)(1)(B) (“Gross income does not include any amount
10 which (but for this subsection) would be includible in gross income by reason of the discharge
11 (in whole or in part) of indebtedness of the taxpayer if the discharge occurs when the taxpayer is
12 insolvent.”).

13 Specifically, in describing the short sale and cancellation of debt resulting from the short
14 sale, Overland’s tax return stated as follows:

15 NCUAB/TCCU Bank, - Account #[redacted], first loan on the
16 [Willard Property] has issued form 1099-C debt cancelled in the
17 total amount of \$8,597,250 under debtor’s ID# [redacted] and
18 debtor’s name Overland Development Corp., Inc. The property is
19 41% owned by Overland Development Inc. and 59% owned by
20 Larry J. Willard, Truste[e] of the Larry James Willard Trust dated
21 11/14/1987. The amount of cancellation of debt for Overland
development Inc. is \$3,524,873. Overland Development Inc.’s
total of all its liabilities exceed the [fair market value] of all of its
assets immediately before the cancellation of this debt. Therefore
Overland Development Inc. is considered insolvent.

22 (2014 Federal Tax Return Overland at Federal Supplemental Information pg. 1, **Exhibit 7**).
23 Overland claimed \$3,524,873 as “discharged indebtedness excluded from gross income.” *Id.* at
24 Form 982. Overland did not pay or owe anything in income tax for the year 2014, the year the
25 short sale occurred. Tax Return at pg. 1, lines 32, 34; (2013 Federal Tax Return Overland at pg.
26 1, lines 30, 34, Federal Statements pg. 2, **Exhibit 24**).

1 Similarly, in describing the short sale and cancellation of debt resulting from the short
2 sale, Mr. Willard's tax return stated that:

3 NCUAB/TCCU Bank, - Account #[redacted], first loan on the
4 [Willard Property] has issued form 1099-C debt cancelled in the
5 total amount of \$8,597,250 under debtor's ID#[redacted] and
6 debtor's name Overland Development Corp., Inc. The property is
7 41% owned by Overland Development Inc. and 59% owned by
8 Larry J. Willard, Truste[e] of the Larry James Willard Trust dated
9 11/14/1987. Taxpayer's total of all his liabilities exceed the [fair
10 market value] of all of his assets immediately before the
11 cancellation of this debt. Therefore taxpayer is considered
12 insolvent.

13 (2014 Federal Tax Return for Mr. Willard at Federal Supplemental Information, **Exhibit 8**). Mr.
14 Willard put \$4,196,190 as the "total amount of discharged indebtedness excluded from gross
15 income." *Id.* at Form 982. Mr. Willard did not pay or owe anything in income tax for 2014, the
16 year the short sale occurred. *Id.* at Form 1040, lines 63, 74, 78.

17 Thus, as Overland and Mr. Willard did not actually pay any taxes for 2014, much less
18 the more than \$5 million claimed, Overland and Mr. Willard cannot recover the claimed tax
19 damages that they seek from Defendants, for the simple reason that they did not actually incur
20 those damages by paying the taxes. Indeed, "a breach of contract claim fails as a matter of law if
21 the plaintiff cannot establish that he or she has been damaged by the alleged breach." *Roberts v.*
22 *Brunswick Corp.*, 783 N.W.2d 226, 233 (Minn. Ct. App. 2010). Further, to award Willard this
23 amount would be to inequitably make Willard far more than whole because these damages were
24 not actually incurred by Willard. 22 Am. Jur. 2d *Damages* § 48 ("As a general rule, a non-
25 breaching party is not entitled, through the award of damages, to achieve a better or superior
26 position to the one it would reasonably have occupied had the breach not occurred."). Therefore,
27 Willard is not entitled to his claimed tax consequences damages as a matter of law, and
28 judgment should be entered in Defendants' favor.

With respect to the closing cost damages, Willard claims to have incurred "\$549,852 in
closing costs" as a result of the purported forced sale. (FAC ¶ 15, on file herein). The only

1 evidentiary support that Willard has ever provided for this allegation is the “Seller’s Final
2 Closing Statement.” (Closing Statement, **Exhibit 9**; Responses to Interrogatories at 7, **Exhibit**
3 **12** (“Damages for closing costs were calculated from the values appearing on the Seller’s Final
4 Closing Statement.”)). However, the Closing Statement does not support Willard’s claim for
5 damages.

6 First, there is absolutely no indication that Willard actually paid the costs in the Closing
7 Statement. *Mort Wallin*, 105 Nev. at 857, 784 P.2d at 955 (“The party seeking damages has the
8 burden of proving both the fact of damages and the amount thereof.”). According to the Closing
9 Statement, Willard’s **lenders** received all of the proceeds from the short sale, while Willard
10 received nothing. (Closing Statement, **Exhibit 9**). Willard’s lenders then forgave any remaining
11 debt owed on the Willard Property after the short sale. (Deposition of L. Willard at 89, **Exhibit**
12 **6**). Therefore, the closing costs for the sale **only** impacted how much Willard’s lenders received
13 in payoff from the purchase price. Further, the payoff amount made no difference to Willard’s
14 damages because the lenders forgave any remaining debt outstanding on the mortgage (and
15 Willard did not claim that debt forgiveness as gross income). Thus, the Closing Statement only
16 reflects that the lenders were paid the purchase price minus the closing costs, not that Willard
17 actually paid any closing costs—or incurred any other financial consequences from the closing
18 costs since the lenders forgave any outstanding remaining debt owed by Willard. As Willard did
19 not pay any closing costs or incur financial consequences from the amount of closing costs
20 (only the lenders’ payoff amount was impacted by the closing costs, which was irrelevant to
21 Willard because the lenders forgave Willard’s remaining debt), Willard is not entitled to recover
22 these costs as a matter of law.

23 Even if Willard did incur any purported closing costs, the total closing costs listed in the
24 Closing Statement, including commissions paid to the broker, are \$134,615. (Closing Statement,
25 **Exhibit 9**). After a reduction is made for the credits from the buyer, the net closing costs total
26 \$84,260. *Id.* Thus, Willard’s claim for closing costs—assuming that those costs were
27
28

foreseeable and actually incurred by Willard (neither of which is satisfied here)—are overstated by \$465,592. Therefore, Willard is not entitled to his claimed costs of \$549,852 as a matter of law.

Finally, with respect to the purported earnest money damage, Willard claims to have incurred “\$4,437,500.00 of earnest money invested in the Willard Property” as a result of the purported forced sale. Assuming the existence of any documentary support for this claim (Willard has not provided any), nothing in the Willard Lease requires or even contemplates Defendants paying Willard his purported invested earnest money in the event of a breach. Indeed, it would be categorically unreasonable to require a tenant to be responsible for a landlord’s purported lost earnest money in the property absent an express agreement in the lease to do so. Thus, Willard is not entitled to recover this money from Defendants as a matter of law.

b. Willard is not entitled to its attorneys’ fees consequential damages.

In addition to the short sale damages, Willard also sought the following consequential damages: (1) attorneys’ fees incurred in a California action that Willard brought against Defendants for breach of the Willard Lease; and (2) attorneys’ fees and accounting fees incurred in a bankruptcy action that Willard filed as a result of Defendants’ purported breach. Willard is not entitled to these damages as a matter of law.

i. The California action.

Willard claims that “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 in attorney’s fees.” (FAC ¶ 18, on file herein). This action was a complaint filed in California against Defendants for breach of the Willard Lease. (Docket Sheet, **Exhibit 4**). Unsurprisingly, as all Defendants and the lease are Nevada-based, and the lease specifically requires lawsuits to be brought in Nevada, Defendants obtained a dismissal of the action for lack of personal jurisdiction. *Id.* at 11. The fees purportedly incurred by Willard in that action are clearly not recoverable. These attorneys’ fees

1 could only be recoverable as litigation fees or as special damages, neither of which applies to
2 this case. *Sandy Valley Associates v. Sky Ranch Estates Owners Ass’n*, 117 Nev. 948, 956, 35
3 P.3d 964, 969 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170
4 P.3d 982 (2007); *Liu v. Christopher Homes, LLC*, 130 Nev. ___, ___, 321 P.3d 875, 878 (2014)
5 (noting the general rule that attorneys’ fees cannot be awarded absent a statute, rule, or contract
6 provision, and that “as an exception to the general rule, attorney fees may be awarded as special
7 damages in limited circumstances.”).

8 First, “when parties seek attorney fees as a cost of litigation, documentary evidence of
9 the fees is presented to the trial court, generally in a post-trial motion.” *Sandy Valley*, 117 Nev.
10 at 956, 35 P.3d at 969. However, “generally, attorney fees are not recoverable absent authority
11 under a statute, rule, or contract.” *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 878.
12 Here, to the extent that Willard is seeking the California action attorneys’ fees as a cost of
13 litigation, Willard has not identified any statute, rule, or contract provision that would entitle
14 Willard to fees incurred in the futile and now dismissed California action. Nor could he:
15 Plaintiffs chose an improper forum, and Defendants were the prevailing party in the California
16 action and successfully obtained dismissal of the case for lack of jurisdiction. (Docket Sheet at
17 11, **Exhibit 4**). Thus, if anyone is entitled to their fees from the California action, it is
18 Defendants. Further, even if Willard was somehow able to provide a basis for recovering
19 attorneys’ fees in the California action, it is wholly unclear why this Court, as opposed to the
20 court in the California action, should determine the award of attorneys’ fees incurred in that
21 action. Not only is Willard’s request for fees in this Court untimely, it would be inappropriate
22 for this Court, rather than the presiding court, to make determinations regarding the
23 reasonableness of the fees. *See* NRCP 54(d)(2). Thus, Willard is not entitled to the fees in the
24 California action as a cost of that litigation.

25 Second, “when a party claims it has incurred attorney fees as foreseeable damages
26 arising from tortious conduct or a breach of contract, such fees are considered special damages.”

1 *Sandy Valley*, 117 Nev. at 956, 35 P.3d at 969. Special damages can only be sought in a narrow
 2 set of circumstances: (1) a party to a contract can seek to recover from a breaching party the
 3 attorneys' fees that arise from the breach that caused the former party to accrue attorneys' fees
 4 in defending himself against a third party's legal action; and (2) in cases concerning title to real
 5 property, attorneys' fees can be allowable as special damages in slander of title actions.
 6 *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875. Here, no purported breach by
 7 Defendants has caused Willard to have to defend himself against a third party's legal action.
 8 Rather, Willard seeks attorneys' fees purportedly incurred from **Willard** bringing an improper
 9 action against Defendants in California, not a third-party action. (FAC ¶ 18, on file herein
 10 (Willard "hired an attorney to file suit against BHI and Herbst in Santa Clara County,
 11 California, thereby incurring \$35,000 in attorney's fees.")). "Attorneys' fees and other expenses
 12 of former litigation, particularly suits prosecuted by the plaintiff against the defendant,
 13 ordinarily are not recoverable in a subsequent action." Robert Rossi, 1 Attorneys' Fees 8:1 (3d
 14 ed.). The Nevada Supreme Court has been clear that such fees are only recoverable, if at all, in
 15 defending against a third-party action. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at
 16 875. Thus, the first circumstance does not apply. Further, the California action had nothing to
 17 do with real property claims, much less slander of title claims. Thus, the attorneys' fees are not
 18 recoverable as special damages.⁸

19 Accordingly, because Willard is not entitled to recover the attorneys' fees allegedly
 20 incurred in the California action as either a cost of that litigation or as special damages,

22 ⁸Even if Willard's claim was entitled to seek the attorneys' fees in the California action
 23 as special damages, "as a practical matter, attorney fees are rarely awarded as damages simply
 24 because parties have a difficult time demonstrating that the fees were proximately and
 25 necessarily caused by the actions of the opposing party and that the fees were a reasonably
 26 foreseeable consequence of the breach or conduct. Because parties always know lawsuits are
 possible when disputes arise, the mere fact that a party was forced to file or defend a lawsuit is
 insufficient to support an award of attorney fees as damages." *Sandy Valley*, 117 Nev. at 957, 35
 P.3d at 969-70.

1 Defendants respectfully request that this Court deny Willard's request for such damages as a
2 matter of law.

3 **ii. The bankruptcy.**

4 Willard also claims that "as a further direct and proximate result of BHI breaching the
5 Willard Lease, Willard filed for bankruptcy protection, incurring \$22,623.00 in legal fees and
6 \$15,000 in accounting fees in the process." (FAC ¶ 17, on file herein). Willard is not entitled to
7 these fees as a matter of law.

8 First, it is undisputed that Willard's bankruptcy was not foreseeable at the time the
9 parties entered into the contracts. Willard expressly admitted that he never had any discussions
10 with Defendants that a breach of the lease could result in him filing bankruptcy. (Deposition of
11 L. Willard at 115, **Exhibit 6**; Affidavit of T. Herbst, **Exhibit 1**). In fact, not only was the
12 bankruptcy unforeseeable, it was frivolous: Willard admits that a mere six months after filing
13 the bankruptcy, Willard voluntarily withdrew his bankruptcy petition upon the advice of his
14 counsel. (FAC ¶ 17, on file herein). If Willard's bankruptcy was not a foreseeable consequence
15 of a breach of the Willard Lease, then any fees incurred "in the process" of Willard filing and
16 pursuing his six-month voluntary bankruptcy are also not foreseeable, and therefore not
17 recoverable by Willard. Footnote 8; Restatement (Second) of Contracts § 351(1) ("Damages are
18 not recoverable for loss that the party in breach did not have reason to foresee as a probable
19 result of the breach when the contract was made.").

20 Second, even if the bankruptcy was somehow foreseeable, Willard does not meet any of
21 the requirements to seek his fees purportedly incurred as a result of the bankruptcy.⁹ If Willard
22 wanted to recover his fees as a cost of litigation of the bankruptcy, he should have sought them
23 with the bankruptcy court, although the availability of such fees upon a voluntarily dismissed
24

25 ⁹While the law cited herein discusses attorneys' fees, Willard appears to claim that his
26 accounting fees were a cost of the bankruptcy litigation. Thus, the analysis should be the same
27 for both.

voluntary bankruptcy would be questionable at best. Further, if Willard seeks these fees as special damages, Willard does not fall within the specific categories of damages permitted to be sought as special damages. *Christopher Homes, LLC*, 130 Nev. at ___, 321 P.3d at 875. Thus, Willard is not entitled to the attorneys' fees or accounting fees purportedly incurred in the bankruptcy as a matter of law.

Thus, Willard is not entitled to any of the consequential damages discussed herein, and summary judgment is appropriate on these claims.

3. Wooley is not entitled to consequential damages as a matter of law.

Wooley also seeks consequential damages, claiming that as a result of Defendants' purported breach:¹⁰ (1) "because the [Baring] Property was cross-collateralized with the Highway 50 Property, the Wooley Plaintiffs were forced to sell the [Baring] Property at a loss of \$147,847.30"; (2) "because the [Baring] Property was cross-collateralized with the Highway 50 Property and the Wooley Plaintiffs were forced to sell the [Baring] Property, the Wooley Plaintiffs incurred tax liabilities in an amount to be proven at trial but which is at least \$600,000"; and (3) Wooley "hired an attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring \$45,088.00 in attorney's fees." (FAC ¶¶ 34, 39-42, on file herein). As will be discussed herein, Wooley is not entitled to these damages as a matter of law.

a. Cross-collateralization with the Baring Property.

With respect to the purported "Baring Property" damages, Wooley claims that because Defendants allegedly breached the Highway 50 Lease, and Wooley's mortgage loan for the Highway 50 Property was cross-collateralized with his loan for a separate property, the Baring Property,¹¹ Defendants' purported breach of the Highway 50 Lease forced Wooley to sell the

¹⁰Certain consequential damages sought by Wooley are not addressed in this Motion but will be addressed at a later time.

¹¹According to Mr. Wooley, this means that "if you do not make your payments on either one of the properties, they can foreclose on both of the properties." (Deposition of E. Wooley p. 105, **Exhibit 16**).

1 Baring Property “at a loss” and caused him to incur tax liabilities. *Id.*; (Deposition of E. Wooley
2 p. 104-106, **Exhibit 16**). Wooley is not entitled to these purported damages because they were
3 unforeseeable as a matter of law.

4 Specifically, nothing in the Highway 50 Lease mentioned that a consequence for a
5 breach was that BHI would be liable for damages incurred with respect to selling one of
6 Wooley’s **other** properties, the Baring Property. (Highway 50 Lease, **Exhibit 10**). Thus, the
7 only way that Wooley could recover these consequential damages is by proving that such a loss
8 was foreseeable as a probable result of the breach at the time the parties entered into the
9 Highway 50 Lease. Restatement (Second) of Contracts § 351(1).

10 The undisputed facts show that Wooley cannot satisfy this burden as a matter of law.
11 First, it would be impossible for anyone to know at the time of execution of the Highway 50
12 Lease that the Highway 50 and Baring Properties were cross-collateralized, or that breach of the
13 Highway 50 Lease could impact the Baring Property, because Wooley did not even enter into
14 the Baring Property loan until **after** the execution of the Highway 50 Lease.¹² (Highway 50
15 Lease, **Exhibit 10**; Baring Loan, **Exhibit 15**). The Baring cross-collateralization language is
16 found in the **July 18, 2006**, Baring Property Loan, which was executed months after the
17 **December 2005** Highway 50 Lease. (Highway 50 Lease, **Exhibit 10**; Baring Property Loan at
18 ECW78 1.7, **Exhibit 15**). Because foreseeability is measured at the time of entry into a contract,
19

20 ¹²Defendants were also tenants to the Baring Lease, but later assigned its lease to
21 Jackson’s. Importantly, it is undisputed that Defendants were not in breach of the Baring Lease
22 when Wooley sold the Baring Property. (Deposition of E. Wooley p. 99-100, **Exhibit 16**; Lease
23 Assignment, **Exhibit 17**; Second Amendment to Baring Lease, **Exhibit 22**). However, despite
24 that fact, Wooley attempted to sue BHI for breach of the Baring Lease, seeking nearly \$4
25 million in damages. (Initial Complaint ¶¶ 34, 42-44, on file herein.) Defendants were forced to
26 bring this fact to Wooley’s attention and threaten motion practice in this case before Wooley
27 finally agreed to amend his pleading to remove a claim for breach of the Baring Lease.
28 (November 2014 email exchange, **Exhibit 19**; January 2015 email exchange, **Exhibit 20**).
Interestingly, Wooley originally attempted to claim that BHI’s purported breach of the **Baring**
Lease caused the claimed damages discussed herein. (Initial Complaint ¶¶ 42-44, on file herein.)

1 this precludes Wooley from claiming foreseeability as a matter of law. Restatement (Second) of
2 Contracts § 351 at cmt. a.

3 Second, regardless, it is undisputed that Defendants did not know about the Highway 50
4 Property being cross-collateralized with the Baring Property. (Affidavit of T. Herbst at ____,
5 **Exhibit 1**). In written discovery, Defendants asked Wooley to “please identify and describe in
6 detail any and all facts demonstrating that BHI knew at the time [Wooley] and BHI entered into
7 the Highway 50 Lease that the Highway 50 property was cross-collateralized with the Baring
8 Property.” (Wooley Responses to Second Set of Interrogatories at 3, **Exhibit 23**). In response,
9 Wooley stated that Wooley “is presently unaware of facts responsive to this request,” and
10 reserved the right to amend the response. *Id.* Mr. Wooley agreed with this response during his
11 deposition, and elaborated “I don’t know why they would even know.... They’re not party to
12 getting a loan. I am. They take the check and cash it.” (Deposition of E. Wooley p.119, **Exhibit**
13 **16**). Mr. Wooley’s description could hardly be plainer.

14 Defendants also asked Wooley to “please identify and describe in detail any and all facts
15 demonstrating that Jerry Herbst at the time [Wooley] and BHI entered into the Highway 50
16 lease that the Highway 50 property was cross-collateralized with the Baring Property.” (Wooley
17 Responses to Second Set of Interrogatories at 4, **Exhibit 23**). In response, Wooley stated that
18 Wooley “is presently unaware of facts responsive to this request,” and reserved the right to
19 amend the response. *Id.* Wooley agreed with this answer at his deposition. (Deposition of E.
20 Wooley p. 120, **Exhibit 16**).

21 Finally, it is not clear how Wooley both sold the Baring Property “at a loss” yet also had
22 to pay “at least \$600,000” in tax liabilities. (FAC, on file herein). Contrary to Wooley’s claim
23 that the Baring Property was sold at a loss, the closing statement for the sale of the Baring
24 Property states that Wooley sold the Baring Property at a gain of \$870,844.39, (Closing
25 Statement, **Exhibit 9**), which Wooley admits that he deposited in his bank account. (Deposition
26 of E. Wooley p. 111, **Exhibit 16**).

1 Thus, it is undisputed that Defendants did not have reason to foresee this purported
2 “loss” as a probable result of their alleged breach when the contracts were made, precluding
3 Wooley from recovering any damages as a matter of law.¹³ Restatement (Second) of Contracts §
4 351(1).

5 **b. Fees in the California action.**

6 Wooley claims that as a result of Defendants’ purported breach, Wooley “hired an
7 attorney to file suit against BHI and Herbst in Santa Clara County, California, thereby incurring
8 \$45,088.00 in attorney’s fees.” (FAC ¶ 42, on file herein). This is the same California action as
9 that pursued by Willard. (Docket Sheet, **Exhibit 4**). Wooley’s claim also has the same
10 deficiencies as Willard’s and was dismissed as such.

11 Specifically, as explained *supra* p. 17-19, no rule, statute, or contractual provision
12 entitles Wooley to these fees as a cost of litigating the California action. Indeed, Defendants,
13 who obtained a full dismissal of the case, were unequivocally the prevailing party, and
14 regardless, a request for fees incurred as a cost of the California litigation would have only been
15 appropriate in the California court. Further, the California action was not within the limited set
16 of actions that would entitle Wooley to seek these fees as special damages. Thus, Wooley is not
17 entitled to these fees as a matter of law.

18 **CONCLUSION**

19 Defendants respectfully request that this Court conclude that Plaintiffs are not entitled to
20 recover the following as a matter of law: (1) Willard’s “short sale” damages, including tax
21 consequences, closing costs, and earnest money; (2) Willard’s attorneys’ fees incurred in the
22 California action; (3) Willard’s attorneys’ and accounting fees incurred in the bankruptcy; (4)
23 Wooley’s “Baring Property” damages, including tax consequences and purported lost monies as
24

25 ¹³Nor can any argument be made that it is foreseeable, in the ordinary course of events,
26 that a tenant’s breach of a lease will result in a landlord having to sell one of the landlord’s
27 other properties. *See Margoese*, 902 F.2d at 1578.

1 a result of the sale; and (5) Wooley's attorneys' fees incurred in the California action. Thus,
2 Defendants respectfully request summary judgment in their favor on these damages requests.

3
4 **AFFIRMATION**
Pursuant to NRS 239B.030

5 The undersigned does hereby affirm that the preceding document does not contain the
6 social security number of any person.

7 DATED this 1st day of August, 2016.

8 DICKINSON WRIGHT, PLLC

9
10 /s/ Brian R. Irvine
11 JOHN P. DESMOND
12 Nevada Bar No. 5618
13 BRIAN R. IRVINE
14 Nevada Bar No. 7758
15 ANJALI WEBSTER
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24 *Attorneys for Defendants*
25 *Berry Hinckley Industries, and*
26 *Jerry Herbst*

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 **DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** on the parties as set forth below:

A.App.421

EXHIBIT TABLE

Exhibit	Description	Pages¹⁴
1	Affidavit of Tim Herbst	4
2	Willard Lease	35
3	Willard Guaranty	4
4	Docket Sheet, Superior Court of Santa Clara, Case No. 2013-CV-245021	11
5	Second Amended Motion to Dismiss	17
6	Deposition Excerpts of Larry Willard	10
7	2014 Federal Tax Return for Overland	11
8	2014 Willard Federal Tax Return -redacted	25
9	Seller's Final Closing Statement	1
10	Highway 50 Lease	43
11	Highway 50 Guaranty	4
12	Willard Responses to Defendants' First Set of Interrogatories	11
13	Baring Purchase and Sale Agreement	22
14	Baring Lease	35
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16	Deposition Excerpts of Edward Wooley	13
17	Assignment of Baring Lease	7
18	HUD Statement	2
19	November 2014 email exchange	9
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21	IRS Publication 4681	16
22	Second Amendment to Baring Lease	2
23	Wooley Responses to Second Set of Interrogatories	7
24	2013 Overland Federal Income Tax Return	14
25	Declaration of Brian Irvine	4

¹⁴ Exhibit page counts are exclusive of exhibit slip sheets.

EXHIBIT 1

EXHIBIT 1

1030
 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.

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

Counterclaimants,

vs

LARRY J. WILLARD, individually and as

CASE NO. CV14-01712

DEPT. 6

1 trustee of the Larry James Willard Trust
2 Fund; OVERLAND DEVELOPMENT
3 CORPORATION, a California corporation;

4 Counter-defendants.

5
6 **AFFIDAVIT OF TIMOTHY HERBST**

7 STATE OF NEVADA)
8 COUNTY OF clark)ss.

9 I, TIMOTHY HERBST, declare and state as follows:

10 1. I am over the age of 18 years and have personal knowledge of and am competent
11 to testify concerning the facts stated herein, except for those matters stated upon information and
12 belief, and as to those matters, I believe them to be true..

13 2. I make this affidavit in support of Defendants/Counterclaimants' Motion for
14 Partial Summary Judgment ("Motion").

15 3. I am a citizen and resident of the State of Nevada.

16 4. I am the Treasurer for Berry-Hinckley Industries, a Nevada corporation ("BHI"),
17 and have served in that capacity since 2007.

18 5. BHI is a wholly-owned subsidiary of JH, Inc.

19 6. On or about November 18, 2005, BHI entered into a lease agreement (the
20 "Willard Lease") on property owned by the Willard Plaintiffs located at 7695-7699 S. Virginia
21 Street, Reno, Nevada (the "Willard Property").

22 7. A true and correct copy of the Willard Lease is attached to the Motion as Exhibit
23 2.

24 8. On information and belief, BHI had no knowledge or reason to believe, at the
25 time of execution of the Willard Lease, that a breach of the Willard Lease could cause the
26 Willard Plaintiffs to be forced to sell the Willard Property, or to incur tax consequences, closing
27 costs, or lost earnest money as a result of such a sale.
28

1 9. On information and belief, BHI had no knowledge or reason to believe, at the
2 time of execution of the Willard Lease, that a breach of the Willard Lease could cause Larry
3 Willard to declare bankruptcy.

4 10. On or about June 28, 2007, JH, Inc. entered into an Amended and Restated Stock
5 Purchase Agreement whereby JH, Inc. purchased all of the issued and outstanding stock of BHI.

6 11. On information and belief, at this time, BHI had no knowledge or reason to
7 believe that a breach of the Willard Lease could cause the Willard Plaintiffs to be forced to sell
8 the Willard Property, or to incur tax consequences, closing costs, or lost earnest money as a
9 result of such a sale.

10 12. On information and belief, BHI also had no knowledge at this time that a breach
11 of the Willard Lease could cause Larry Willard to declare bankruptcy.

12 13. On or about December 2, 2005, BHI entered into a lease agreement (the
13 "Highway 50 Lease") for property owned by the Wooley Plaintiffs located at 1820 Highway 50
14 East, Carson City, Nevada (the "Highway 50 Property").

15 14. A true and correct copy of the Highway 50 Lease is attached to the Motion as
16 **Exhibit 10.**

17 15. On information and belief, BHI had no knowledge or reason to believe, at the
18 time of execution of the Highway 50 Lease, that the Highway 50 Property was cross-
19 collateralized with property owned by the Wooley Plaintiffs located at 1365 Baring Boulevard,
20 Sparks, Nevada (the "Baring Property"), or that a breach of the Highway 50 Lease could cause
21 the Wooley Plaintiffs to have to sell the Baring Property.

22 16. As noted, on or about June 28, 2007, JH, Inc. entered into an Amended and
23 Restated Stock Purchase Agreement whereby JH purchased all of the issued and outstanding
24 stock of BHI.

25 ///

26
27 ///

1 17. On information and belief, at this time, BHI had no knowledge or reason to
2 believe that the Highway 50 Property was cross-collateralized with the Baring Property, or that a
3 breach of the Highway 50 Lease could cause the Wooley Plaintiffs to have to sell the Baring
4 Property.

5 18. I declare under penalty of perjury of the laws of the State of Nevada that the
6 foregoing is true and correct.

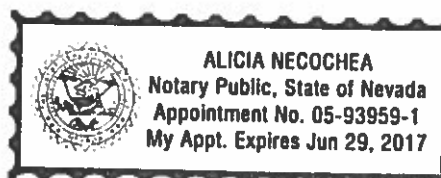
7 FURTHER AFFIANT SAYETH NAUGHT.

8 DATED this 29 day of July, 2016.

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TIMOTHY HERBST

SUBSCRIBED and SWORN to before me
this 29 day of July, 2016, by
TIMOTHY HERBST.




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NOTARY PUBLIC in and for said
County and State Clark County, Nevada
RENO 65540-1 9952v1

EXHIBIT 2

EXHIBIT 2

LEASE AGREEMENT

THIS LEASE AGREEMENT (this "Lease") is made as of November 18, 2005 by and between **OVERLAND DEVELOPMENT CORPORATION INC. dba LJW ENTERPRISES INC.** and **LARRY J. WILLARD, TRUSTEE OF THE LARRY JAMES WILLARD TRUST ("Lessor")**, whose address is 133 Glenridge Avenue, Los Gatos, CA 95030, and **BERRY-HINCKLEY INDUSTRIES**, a Nevada corporation ("**Lessee**"), whose address is 425 Maestro Drive, Reno, NV 89511

In consideration of the mutual covenants and agreements herein contained, Lessor and Lessee hereby covenant and agree as follows:

Certain Defined Terms. Capitalized terms not defined herein shall have the meanings set forth in Exhibit A hereto.

Lease of Property; Use; Possession. In consideration of the Rentals and other Monetary Obligations to be paid by Lessee and of the other terms, covenants and conditions on Lessee's part to be kept and performed, Lessor hereby leases to Lessee, and Lessee hereby takes and leases, the Property (as such term is defined in Exhibit A attached hereto and which Property is located at the address set forth in Exhibit B attached hereto and situated on the real property legally described in Exhibit B attached hereto), subject to the Permitted Encumbrances, all Legal Requirements (including any existing violation thereof), and the condition of the Property as of the Effective Date; *provided, however*, that the recital of the Permitted Encumbrances herein shall not be construed as a revival of any Permitted Encumbrance which may have expired or been terminated. During the Lease Term, the Property shall be used solely for the operation of a Permitted Facility, and related purposes such as ingress, egress and parking.

To the maximum extent permitted by law, Lessee waives the implied warranty of suitability of the Property and Lessee acknowledges that it has accepted the Property "as is," in its current condition, with no representations, warranties or covenants, express or implied, on the part of the Lessor with respect to condition of the same or the suitability of the Property for Lessee's intended use.

Lease Term; Extension. The initial term of this Lease ("**Initial Term**") shall commence February 24, 2006 ("**Effective Date**") and shall expire at midnight on August 23, 2023 ("**Expiration Date**"), unless terminated sooner as provided in this Lease and as may be extended as provided herein. The time period during which this Lease shall actually be in effect, including any Extension Term, is referred to herein as the "**Lease Term**." Lessee shall have the right and option (each, an "**Extension Option**") to extend the Initial Term for four (4) additional successive periods of five (5) years each (each, an "**Extension Term**"), pursuant to the terms and conditions of this Lease then in effect. Lessee may only exercise the Extension Options by giving written notice thereof to Lessor of its election to do so first, no later than two hundred forty (240) days prior to the Expiration Date and two hundred forty (240) days prior to the immediately preceding Extension Term, as the case may be. If written notice of the exercise of any Extension Option is not received by Lessor by the applicable dates described above, then this

Sample Lease
1/4/2006
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Lease shall terminate on the last day of the Initial Term or, if applicable, the last day of the Extension Term then in effect.

4. Rental and Other Monetary Obligations.

A. *Base Monthly Rental.* During the Initial Term, on or before the first day of each calendar month, Lessee shall pay in advance the Base Monthly Rental; *provided, however, if the Effective Date is a date other than the first day of the month, Lessee shall pay to Lessor (or any other party designated by Lessor) on the Effective Date the Base Monthly Rental prorated by multiplying the Base Monthly Rental by a fraction, the numerator of which is the number of days remaining in the month (including the Effective Date) for which Rental is being paid, and the denominator of which is the total number of days in such month.* During the Extension Terms, if any, Lessee shall pay the Rental (including the Base Monthly Rental) in the manner set forth in this Section 4. Unless otherwise specifically stated to the contrary herein, Lessee shall perform all its obligations under this Lease at its sole cost and expense and shall pay all Rental and any other Monetary Obligation due hereunder when due and payable, without notice or demand.

B. *Adjustments.* On the first Adjustment Date and on each Adjustment Date thereafter, the Base Annual Rental shall increase by an amount equal to the Rent Adjustment. The "Rent Adjustment" shall be an amount equal to two percent (2%) of the Base Annual Rental in effect immediately prior to the applicable Adjustment Date. The Adjustment Date shall be on the annual anniversary of the Effective Date.

C. *Additional Rental.* Lessee shall pay and discharge, as additional rental ("Additional Rental"), all sums of money required to be paid by Lessee under this Lease which are not specifically referred to as Base Annual Rental or Base Monthly Rental. Lessee shall pay and discharge any Additional Rental when the same shall become due, provided that amounts which are billed to Lessor or any third party, but not to Lessee, shall be paid within five (5) days after Lessor's demand for payment thereof or, if later, when the same are due. In no event shall Lessee be required to pay to Lessor any item of Additional Rental that Lessee is obligated to pay and has paid to any third party pursuant to any provision of this Lease.

D. *Payment of Rental and Other Monetary Obligations.* All Rental and other Monetary Obligations which Lessee is required to pay hereunder shall be the unconditional obligation of Lessee and shall be payable in full when due without any setoff, abatement, deferment, deduction or counterclaim whatsoever, except as set forth herein. All payments of Base Monthly Rental and any other Monetary Obligations payable to Lessor shall be remitted to Lessor at Lessor's address set forth in the first paragraph of this Lease or such other address as Lessor may designate pursuant to Section 24 hereof.

E. *Late Payment Charge.* Lessee acknowledges that late payment by Lessee to Lessor of Rental will cause Lessor to incur costs not contemplated by this Lease, the exact amount of such costs being extremely difficult and impracticable to fix in advance.

Sample Lease
1/4/2006

Such costs include, without limitation, processing and accounting charges, and late charges that may be imposed on Lessor by the terms of any encumbrance and note secured by any encumbrance covering the Property. Therefore, if any payment which is required to be made by Lessee to Lessor pursuant to the terms of this Lease is made more than ten (10) days after the due date thereof, then Lessee shall pay to Lessor, as a late payment charge, five percent (5%) of the amount of the delinquent payment. Additionally, if any payment which is required to be made by Lessee pursuant to the terms of this Lease is made more than ten (10) days after the due date thereof, such payment shall bear interest at the Default Rate until received by Lessor. The late payment charge and default interest shall be paid to Lessor at the time of payment of the delinquent amount. The late payment charge and the default interest charge shall compensate Lessor for the expenses incurred by Lessor in financing, collecting and processing the late payment. The parties agree that the late charge and the default interest charge represent a fair and reasonable estimate of the costs that Lessor will incur by reason of late payment by Lessee.

5. **Gaming.** Lessor hereby conditionally assigns to Lessee all leases, written or oral, and all agreements for use or occupancy of the Property together with any and all extensions and renewals thereof and any and all further leases, subleases, lettings or agreements (including subleases thereof and tenancies following attornment) upon or covering the use or occupancy of the Property all of which leases, agreements, subleases and tenancies are herein sometimes collectively referred to as the "Assigned Leases"; (ii) the immediate and continuing right to collect and receive all of the rents, income, receipts, revenues, issues and profits now due or which may become due or which may now or hereafter become due from or out of the Assigned Leases or any part thereof, including, but not limited to, security deposits, minimum rents, additional rents, parking rents, deficiency rents and liquidated damages following default, any premium payable by any tenant upon the exercise of a cancellation privilege contained in its Lease; all proceeds payable under any policy of insurance covering loss of rents resulting from untenability caused by destruction or damage to the Property; any and all rights and claims of any kind which Lessor has or hereafter may have against the tenants under the Assigned Leases and any subtenants and other occupants of the Property; any award granted Lessor after the date hereof in any court proceeding involving any tenant in any bankruptcy, insolvency or reorganization proceedings in any state or federal court and any and all payments made by any tenant in lieu of rent (any and all such moneys, rights and claims identified in this paragraph are herein sometimes referred to as the "Rents" and sometimes as the "Rent"); and (iii) all of the rights, powers and privileges of Lessor (A) to accept prepayment of more than one (1) monthly installment of the Rent thereunder, and (B) except with respect to the Assigned Lease, (I) to cancel, terminate or accept the surrender of any Assigned Lease, and (II) to amend, modify or abridge any of the terms, covenants or conditions of any Assigned Lease. The assignment contained in this Section 5 and Lessee's interest in the Assigned Leases shall become void and of no further force or effect upon the expiration or early termination of this Lease and upon such event, Lessor shall be the sole party with any interest as a landlord or lessor in the Assigned Leases. Furthermore, Lessee shall have no right to collect any amounts under the Assigned Leases upon the occurrence and continuance of an Event of Default and all such amounts shall be paid to Lessor during any such period.

Sample Lease
1/4/2016

6. **Nevada Gaming Control Board.** Lessor will follow all laws of the State of Nevada and cooperate with WGI in making application to the Nevada Gaming Control Board as may be required.

7. **Rentals To Be Net to Lessor.** The Base Annual Rental payable hereunder shall be net to Lessor, so that this Lease shall yield to Lessor the Rentals specified during the Lease Term, and all Costs and obligations of every kind and nature whatsoever relating to the Property shall be performed and paid by Lessee, including but not limited to all impositions, operating charges, maintenance charges, construction costs and any other charges, costs and expenses now existing or that arise or may be contemplated under the Permitted Encumbrances or otherwise, all maintenance and repair expenses, all utility expenses, all Taxes, all premiums for insurance required to be maintained by Lessee pursuant to the terms hereof and all other expenses, charges, assessments and costs associated with the Property or otherwise provided to be paid by Lessee pursuant to the terms of this Lease. All such charges, costs and expenses shall constitute Additional Rental and upon the failure of Lessee to pay any of such costs, charges or expenses, Lessor shall have the same rights and remedies as otherwise provided in this Lease for the failure of Lessee to pay Base Annual Rental. It is the intention of the parties except as expressly provided herein that this Lease shall not be terminable for any reason by Lessee, and that Lessee shall in no event be entitled to any abatement of, or reduction in, Rental payable under this Lease, except as otherwise expressly provided herein. Any present or future law to the contrary shall not alter this agreement of the parties.

8. **Taxes and Assessments.** Lessee shall pay, prior to the earlier of delinquency or the accrual of interest on the unpaid balance, one hundred percent (100%) of the following (collectively, "Taxes"): all taxes and assessments of every type or nature assessed against or imposed upon the Property or Lessee during the Lease Term, including without limitation, all ad valorem taxes, assessments and special assessments upon the Property or any part thereof and upon any personal property, trade fixtures and improvements located on the Property, whether belonging to Lessor or Lessee, or any tax or charge levied in lieu of such taxes and assessments; all taxes, charges, license fees and or similar fees imposed by reason of the use of the Property by Lessee; and all excise, transaction, privilege, license, sales, use and other taxes upon the Rental or other Monetary Obligations hereunder, the leasehold estate of either party or the activities of either party pursuant to this Lease, and all interest, surcharges or service or other fees payable in connection with the foregoing.

Within thirty (30) days after each tax and assessment payment is required by this Section to be paid and upon request of Lessor, Lessee shall, upon prior written request of Lessor, provide Lessor with evidence reasonably satisfactory to Lessor that such payment was made in a timely fashion. Lessee may, at its own expense, contest or cause to be contested by appropriate legal proceedings conducted in good faith and with due diligence, any above-described item or lien with respect thereto, including, without limitation, the amount or validity or application, in whole or in part, of any such item, provided that (A) neither the Property nor any interest therein would be in any danger of being sold, forfeited or lost by reason of such proceedings, (B) no monetary Event of Default has occurred, (C) Lessee shall promptly provide Lessor with copies of all notices received or delivered by Lessee and filings made by Lessee in connection with such proceeding, and (D) Lessee shall indemnify and hold Lessor harmless against any loss, Costs or damages arising from or related to such contest.

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If Lessee shall fail to pay any Taxes when due and before any delinquency, penalty or interest is imposed on such Taxes, Lessor shall have the right to pay the same after notice to Lessee, in which case Lessee shall repay in full such amount to Lessor with Lessee's next Base Monthly Rental installment together with interest at the Default Rate.

9. **Utilities.** Lessee shall contract, in its own name, for and pay when due (and hold Lessor free and harmless from) all charges for the connection and use of water, gas, electricity, telephone, garbage collection, sewer use and other utility services supplied to the Property during the Lease Term. All utility charges, assessments and fees for the last year of the Lease shall be prorated as of the termination date of this Lease. No full or partial utility deprivation including, but not limited to, blackout, brownout, or rationing, nor any loss of or damage to improvements related to disruption or failure of any utility service shall give rise to any abatement of Rentals nor give rise to any right of Lessee to offset Rentals or to terminate the Lease, unless caused by the gross negligence or willful misconduct of Lessor or its agents, employees or contractors (but not of any other tenants or occupants of the Property). Lessor shall reasonably cooperate with Lessee, but without out-of-pocket expense to Lessor, in Lessee's efforts to restore utility service to the Property; provided, however, that if the utility service was disrupted due to Lessor's gross negligence or willful misconduct, then the cost of such restoration shall be borne by Lessor.

10. **Insurance.** Throughout the Lease Term, Lessee shall maintain, at its sole expense, the following types and amounts of insurance:

A. Insurance against loss or damage to the Property and all buildings and improvements thereon under an "all risk" insurance policy, which shall include coverage against all risks of direct physical loss, including loss by fire, lightning, and other risks normally included in the standard ISO special form (which shall include coverage for all risks commonly insured for properties similar to the Property in the Reno, Nevada area, including insurance coverage for damage caused by earthquakes, flood, tornado, windstorm and other disasters for which insurance is customarily maintained for similar commercial properties). Such insurance shall be in amounts sufficient to prevent Lessor from becoming a co-insurer under the applicable policies, and in any event, after application of deductible, in amounts not less than 100% of the full insurable replacement cost. Such insurance shall contain an agreed valuation provision in lieu of any co-insurance clause, an increased cost of construction endorsement, debris removal coverage and a waiver of subrogation endorsement in favor of Lessor. While any portion of the improvements on the Property is being rebuilt on the Land, Lessee shall provide such property insurance in builder's risk completed value form, including coverage available on the so-called "all-risk" non-reporting form of policy in an amount equal to 100% of the full insurable replacement value of the improvements on the Property or such portion as is being rebuilt. The insurance policy shall insure Lessee as loss payee. No parties other than Lessor, Lessor's Lender and Lessee may be named as insureds or loss payees on such property insurance policy.

B. Commercial general liability insurance, including products and completed operation liability, covering Lessor and Lessee against bodily injury liability, property damage liability and personal and advertising injury, liquor liability coverage (to the extent liquor is sold or manufactured at the Property), garage liability coverage including

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without limitation any liability arising out of the ownership, maintenance, repair, condition or operation of the Property or adjoining ways, streets, parking lots or sidewalks. Such insurance policy or policies shall contain a broad form contractual liability endorsement under which the insurer agrees to insure Lessee's obligations under Section 15 hereof to the extent insurable, and a "severability of interest" clause or endorsement which precludes the insurer from denying the claim of Lessee, Lessor or Lessor's Lender because of the negligence or other acts of the other, shall be in amounts of not less than \$2,000,000 per occurrence for bodily injury and property damage, and \$2,000,000 general aggregate per location, or such higher limits as Lessor may reasonably require from time to time or as may be required by the Permitted Encumbrances, and shall be of form and substance satisfactory to Lessor.

C. Workers' compensation insurance in the statutorily mandated limits covering all persons employed by Lessee on the Property or any persons employed by Lessee in connection with any work done on or about any Property for which claims for death or bodily injury could be asserted against Lessor, Lessee or the Property, together with Employers Liability Insurance with limits of not less than \$100,000 per accident or disease and \$500,000 aggregate by disease.

D. Rental value insurance, equal to 100% of the Base Annual Rental (as may adjusted hereunder) for a period of not less than twelve (12) months; which insurance shall be carved out of Lessee's business interruption coverage for a separate rental value insurance payable to Lessor, or if rental value insurance is included in Lessee's business interruption coverage, the insurer shall provide priority payment to any Rental obligations, and such obligations shall be paid directly to Lessor. Such insurance is to follow form of the real property "all risk" coverage and is not to contain a co-insurance clause.

B. Comprehensive Boiler & Machinery Insurance against loss or damage from explosion of any steam or pressure boilers or similar apparatus, if any, located in or about the Property in an amount not less than the actual replacement cost of the Property. Such insurance should be in an amount of the lesser of 25% of the 100% replacement cost or \$5,000,000.00.

All insurance policies shall:

(i) Provide (1) for a waiver of subrogation by the insurer as to claims against Lessor, Lessor's Lenders and their employees, officers and agents, (2) that the insurer shall not deny a claim and that such insurance cannot be unreasonably cancelled, invalidated or suspended on account of the conduct of Lessee, its officers, directors, employees or agents, or anyone acting for Lessee or any sublessee or other occupant of the Property, and (3) that any losses otherwise payable thereunder shall be payable notwithstanding any act or omission of Lessor, Lessor's Lenders or Lessee which might, absent such provision, result in a forfeiture of all or a part of such insurance payment;

(ii) Be primary and provide that any "other insurance" clause in the insurance policy shall exclude any policies of insurance maintained by Lessor and the insurance policy shall not be brought into contribution with insurance maintained by Lessor;

(iii) intentionally omitted

(iv) Contain a standard non-contributory mortgages clause or endorsement in favor of any Lessor's Lender designated by Lessor;

(v) Provide that the policy of insurance shall not be terminated, cancelled or amended without at least thirty (30) days' prior written notice to Lessor and to any Lessor's Lender covered by any standard mortgages clause or endorsement;

(vi) Provide that the insurer shall not have the option to restore the Property if Lessor elects to terminate this Lease in accordance with the terms hereof;

(vii) Be in amounts sufficient at all times to satisfy any coinsurance requirements thereof;

(viii) Except for workers' compensation insurance referred to in Section 10.C above, name Lessor and any Lessor Affiliate requested by Lessor, as an "additional insured" (and, with respect to any Lessor's Lender designated by Lessor, as an "additional insured mortgagee") with respect to general liability insurance, and as a "named insured" with respect to real property and "loss payee" with respect to all real property and rent value insurance, as appropriate and as their interests may appear;

(ix) Be evidenced by delivery to Lessor and any Lessor's Lender designated by Lessor of an Acord Form 28 for property coverage (or any other form requested by Lessor) and an Acord Form 25 for liability, workers' compensation and umbrella coverage (or any other form requested by Lessor); provided that in the event that either such form is no longer available, such evidence of insurance shall be in a form reasonably satisfactory to Lessor and any lender designated by Lessor; such certificates of insurance shall be delivered to Lessor prior to the Effective Date; and

(x) Be issued by insurance companies licensed to do business in the states where the Property is located and which are rated A:VIII or better by Best's Insurance Guide or are otherwise approved by Lessor.

It is expressly understood and agreed that (1) if any insurance required hereunder, or any part thereof, shall expire, be withdrawn, become void by breach of any condition thereof by Lessee, or become void or in jeopardy by reason of the failure or impairment of the capital of any insurer, Lessee shall immediately obtain new or additional insurance reasonably satisfactory

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to Lessor and any lender designated by Lessor; (II) the foregoing minimum limits of insurance coverage shall not limit the liability of Lessee for its acts or omissions as provided in this Lease; and (III) Lessee shall procure policies for all insurance for periods of not less than one year and shall provide to Lessor and any servicer or lender of Lessor certificates of insurance or, upon Lessor's request, duplicate originals of insurance policies evidencing that insurance satisfying the requirements of this Lease is in effect at all times.

Lessee shall pay as they become due all premiums for the insurance required by this Section 10. In the event that Lessee fails to comply with any of the foregoing requirements of this Section 10 within ten (10) days of the giving of written notice by Lessor to Lessee, Lessor shall be entitled to procure such insurance. Any sums expended by Lessor in procuring such insurance shall be Additional Rental and shall be repaid by Lessee, together with interest thereon at the Default Rate, from the time of payment by Lessor until fully paid by Lessee immediately upon written demand therefor by Lessor.

Anything in this Section 10 to the contrary notwithstanding, any insurance which Lessee is required to obtain pursuant to this Section 10 may be carried under a "blanket" policy or policies covering other properties or liabilities of Lessee provided that such "blanket" policy or policies that otherwise comply with the provisions of this Section 10 and specify the location of the Property.

11. **Intentionally Omitted**

12. **Compliance With Laws, Restrictions, Covenants, Encumbrances and Agreements.** It is expressly understood and agreed that the obligations of Lessee under this Section shall survive the expiration or earlier termination of this Lease for any reason.

A. **Legal and Gaming Law Compliance.** Lessee's use and occupation of the Property, the use and occupation of the Property by any other person (including but not limited to any subtenants and WGI) and the condition of the Property, shall, at Lessee's sole cost and expense, comply with all Legal Requirements (including without limitation the Americans with Disabilities Act and all Legal Requirements related to gaming operations and the sales of tobacco and liquor on the Property). Lessee shall promptly file, or cause to be filed, and provide to Lessor any notices, reports or other filings that Lessee or any other Person is required to file or provide to any Governmental Authorities regarding the business operations conducted on or from the Property, including but not limited to those described in Subsection D(iii) hereof and those required by Governmental Authorities with respect to gaming operations and the sales of tobacco and liquor on the Property, including any filings required to be made in connection with the change of ownership or control of Lessee and, within fifteen (15) days of Lessee's receipt of written notice from Lessor of any planned or actual change in the ownership or control of Lessor or any planned or actual change in the ownership of the Property.

B. **Acts Resulting in Increased Insurance Rates.** Lessee will use its commercially reasonable efforts to prevent any act or condition to exist on or about the Property which will materially increase any insurance rate thereon, except when such acts are required in the normal course of its business and Lessee shall pay for such increase.

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Lessee shall comply with all orders and directives of any insurance companies issuing liability, fire, or extended coverage insurance pursuant to Section 10 hereof, and Lessee shall not do, bring, or keep anything in or about the Property that will cause a cancellation of any insurance covering the Property.

C. *Prevention of Nuisance.* Lessee shall not commit nor cause or permit to be committed any public or private nuisance on the Property.

D. *Environmental.*

(i) *Covenants.* All uses and operations on or of the Property, including the use and operation of UST's on the Property, whether by Lessee or any other Person, shall be in compliance with all Environmental Laws and permits issued pursuant thereto. Lessee shall keep the Property or cause the Property to be kept free and clear of all Environmental Liens, whether due to any act or omission of Lessee or any other Person. Lessee hereby represents and warrants that Lessee shall not install and shall not permit any person to install any asbestos containing materials ("ACM") or materials or equipment containing polychlorinated biphenyl ("PCBs") in the Property, and to the extent any ACM, PCBs or other Hazardous Materials are on or in the Property, the same shall be maintained, stored and used in accordance with all Legal Requirements.

(ii) *Notification Requirements.* Lessee shall immediately notify Lessor in writing upon Lessee obtaining actual knowledge of (1) any Releases or Threatened Releases in, on, under or from the Property other than in Permitted Amounts, or migrating towards any of the Property; (2) any non-compliance with any Environmental Laws related in any way to any of the Property; (3) any actual or potential Environmental Lien; (4) any required or proposed Remediation of environmental conditions relating to any of the Property required by applicable Governmental Authorities; and (5) any written or oral notice or other communication which Lessee becomes aware from any source whatsoever (including but not limited to a Governmental Authority) relating in any way to Hazardous Materials, Regulated Substances or USTs, or Remediation thereof at or on the Property, other than in Permitted Amounts, possible liability of any Person relating to the Property pursuant to any Environmental Law, other environmental conditions in connection with the Property, or any actual or potential administrative or judicial proceedings in connection with anything referred to in this Subsection D.

(iii) *Reports and Investigations.* Lessee shall promptly supply Lessor with copies of all reports of any testing of the Property conducted by or at the request of Lessor or any Governmental Authorities and all submissions by Lessee to any Governmental Authority concerning environmental matters, the USTs, or Hazardous Materials. Lessee shall furnish to Lessor certificates of enrollment issued by the State of Nevada, Division of Environmental Protection, for each UST at the Property no later than October 30 of each year, and gasoline storage tank permits issued by the Department of Air Quality Management of the County

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in which the Property is located with respect to each UST on the Property no later than May 5 of each year, and such other certificates or permits as may be issued or required by any other Governmental Authority; all of the foregoing shall evidence continuing compliance of each UST on the Property with all applicable Legal Requirements. Additionally, upon Lessor's reasonable request in the event that Lessor reasonably suspects that Contamination (as hereafter defined) may have occurred or be occurring at the Property, Lessee agrees to perform, at Lessee's sole expense, an environmental assessment of the Property, including soil borings, to confirm whether such Contamination is occurring. Additionally, at least ninety (90) days prior to the expiration of the Lease Term, Lessee agrees to perform an environmental assessment of the Property in order to define the nature and extent of Contamination, if any.

(iv) *Indemnification.* Lessee shall indemnify, defend, protect and hold each of the Indemnified Parties free and harmless from and against any and all Losses, arising from or caused in whole or in part, directly or indirectly, by any of the following, unless arising from or caused by the gross negligence or willful misconduct of the Indemnified Party requesting indemnification: (a) the use, storage, transportation, disposal, release, discharge or generation of Hazardous Materials to, in, on, under or about the Property (whether occurring before or after the date hereof) (any of the foregoing in violation of Legal Requirements is "Contamination"), including diminution in value of the Property; and (b) the cost of any required or necessary repair, remediation, cleanup or detoxification and the preparation of any closure or other required plans or reports, whether such action is required or necessary prior to or following transfer of title to the Property (such acts are sometimes referred to herein as "Corrective Action"), and (c) Lessee's failure to comply with any Legal Requirements. Lessee's obligations to perform Corrective Action shall include, without limitation, and whether foreseeable or unforeseeable, all cost of any investigation (including consultants and attorneys fees and testing) required or necessary repair, remediation, restoration clean up, detoxification or decontamination of the Property and the preparation and implementation of any closure, remedial action or other required plans in connection therewith, and shall survive the expiration or earlier termination of the Term of this Lease. This agreement to indemnify, defend, protect and hold harmless each of the Indemnified Parties shall be in addition to any other obligations or liabilities Lessee may have to Lessor or the Indemnified Parties, if any, at common law under all statutes and ordinances or otherwise and survive the termination of the Lease.

In the event that Lessee is required to perform Corrective Action to address any Contamination, Lessee shall perform such activities in a diligent manner. In the event that Lessee has not completed its Corrective Action (if necessary), as required herein, by the expiration of the Lease Term, Lessor shall grant Lessee, and its consultants, contractors and agents a revocable license, at no cost to Lessee except as set forth in the succeeding sentence, to enter upon the Property from and after the date of expiration of the Lease Term to conduct Corrective Action and to place and remove all necessary equipment and

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improvements on the Property sufficient to satisfy the requirements of all Governmental Authorities regarding the Contamination. If such post-expiration Corrective Action will unreasonably interfere with a reasonably foreseeable intended commercial use of the Property (i.e., if Lessor cannot reasonably lease the Property for reasonable commercial uses at reasonable market rents), the Lease Term shall be extended until sixty (60) days after the Corrective Action has been performed such that post-expiration Corrective Action by Lessee no longer unreasonably interferes with a reasonably foreseeable commercial use of the Property, and Lessee agrees to keep Lessor apprised of the anticipated completion date of the Corrective Action.

E. Intentionally Omitted.

F. Dealer Requirements. In addition to the requirements set forth in this Lease, Lessee, in its use, occupancy and maintenance of the Property shall comply with all requirements of its Dealer Agreements with Dealer. Lessee hereby consents to Lessor providing information it obtains to Dealer and to Lessor obtaining from Dealer information which Dealer receives relating to Lessee's operation of its business on the Property.

G. WGI Agreements. Lessee represents that the WGI Agreement is in full force and effect, and that the WGI Agreement permits WGI to operate gaming machines on the Property. Lessee shall abide by all the terms and conditions of the WGI Agreement, and Lessee represents and warrants that WGI has approved this Lease, if WGI has such approval rights under the WGI Agreement.

H. Winner's Corner. Lessee shall at all times operate the gas station and convenience store on the Property under the trade name "Winner's Corner" and/or under a major oil brand (such as Chevron, BP, Amoco, Shell, Sun Oil, or the such).

13. Maintenance; Repairs and Reconstruction. Lessee shall, at its sole cost and expense, be responsible for keeping all of the buildings, structures, improvements and signs erected on the Property in good and substantial order, condition, and repair, including but not limited to replacement, maintenance and repair of all structural or load-bearing elements, roofs, walls, foundations, gutters and downspouts, heating, ventilating and air conditioning systems, any building security and monitoring system, windows, walls, doors, electrical and other utility systems and equipment, mechanical equipment, plumbing and all other components of the buildings, mowing of lawns and care, weeding and replacement of plantings; replacing, resurfacing and striping of walkways, driveways and parking areas, and adjacent public sidewalks; removal of snow and ice from the Property and adjacent public sidewalks, removal of trash, maintenance of utility lines and exterior lighting and signage on Property, and any maintenance, repairs or replacements (or fees or reserves therefor) as may be required by any Permitted Encumbrances. All such replacements, maintenance and repair shall keep the Property in good repair and in a clean, safe, and sanitary condition and in compliance with all Legal Requirements and insurance regulations. Lessee must make all repairs, corrections, replacements, improvements or alterations necessitated by age, Lessee's use, or natural elements

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or as required pursuant to Governmental Authorities or Legal Requirements. Lessee expressly waives the benefit of any statute now or hereinafter in effect which would otherwise afford Lessee the right to make repairs, corrections, improvements or alterations at Lessor's expense or to terminate this Lease because of Lessor's failure to keep the Property in good order, condition or repair, or which would otherwise require Lessor to make repairs, corrections, improvements, replacements or alterations. If the buildings or any improvements on the Property violate any Permitted Encumbrances or Legal Requirements, then Lessee shall, upon the written demand of a Governmental Authority or the written demand of a party to or beneficiary of any Permitted Encumbrance, repair, restore, relocate and/or rebuild the same in accordance with Legal Requirements (including any special or conditional use permits or other variances granted specifically for the Property) and the Permitted Encumbrances.

Lessee shall, at its sole cost and expense, be responsible to repair or reconstruct damage or destruction to any buildings, structures or improvements erected on the Property from acts of God or any other catastrophes or causes. Any such repairs or reconstruction shall restore the buildings and all improvements on the Property to substantially the same condition immediately prior to such damages or destruction and this Lease shall remain in full force and effect, provided, however, that Lessee shall have the right to replace the improvements with different structures so long as (a) the value of the Property with such different structures is no less than the value of the Property immediately prior to the date of casualty and the different square footage of the new buildings is no less than the buildings existing as of the date hereof, and (b) the new structure can be built and occupied in compliance with Legal Requirements (including any special or conditional use permits or other variances granted specifically for the Property) and the Permitted Encumbrances. Such repair, restoration, relocation and rebuilding (all of which are herein called a "repair") shall be commenced within a reasonable time however no more than thirty (30) days after the later of (i) the date that such damage or destruction occurred, (ii) the date that all permits and other approvals necessary to authorize such rebuilding have been issued following reasonable pursuit of the same by Lessee, and (iii) the date that any insurance proceeds payable to Lessor or its lender in conjunction with such damage or destruction, if any, have been made available to Lessee as set forth herein; thereafter, the repair shall be diligently pursued to completion. Lessee shall give Lessor at least fifteen (15) days written notice prior to commencing the repair to permit the Lessor to post appropriate notices of non-responsibility, and all such repair work shall be subject to the provisions of Section 14 hereof related to alterations, improvements and additions to the Property.

The proceeds of any insurance maintained under Section 10 hereof shall be made available to Lessee for payment of costs and expense of repair.

14. Waste; Alterations and Improvements; Trade Fixtures and Equipment. Lessee shall not commit actual or constructive waste upon the Property. During the Lease Term, Lessee may construct any additions or improvements to the Property and make such structural or non-structural alterations to the Property as are reasonably necessary or desirable for Lessee's use of the Property for a Permitted Facility. All improvements, alterations, or additions shall be constructed by Lessee at Lessee's sole cost and expense. Prior to the commencement of construction of any additions, improvements, or alterations to the Property, Lessee shall give Lessor at least fifteen (15) days written notice to allow Lessor to post appropriate notices of non-responsibility. Notwithstanding anything herein to the contrary, without Lessor's prior written

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consent, Lessee shall not make any alterations that will decrease the value or function of the improvements located on the Property.

Lessee's right to make any alterations, improvements and additions shall be deemed conditioned upon Lessee acquiring a permit to do so from appropriate Governmental Authorities, the furnishing of a copy thereof to Lessor prior to the commencement of the work and the compliance by Lessee of all conditions of said permit in a prompt and expeditious manner. All alterations, improvements or other construction by Lessee shall be in compliance with all Legal Requirements, and all alterations and improvements shall be done and performed in good and workmanlike manner, using new and first quality materials. All costs of any such improvements shall be paid by Lessee.

Upon completion of any such work, Lessee shall submit to Lessor as-built plans of any structural, mechanical or interior utility improvements and alterations made, a sworn construction statement, lien waivers from all persons or entities providing materials, services or equipment for the work completed and, if available, an endorsement to Lessor's policy of title insurance or other evidence from a title company confirming the absence of any liens or other matters of record related to the work performed.

Unless expressly released by Lessor in writing, all improvements or alterations shall be and remain, at the time of expiration or other termination of this Lease, the property of Lessor without payment or offset unless such improvements are not attached to the Property. Notwithstanding anything herein to the contrary, all plumbing, electrical, HVAC equipment, doors, ceiling and floor tiles, and wall coverings shall become the property of Lessor and remain in place on the Property upon expiration or other termination of this Lease.

During the Lease Term, Lessee shall have the right to locate in the Property such personal property, furniture, trade fixtures, and equipment (hereafter referred to as "Fixtures and Equipment") as shall be considered by Lessee to be appropriate or necessary to Lessee's use and occupancy of the Property.

All Fixtures and Equipment shall be provided by Lessee at Lessee's own cost and expense. During the term of this Lease, Lessee may remove any Fixtures and Equipment installed by Lessee, and any and all such Fixtures and Equipment shall remain the sole property of Lessee. Lessee shall perform (and pay all costs associated with) any and all restoration necessitated by the removal of Lessee's Fixtures and Equipment, including but not limited to damage resulting from removal of any of Lessee's signs in or about the Property.

Lessee shall keep the Property free and clear of all mechanic's, materialmen or similar liens, including, but not limited to, those resulting from the construction of alterations, improvements, additions, trade fixtures, and equipment performed by or for Lessee.

Lessee shall have the right to contest the correctness or validity of any such lien if, Lessee first procures and records a lien release bond issued by a corporation authorized to issue surety bonds in the state in which the Property are located in an amount required by Legal Requirements to remove such lien. The bond or its equivalent shall meet all applicable requirements of the state in which the Property are located. In the event that any lien does so

attach, and is not released within thirty (30) days after written notice to Lessee thereof, Lessor, in its sole discretion, may pay and discharge the same and relieve the Property therefrom, and Lessee agrees to repay and reimburse Lessor as Additional Rental upon demand for the amount so paid by Lessor. On final determination of the lien or claim of lien Lessee will immediately pay any judgment rendered, and all costs and charges, and shall cause the lien to be released or satisfied. In addition, Lessor may require Lessee to pay Lessor's reasonable attorneys' fees and costs in participating in such action if Lessor shall decide it is in its best interest to do so.

15. **Indemnification.** Lessee agrees to use and occupy the Property at its own risk and hereby releases Lessor and Lessor's agents and employees from all claims for any damage or injury to the full extent permitted by law. Lessee agrees that Lessor shall not be responsible or liable to Lessee or Lessee's employees, agents, customers or invitees for bodily injury, personal injury or property damage occasioned by the acts or omissions of any other lessee or such lessee's employees, agents, contractors, customers or invitees. In addition to other specific indemnification provisions set forth in this Lease, Lessee shall indemnify, protect, defend and hold harmless each of the Indemnified Parties from and against any and all Losses caused by, incurred or resulting from Lessee's use and occupancy of the Property, whether relating to its original design or construction, latent defects, alteration, maintenance, use by Lessee or any Person thereon, with supervision or otherwise, or from any breach of, default under, or failure to perform, any term or provision of this Lease by Lessee, its officers, employees, agents or other Persons. It is expressly understood and agreed that Lessee's obligations under this Section shall survive the expiration or earlier termination of this Lease for any reason.

16. **Quiet Enjoyment.** So long as Lessee shall pay the Rental and other Monetary Obligations herein provided and shall keep and perform all of the terms, covenants and conditions on its part herein contained, Lessee shall have, subject and subordinate to Lessor's rights herein, the right to the peaceful and quiet occupancy of the Property, subject to the Permitted Encumbrances, Laws and the WGI Agreement and any use or occupancy agreements, leases or licenses now affecting the Property or hereinafter made by Lessee.

17. **Inspection; Right of Entry.** Lessor and its authorized representatives shall have the right, at all reasonable times and upon giving reasonable prior notice (except in the event of an emergency, in which case no prior notice shall be required), to enter the Property or any part thereof and to inspect the same; to serve, post, or keep posted any notices required or allowed under the provisions of this Lease or by law; to show the Property to prospective brokers, agents, buyers, or persons interested in an exchange, at any time; and to show the Property to prospective tenants within two hundred forty (240) days prior to the expiration of this Lease or any time during the option period and to place upon the Property any "to let" or "for lease" signs at any time within two hundred forty (240) days prior to the expiration of this Lease. Lessee hereby waives any claim for damages for any injury or inconvenience to or interference with Lessee's business, any loss of occupancy or quiet enjoyment of the Property and any other loss occasioned by such entry, but, subject to Section 37, excluding damages arising as a result of the negligence or intentional misconduct of Lessor.

18. **Condemnation and Casualty.**

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A. *Damage or Destruction to the Property; No Abatement of Rent.* If the Property is damaged or destroyed as a result of fire or other casualty Lessee shall promptly restore the Property pursuant to the terms of Section 13 hereof. Notwithstanding the partial or total destruction of the Property and any part thereof, and notwithstanding whether the casualty is insured or not, there shall be no abatement of Rentals or of any other obligation of Lessee hereunder including, without limitation, payment of operating expenses, insurance premiums and Taxes, by reason of such damage or destruction unless the Lease is terminated by virtue of another provision of this Lease.

B. *Option to Terminate.* If the Property is damaged or destroyed during the last one (1) year of the Lease Term to the extent that the Property is untenable, Lessee may terminate this Lease as of the date of such damage or destruction by giving written notice to Lessor of such election within thirty (30) days following the date of such fire or other casualty, in which case, all insurance proceeds related to the Property (other than attributable to Lessee's Fixtures and Equipment) will be paid over to Lessor, or if required by Lessor's Lender, to such lender.

C. *Termination Upon Taking.* If as a consequence of a Taking, (i) any part of the convenience store building on the Property; or (ii) twenty-five percent (25 %) or more of the parking area at the Property shall be taken and Lessee determines in its reasonable discretion that such Taking will have a material adverse impact on the ability of Lessee to conduct its normal business operations from the Property, then, within thirty (30) days after the date on which Lessee receives written notice of such Taking, Lessee may terminate this Lease by written notice to Lessor which termination shall be effective as of the date the condemning authority takes actual possession of the portion of the Property that is subject to the Taking. If Lessee terminates this Lease, Lessor shall promptly refund to Lessee all unearned Annual Base Rental and other amounts paid in advance by Lessee.

D. *Obligation to Restore.* If a Taking does not result in a termination of this Lease pursuant to Subsection C hereof, Lessee shall restore the Property to a condition similar in physical appearance to that which existed immediately prior to the Taking to the extent possible such that Lessee can conduct its normal business operations. Lessee shall commence such restoration within ninety (90) days after the occurrence of the taking and shall complete such restoration within six (6) months after the occurrence of the taking.

E. *Condemnation Award.* Any condemnation award payable during the term of this Lease shall belong to and be paid to Lessor, including but not limited to awards payable with respect to damage to either the fee or leasehold estates, except that Lessee shall receive from the award the following:

- i. If Lessee exercises its rights to terminate this Lease, the portion of the award, if any, attributable to Lessee's Equipment or Fixtures that are taken in the Taking and the unamortized cost of any leasehold improvements made to the Property by Lessee after the date hereof that are taken in the Taking.

ii. The portion of the award, if any, attributable to severance damages for the repair or restoration of the Property (herein called "repair"), but only if Lessee does not exercise Lessee's right to terminate the Lease and further provided, that such damages shall be deposited and disbursed in accordance with the provisions hereof related to the handling of insurance proceeds that are applied to a repair of the Property and Lessee shall promptly commence and diligently complete the repair so that upon completion the Property will have a character and commercial value as nearly as possible equal to the value of the Property immediately prior to the taking, and further provided that, in the event such damages are insufficient to cover the cost of repair, then any amounts required over the amount thereof that are required to complete said repair shall be promptly deposited with the disbursing entity by Lessee in advance of commencing the repair.

iii. Additionally, if this Lease is terminated as a result of any such taking, Lessee shall be permitted to recover its relocation expenses and the going concern value of Lessee's business from the condemning authority (but not from Lessor or the portion of the award otherwise payable to Lessor) as provided by law.

19. Intentionally Deleted.

20. Default, Conditional Limitations, Remedies and Measure of Damages.

A. *Event of Default.* Each of the following shall be an event of default by Lessee under this Lease (each, an "Event of Default"):

(i) If any Rental or other Monetary Obligation due under this Lease is not paid within five (5) Business Days of notice it is past due, provided, however, that if within the first twelve (12) months of the Lease Term, Lessor has given two (2) such notices to Lessee, then a default shall be deemed to have occurred when such failure has continued for three (3) business days after the same is due, without notice thereof by Lessor to Lessee; and further, provided, however, that after the first twelve (12) months of the Lease Term, if Lessor has given such notice to Lessee within the preceding twelve (12) months, then a default shall be deemed to have occurred when such failure has continued for three (3) Business Days after the same is due, without notice thereof by Lessor to Lessee;

(ii) if there is an Insolvency Event;

(iii) if Lessee fails to observe or perform any of the other covenants, conditions or obligations of Lessee in this Lease; *provided, however*, if any such failure does not involve the payment of any Monetary Obligation, does not place any rights or property of Lessor in immediate jeopardy, as determined by Lessor in its reasonable discretion, then such failure shall not constitute an Event of Default hereunder, unless otherwise expressly provided herein, unless and until Lessor shall have given Lessee notice thereof and a period of thirty (30) days shall

have elapsed, during which period Lessee may correct or cure such failure, upon failure of which an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required. If such failure cannot reasonably be cured within such thirty (30) day period, as determined by Lessor in its reasonable discretion, and Lessee is diligently pursuing a cure of such failure, then Lessee shall have a reasonable period to cure such failure beyond such thirty (30) day period. If Lessee shall fail to correct or cure such failure within such period and said period is not extended by the parties, an Event of Default shall be deemed to have occurred hereunder without further notice or demand of any kind being required;

(iv) if Lessee shall be liquidated or dissolved or shall begin proceedings towards its liquidation or dissolution; or

B. Remedies. Upon the occurrence of an Event of Default, with or without notice or demand, except as otherwise expressly provided herein or such other notice as may be required by statute and cannot be waived by Lessee, Lessor shall be entitled to exercise, at its option, concurrently, successively, or in any combination, all remedies available at law or in equity, including without limitation, any one or more of the following:

(i) To terminate this Lease, whereupon Lessee's right to possession of the Property shall cease and this Lease, except as to Lessee's liability, shall be terminated. Upon such termination, Lessor shall be entitled to recover liquidated damages equal to the total of (i) the cost of recovering possession of the Property; (ii) the unpaid Rental earned at the time of termination, plus interest at the Default Rate thereon; (iii) late charges and interest at the Default Rate on the unpaid Rental; (iv) the present value of the balance of the Base Annual Rental for the remainder of the Lease Term using a discount rate of four percent (4%), less the present value of the reasonable rental value of the Property for the balance of the Term remaining after a one-year period following repossession using a discount rate of four percent (4%); (v) costs of operating the Property until relet and the reasonable costs of performing any obligations of Lessee under this Lease to be performed upon termination or expiration of this Lease (including but not limited to the Lessee's obligations under Sections 12.D and 27 hereof); and (vi) any other sum of money and damages reasonably necessary to compensate Lessor for the detriment caused by Lessee's default.

(ii) To the extent not prohibited by applicable law, to reenter and take possession of the Property (or any part thereof) without being deemed guilty in any manner of trespass or becoming liable for any loss or damage resulting therefrom, without resort to legal or judicial process, procedure or action. No notice from Lessor hereunder or under a forcible entry and detainer statute or similar law shall constitute an election by Lessor to terminate this Lease unless such notice specifically so states. If Lessee shall, after default, voluntarily give up possession of the Property to Lessor, deliver to Lessor or its agents the keys to the Property, or both, such actions shall be deemed to be in compliance with Lessor's

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rights and the acceptance thereof by Lessor or its agents shall not be deemed to constitute a termination of the Lease. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving Lessee written notice thereof, in which event this Lease will terminate, and Lessor may recover liquidated damages as set forth in Subsection (i) above.

(iii) To bring an action against Lessee for any damages sustained by Lessor or any equitable relief available to Lessor.

(iv) To relet the Property or any part thereof for such term or terms (including a term which extends beyond the original Lease Term), at such rentals and upon such other terms as Lessor, in its sole discretion, may determine, with all proceeds received from such reletting being applied to the Rental and other Monetary Obligations due from Lessee in such order as Lessor may, in its sole discretion, determine, which other Monetary Obligations include, without limitation, all commercially reasonable repossession costs, brokerage commissions, attorneys' fees and expenses and repair costs. Lessor reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving Lessee written notice thereof, in which event this Lease will terminate as specified in said notice.

(v) To recover from Lessee all Costs paid or incurred by Lessor as a result of such breach, regardless of whether or not legal proceedings are actually commenced.

(vi) To immediately or at any time thereafter, and with or without notice, at Lessor's sole option but without any obligation to do so, correct such breach or default and charge Lessee all Costs incurred by Lessor therein. Any sum or sums so paid by Lessor, together with interest at the Default Rate, shall be deemed to be Additional Rental hereunder and shall be immediately due from Lessee to Lessor. Any such acts by Lessor in correcting Lessee's breaches or defaults hereunder shall not be deemed to cure said breaches or defaults or constitute any waiver of Lessor's right to exercise any or all remedies set forth herein.

(vii) To immediately or at any time thereafter, and with or without notice, except as required herein, set off any money of Lessee held by Lessor under this Lease.

(viii) To seek any equitable relief available to Lessor, including, without limitation, the right of specific performance.

All powers and remedies given by this Section to Lessor, subject to applicable Law, shall be cumulative and not exclusive of one another or of any other right or remedy or of any other powers and remedies available to Lessor under this Lease, by judicial proceedings or otherwise, to enforce the performance or observance of the covenants and agreements of Lessee contained in this Lease, and no delay or omission of Lessor to

exercise any right or power accruing upon the occurrence of any Event of Default shall impair any other or subsequent Event of Default or impair any rights or remedies consequent thereto. Every power and remedy given by this Section or by Law to Lessor may be exercised from time to time, and as often as may be deemed expedient, by Lessor, subject at all times to Lessor's right in its sole judgment to discontinue any work commenced by Lessor or change any course of action undertaken by Lessor.

C. Default by Lessor. Lessor shall be in default under this Lease if Lessor fails or refuses to perform any obligation of Lessor under the terms of this Lease, and if the failure to perform the obligation is not cured within thirty (30) days after notice of the default has been given by Lessee to Lessor. If the default cannot reasonably be cured within thirty (30) days, then Lessor shall not be in default if Lessor commences to cure the default within the thirty (30) day period and diligently and in good faith continues to cure the default thereafter.

Lessee, at any time after expiration of the cure period provided above and a subsequent written notice to Lessor, may cure the default at Lessor's cost. If Lessee at any time, as a result of Lessor's default, pays any sum or performs any act that requires the payment of any sum, the sum paid by Lessee shall be due immediately from Lessor to Lessee at the time the sum is paid, and if paid at a later date shall bear interest at the rate of twelve percent (12%) per annum from the date the sum is paid by Lessee until the date Lessee is reimbursed by Lessor. Any amounts due from Lessor to Lessee pursuant to this Section 15 may be deducted or offset against Lessee's Base Monthly Rental.

21. Mortgage, Subordination and Attornment. Lessor's interest in this Lease and/or the Property shall not be subordinate to any liens or encumbrances placed upon the Property by or resulting from any act of Lessee, and nothing herein contained shall be construed to require such subordination by Lessor. Notwithstanding the terms of or the parties to the WGI Agreement and any other agreements pursuant to which Persons other than Lessee have the right to occupy any portion of the Property, such agreements shall, as between Lessor and Lessee, be treated as an instrument subordinate to Lessor's interest in the Property and this Lease. Lessee shall keep the Property free from any liens for work performed, materials furnished or obligations incurred by Lessee. **NOTICE IS HEREBY GIVEN THAT LESSEE IS NOT AUTHORIZED TO PLACE OR ALLOW TO BE PLACED ANY LIEN, MORTGAGE, DEED OF TRUST, SECURITY INTEREST OR ENCUMBRANCE OF ANY KIND UPON ALL OR ANY PART OF THE PROPERTY OR LESSEE'S LEASEHOLD INTEREST THEREIN, AND ANY SUCH PURPORTED TRANSACTION SHALL BE VOID.**

This Lease at all times shall automatically be subordinate to the lien of any and all Deeds of Trust now or hereafter placed upon the Property by Lessor, provided, that the holder of such interest shall not disturb Lessee's use and enjoyment of Lessee's rights under this Lease so long as Lessee is not in default hereunder. Lessee covenants and agrees to execute and deliver, upon demand, such further instruments which are acceptable to Lessee, subordinating this Lease to the lien of any or all such Deeds of Trust as shall be desired by Lessor, or any present or proposed Deeds of Trust; provided, that the terms and provisions of any such instrument are commercially reasonable. The Lessee acknowledges that the terms and provisions of the Instrument attached hereto as Exhibit C are commercially reasonable.

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If any Lessor's Lender, mortgagee, receiver or other secured party elects to have this Lease and the interest of Lessee hereunder be superior to any such Deed of Trust and evidences such election by notice given to Lessee, then this Lease and the interest of Lessee hereunder shall be deemed superior to any such Deed of Trust, whether this Lease was executed before or after such Deed of Trust and in that event such mortgagee, receiver or other secured party shall have the same rights with respect to this Lease as if it had been executed and delivered prior to the execution and delivery of such Deed of Trust and had been assigned to such mortgagee, receiver or other secured party.

In the event any purchaser or assignee of any mortgagee or deed of trust holder at a foreclosure sale acquires title to the Property, or in the event that any mortgagee or any assignee otherwise succeeds to the rights of Lessor as Lessor under this Lease, Lessee shall attorn to mortgagee or deed of trust holder or such purchaser or assignee, as the case may be (a "Successor Lessor"), and recognize the Successor Lessor as lessor under this Lease, and, if the Successor Lessor in its sole discretion elects to recognize Lessee's tenancy under this Lease, this Lease shall continue in full force and effect as a direct lease between the Successor Lessor and Lessee, provided that the Successor Lessor shall only be liable for any obligations of Lessor under this Lease which accrue after the date that such Successor Lessor acquires title. The foregoing provision shall be self-operative and effective without the execution of any further instruments.

Lessee shall give written notice to any Lessor's Lender of whom Lessee is notified of in writing of any breach or default by Lessor of any of its obligations under this Lease and give such lender or mortgagee the same rights to which Lessor might be entitled to cure such default before Lessee may exercise any remedy with respect thereto. Upon request by Lessor, Lessee shall authorize Lessor to release to Lessee's financial statements delivered to Lessor pursuant to this Lease to such Lessor's Lender.

22. **Estoppel Certificate and Other Documents.** At any time, and from time to time, each party shall, promptly and in no event later than ten (10) days after a request from the other executes, acknowledge and deliver to the requesting party, as the case may be, a certificate in the form supplied by the requesting party, certifying: (A) that this Lease is in full force and effect and has not been modified (or if modified, setting forth all modifications), or, if this Lease is not in full force and effect, the certificate shall so specify the reasons therefor; (B) the commencement and expiration dates of the Lease Term; (C) the date to which the Rentals have been paid under this Lease and the amount thereof then payable; (D) whether there are then any existing defaults by Lessee or Lessor in the performance of its obligations under this Lease, and, if there are any such defaults, specifying the nature and extent thereof; (E) that no notice has been received by the certifying party of any default under this Lease which has not been cured, except as to defaults specified in the certificate; (F) the capacity of the person executing such certificate, and that such person is duly authorized to execute the same on behalf of Lessee; and; (G) and any other information reasonably requested by the requesting party.

Lessor and Lessee further agree to reasonably negotiate and execute all reasonable documents, including without limitation, estoppel certificates, non-disturbance certificates and other documents requested by WGI, any Lessor's Lender or any lender of Lessee in connection

with a loan to be obtained by Lessor or Lessee, or in connection with a sale, assignment, sublease or other disposition of the Lessor's interest under this Lease.

23. **Assignment/Subletting.** Lessee's interest in this Lease shall not, voluntarily, involuntarily, or by operation of law, be assigned to any third person or entity without the prior written consent of Lessor which will not be unreasonably withheld conditioned or delayed.

In the event of an assignment of Lessee's interest under this Lease to a third person or entity which has been approved by the Lessor, the original Lessee shall be relieved from any and all further obligations under the terms of this Lease upon delivery to Lessor of an originally executed assumption of all of Lessee's obligations under this Lease by the assignee, and upon cure of all then existing defaults of Lessee under the terms of this Lease.

Other than for the WGI Agreement and any Replacement WGI Agreement, and any other agreements pursuant to which experienced and reputable operators are permitted to occupy discrete portions of the convenience store building located on the site for uses that are complementary to or extensions of Lessee's gas station and convenience store operations (e.g., quick-service restaurants, deli and sandwich shops, coffee shops, juice shops, postal contract units and/or UPS/Federal Express services) when such uses are not in violation of Legal Requirements or the Permitted Encumbrances (such other agreements are referred to herein as "Permitted Subleases"), Lessee may not sublease all or any part of the Property without the prior written consent of the Lessor, which shall not be unreasonably withheld, conditioned or delayed. In no event will any Permitted Subleases, or any other subleases that Lessor consents to relieve Lessee of any liability hereunder during the period of any such subletting. Additionally, Lessee shall give Lessor at least thirty (30) days advance notice of any proposed Permitted Sublease, which notice shall be accompanied by a copy of the form of the Permitted Sublease.

Each Permitted Sublease, and any other sublease that Lessor may consent to pursuant to the foregoing paragraph shall provide that (i) the term thereof will not exceed the Initial Term hereof and any extensions of the Initial Term that are permitted hereunder; (ii) the sublease and subtenant shall be subject to and bound by all the terms and conditions of this Lease (except that the Lessee shall continue to pay all Rental and Monetary Obligations hereunder and Lessee shall collect any rents owed by the subtenant pursuant to the sublease); (iii) the sublease shall state that, at Lessor's election, the subtenant will attorn to Lessor and recognize Lessor as Lessee's successor under the sublease for the balance of the sublease term if this Lease is surrendered by Lessee or terminated by reason of Lessee's default.

24. **Notices.** All notices, demands, designations, certificates, requests, offers, consents, approvals, appointments and other instruments given pursuant to this Lease (collectively called "Notices") shall be in writing and given by any one of the following: (A) hand delivery, (B) express overnight delivery service, (C) certified or registered mail, return receipt requested or (D) facsimile, provided that a copy of such facsimile is also sent via certified or registered mail, return receipt requested, or by overnight delivery service, within one Business Day of the transmission of such facsimile, and shall be deemed to have been delivered upon (i) receipt, if hand delivered, (ii) the next Business Day, if delivered by a reputable express overnight delivery service, (iii) the third Business Day following the day of deposit of such notice with the United States Postal Service, if sent by certified or registered mail, return receipt

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requested, or (iv) transmission, if delivered by facsimile pursuant to the requirements of Section 24.D above. Notices shall be provided to the parties and addresses (or electronic mail addresses) specified below:

If to Lessee:	Berry-Hinckley Industries Attn: Paul A. Morabito 425 Maestro Drive Reno, NV 89511 Telephone: (775) 689-1222 Facsimile: (775) 689-1232
With a copy to:	Hodgson Russ LLP Attn: Sujata Yalamanchili One M&T Plaza, Suite 2000 Buffalo, NY 14023 Telephone: (716) 848-1657 Facsimile: (716) 849-0349
If to Lessor:	Overland Development Corporation Inc. Attn: Larry Willard 133 Glenridge Avenue Los Gatos, CA 95030
With a copy to	Sam Chuck, Esq. Rossi, Hamerslough, Reischl & Chuck 1960 The Alameda, Suite 200 San Jose, CA 95126 Telephone: (408) 261-4252 Facsimile: (408) 261-4292

or to such other address or such other person as either party may from time to time hereafter specify to the other party in a notice delivered in the manner provided above.

25. **Holdover.** If Lessee remains in possession of the Property after the expiration of the term hereof, Lessee, at Lessor's option and within Lessor's sole discretion, may be deemed a Lessee on a month-to-month basis and shall continue to pay Rentals and other Monetary Obligations in the amounts herein provided, except that the Base Monthly Rental shall be automatically increased to one hundred fifty percent (150%) of the last Base Monthly Rental payable under this Lease.

26. **Intentionally Omitted.**

27. **Surrender.** At the expiration of the Lease Term, Lessee may remove from the Property all of Lessee's Fixtures and Equipment. Lessee shall repair any damage caused by such removal and shall leave the Property broom clean and in good and working condition and repair inside and out, and comply with all of the requirements of Section 12.D hereof. Lessor may, in

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its sole discretion, elect to retain or dispose of in any manner any Fixtures or Equipment, personal property and vehicles to which Lessee is entitled but which Lessee does not remove from the Property pursuant to this Section within ten (10) days after notice, provided, however, that upon demand, Lessee shall reimburse Lessor for all costs incurred by Lessor in removing any Fixtures and Equipment and any all personal property, vehicles and inventory, Hazardous Materials, USTs and related equipment, located in or about the Property that are left therein by Lessee or in restoring the Property to the condition required by this Lease.

28. **Financial Statements; Compliance Certificate.** Once per calendar year, and within 120 days after the end of Lessee's fiscal year, Lessee shall furnish to Lessor audited financial statements of Lessee for the immediately preceding fiscal year. Lessor shall maintain such statements in confidence but may disclose any financial statements furnished by Lessee to Lessor's lawyers, any prospective purchaser of the Property who has entered into a signed purchase agreement with Lessor, prospective and existing lenders of Lessor, and to Lessor's consultants and accountants; Lessor shall advise such permitted recipients that the financial statements furnished to them are to be held in confidence. In no event shall Lessor knowingly disclose Lessee's financial statements to competitors of Lessee.

29. **Force Majeure.** Any prevention, delay or stoppage due to strikes, lockouts, acts of God, enemy or hostile governmental action, civil commotion, fire or other casualty beyond the control of the party obligated to perform (each, a "Force Majeure Event") shall excuse the performance by such party for a period equal to any such prevention, delay or stoppage, expressly excluding, however, the obligations imposed upon Lessee with respect to Rental and other Monetary Obligations to be paid hereunder.

30. **No Merger.** There shall be no merger of this Lease nor of the leasehold estate created by this Lease with the fee estate in or ownership of the Property by reason of the fact that the same person, corporation, firm or other entity may acquire or hold or own, directly or indirectly, (A) this Lease or the leasehold estate created by this Lease or any interest in this Lease or in such leasehold estate, and (B) the fee estate or ownership of the Property or any interest in such fee estate or ownership. No such merger shall occur unless and until all persons, corporations, firms and other entities having any interest in (i) this Lease or the leasehold estate created by this Lease, and (ii) the fee estate in or ownership of the Property or any part thereof sought to be merged shall join in a written instrument effecting such merger and shall duly record the same.

31. **Characterization:** Lessor and Lessee acknowledge and warrant to each other that each has been represented by independent counsel and has executed this Lease after being fully advised by said counsel as to its effect and significance. This Lease shall be interpreted and construed in a fair and impartial manner without regard to such factors as the party which prepared the instrument, the relative bargaining powers of the parties or the domicile of any party. Whenever in this Lease any words of obligation or duty are used, such words or expressions shall have the same force and effect as though made in the form of a covenant.

32. **Easements.** During the Lease Term, Lessor shall not have the right to grant easements on, over, under and above the Property without the prior consent of Lessee, which consent will not be unreasonably withheld, conditioned or delayed.

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33. **Bankruptcy. Intentionally Omitted.**

34. **Attorneys' Fees.** In the event of any judicial or other adversarial proceeding concerning this Lease, to the extent permitted by Law, Lessor the prevailing party shall be entitled to recover all of its reasonable attorneys' fees and other Costs in addition to any other relief to which it may be entitled. In addition, the prevailing party shall, upon demand, be entitled to all attorneys' fees and all other Costs incurred in the preparation and service of any notice or demand hereunder, whether or not a legal action is subsequently commenced.

35. **Memorandum of Lease.** Concurrently with the execution of this Lease, Lessor and Lessee are executing Lessor's standard form memorandum of lease in recordable form, indicating the names and addresses of Lessor and Lessee, a description of the Property, the Lease Term, but omitting Rentals and such other terms of this Lease as Lessor may not desire to disclose to the public. Further, upon Lessor's request, Lessee agrees to execute and acknowledge a termination of lease and/or quit claim deed in recordable form to be held by Lessor until the expiration or sooner termination of the Lease Term.

36. **No Broker.** Lessor and Lessee represent and warrant to each other that they have had no conversation or negotiations with any broker concerning the leasing of the Property. Each of Lessor and Lessee agrees to protect, indemnify, save and keep harmless the other, against and from all liabilities, claims, losses, Costs, damages and expenses, including attorneys' fees, arising out of, resulting from or in connection with their breach of the foregoing warranty and representation.

37. **Waiver of Jury Trial and Punitive, Consequential, Special and Indirect Damages.** Lessor and Lessee hereby knowingly, voluntarily and intentionally waive the right either may have to a trial by jury with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought by either of the parties hereto against the other or its successors with respect to any matter arising out of or in connection with this Lease, the relationship of Lessor and Lessee, Lessee's use or occupancy of the Property, and/or any claim for injury or damage, or any emergency or statutory remedy. This waiver by the parties hereto of any right either may have to a trial by jury has been negotiated and is an essential aspect of their bargain. Furthermore, Lessee hereby knowingly, voluntarily and intentionally waives the right it may have to seek punitive, consequential, special and indirect damages from Lessor, Lessor's Lenders, and any of the Affiliates, officers, directors, members, managers or employees of Lessor, Lessor's Lenders, or any of their successors with respect to any and all issues presented in any action, proceeding, claim or counterclaim brought with respect to any matter arising out of or in connection with this Lease or any document contemplated herein or related hereto. The waiver by Lessee of any right it may have to seek punitive, consequential, special and indirect damages has been negotiated by the parties hereto and is an essential aspect of their bargain.

38. **Miscellaneous.**

A. **Time Is of the Essence.** Time is of the essence with respect to each and every provision of this Lease.

B. *Waiver and Amendment.* No provision of this Lease shall be deemed waived or amended except by a written instrument unambiguously setting forth the matter waived or amended and signed by the party against which enforcement of such waiver or amendment is sought. Waiver of any matter shall not be deemed a waiver of the same or any other matter on any future occasion. No acceptance by Lessor of an amount less than the Rental and other Monetary Obligations stipulated to be due under this Lease shall be deemed to be other than a payment on account of the earliest such Rental or other Monetary Obligations then due or in arrears nor shall any endorsement or statement on any check or letter accompanying any such payment be deemed a waiver of Lessor's right to collect any unpaid amounts or an accord and satisfaction.

C. *Successors Bound.* Except as otherwise specifically provided herein, the terms, covenants and conditions contained in this Lease shall bind and inure to the benefit of the respective heirs, successors, executors, administrators and assigns of each of the parties hereto.

D. *Captions.* Captions are used throughout this Lease for convenience of reference only and shall not be considered in any manner in the construction or interpretation hereof.

E. *Severability.* The provisions of this Lease shall be deemed severable. If any part of this Lease shall be held unenforceable by any court of competent jurisdiction, the remainder shall remain in full force and effect, and such unenforceable provision shall be reformed by such court so as to give maximum legal effect to the intention of the parties as expressed therein.

F. *Other Documents.* Each of the parties agrees to sign such other and further documents as may be necessary or appropriate to carry out the intentions expressed in this Lease; provided such documents are reasonably acceptable to each parties' counsel.

G. *Entire Agreement.* This Lease and any other instruments or agreements referred to herein, constitute the entire agreement between the parties with respect to the subject matter hereof, and there are no other representations, warranties or agreements except as herein provided.

H. *Forum Selection; Jurisdiction; Venue; Choice of Law.* For purposes of any action or proceeding arising out of this Lease, the parties hereto expressly submit to the jurisdiction of all federal and state courts located in the State of Nevada. Lessee consents that it may be served with any process or paper by registered mail or by personal service within or without the State of Nevada in accordance with applicable law. Furthermore, Lessee waives and agrees not to assert in any such action, suit or proceeding that it is not personally subject to the jurisdiction of such courts, that the action, suit or proceeding is brought in an inconvenient forum or that venue of the action, suit or proceeding is improper. Nothing contained in this Section shall limit or restrict the right of Lessor to commence any proceeding in the federal or state courts located in

the state where each Property is located to the extent Lessor deems such proceeding necessary or advisable to exercise remedies available under this Lease.

I. *Counterparts.* This Lease may be executed in one or more counterparts, each of which shall be deemed an original.

J. *Prohibited Persons and Transactions.* Lessee and Lessor (each a "Representing Party") represents to its current knowledge to the other that the Representing Party is not a person or entity, nor owns property or interests in property, which is blocked pursuant to Executive Order 13224 signed on September 24, 2001 and entitled "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism" or under any rules and regulations related thereto.

39. *Intentionally Omitted.*

40. *Amendments to Accommodate Sale to Tenants In Common.* At the request of Lessor, Lessee shall execute any amendments to this Lease that Lessor deems reasonably necessary to accommodate Lessor's sale of the Property to tenants in common (and subsequent management of the Property by such tenants in common or a manager appointed by them), provided that such amendments do not materially and negatively impact Lessee's obligations hereunder.

[Remainder of page intentionally left blank; signatures follow]

IN WITNESS WHEREOF, Lessor and Lessee have entered into this Lease as of the date first above written.

LESSOR:

LARRY WILLARD

Tax Identification No. [REDACTED]

STATE OF California)
COUNTY OF Santa Clara) ss

The foregoing instrument was acknowledged before me on 12/2/05 by Larry Willard, the President of Overland, on behalf of the limited liability company.

Tina J. Beda
Notary Public

My Commission Expires: 10-15-07



Sample Lease
12/2/05

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001(01/07/97) CUBOCAL (09445-2

STATE OF CALIFORNIA
COUNTY OF Santa Clara

) S.S.

On December 2, 2006, before me,

Tina T. Seda

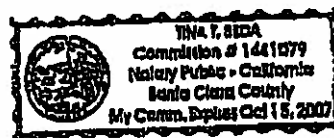
a Notary Public in and for said County and State, personally appeared

Larry J. Willard

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s), acted, executed the instrument.

WITNESS my hand and official seal.

Signature Tina T. Seda



(This area for official notarial seal)

notyack rev. (01/05/03)

LESSEE:

BERRY-HINCKLEY INDUSTRIES, a Nevada corporation

By: 

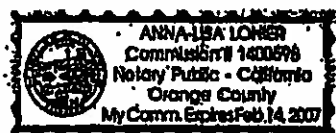
Paul Morabito, its Chief Executive Officer
Tax Identification No. 88-0125101

California
STATE OF ~~NEVADA~~
Orange)ss
COUNTY OF ~~WASHINGTON~~

The foregoing instrument was acknowledged before me on 1/4/06 by Paul Morabito, as Chief Executive Officer of BERRY-HINCKLEY INDUSTRIES, a Nevada corporation, on behalf of the corporation.


Notary Public

My Commission Expires: 2/14/07



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EXHIBIT A
DEFINED TERMS

The following terms shall have the following meanings for all purposes of this Lease:

"*Additional Rental*" has the meaning set forth in Section 4.C.

"*Adjustment Date*" means _____, and every anniversary thereafter during the Initial Term, and any Extension Term.

"*Affiliate*" means any Person which directly or indirectly controls, is under common control with or is controlled by any other Person. For purposes of this definition, "controls", "under common control with", and "controlled by" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or otherwise.

"*Base Annual Rental*" means \$1,464,375.00.

"*Base Monthly Rental*" means an amount equal to 1/12 of the applicable Base Annual Rental.

"*Business Day*" means Monday through Friday, except those days on which the United States Postal Service does not deliver regular first-class mail.

"*Casualty*" means any loss of or damage to any property included within or related to any Property or arising from an adjoining property caused by fire, flood or other casualty.

"*Condemnation*" means a Taking and/or a Requisition.

"*Costs*" means all reasonable costs and expenses incurred by a Person, including without limitation; reasonable attorneys' fees and expenses, court costs, expert witness fees, costs of tests and analyses, repair and maintenance, travel and accommodation expenses, deposition and trial transcripts, copies and other similar costs and fees, brokerage fees, escrow fees, title insurance and other insurance premiums, appraisal fees, stamp taxes, recording fees and transfer taxes or fees, as the circumstances require.

"*Dealer*" means any Person that supplies gasoline and/or diesel fuel to Lessee at the Property for sale to third parties, or its successor or assigns.

"*Dealer Agreement*" means a written agreement or other document granting Lessee the right to operate a gas station operation under the flag, brand or trade name of a Dealer.

"*Default Rate*" means 18% per annum or the highest rate permitted by law, whichever is less.

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"Deed of Trust" means any and all deeds of trust, mortgages or other liens to secure debts or other security instruments here and after placed by Lessor on the Property or any part thereof (except the Lessee's personal property or trade fixtures), and to any and all renewals, modifications, consolidations, replacements, extensions or substitutions of any such instruments.

"Effective Date" has the meaning set forth in Section 3 of this Lease.

"Environmental Laws" means federal, state and local laws, ordinances, common law requirements and regulations and standards, rules, policies and other governmental requirements, administrative rulings and court judgments and decrees having the effect of law in effect now or in the future and including all amendments, that relate to Hazardous Materials, Regulated Substances, USTs, and/or the protection of human health or the environment, or relating to liability for or Costs of Remediation or prevention of Releases, and apply to Lessee and/or the Property.

"Environmental Liens" means liens that may be imposed pursuant to Environmental Laws, including but not limited to Nevada Revised Statutes Chapters 459 and 618.

"Event of Default" has the meaning set forth in Section 20.A.

"Expiration Date" has the meaning set forth in Section 3.

"Extension Option" has the meaning set forth in Section 3.

"Extension Term" has the meaning set forth in Section 3.

"Force Majeure Event" has the meaning set forth in Section 29.

"Governmental Authority" means any governmental authority, agency, department, commission, bureau, board, instrumentality, court or quasi-governmental authority of the United States, any state or any political subdivision thereof (including but not limited to the Nevada Department of Environmental Protection, the Nevada Gaming Control Board and the Nevada Gaming Commission) with authority to adopt, modify, amend, interpret, give effect to or enforce any federal, state and local laws, statutes, ordinances, rules or regulations, including common law, or to issue court orders.

"Hazardous Materials" includes: (a) oil, petroleum products, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or substances or any other materials, contaminants or pollutants which pose a hazard to the Property or to Persons on or about the Property, cause the Property to be in violation of any local, state or federal law or regulation, (including without limitation, any Environmental Law), or are defined as or included in the definition of "hazardous substances", "hazardous wastes", "hazardous materials", "toxic substances", "contaminants", "pollutants", or words of similar import under any applicable local, state or federal law or under the regulations adopted, orders issued, or publications promulgated pursuant thereto, including, but not limited to: (i) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601, *et seq.*; (ii) the Hazardous Materials Transportation Act, as amended, 49 U.S.C. §1801, *et seq.*; (iii) the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901, *et seq.*; and

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(iv) regulations adopted and publications promulgated pursuant to the aforesaid laws; (b) asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls in excess of fifty (50) parts per million; (c) underground storage tanks; and (d) any other Regulated Substances, chemical, material or substance, exposure to which is prohibited, limited or regulated by any governmental authority or which may or could pose a hazard to the health and safety of the occupants of the Property or the owners and/or occupants of any adjoining property.

"Indemnified Parties" means Lessor, any Lessor's Lenders and their members, managers, officers, directors, shareholders, partners, employees, agents, servants, representatives, contractors, subcontractors, affiliates, subsidiaries, participants, successors and assigns, including, but not limited to, any successors by merger, consolidation or acquisition of all or a substantial portion of the assets and business of Lessor or any Lessor's Lenders, as applicable.

"Initial Term" has the meaning set forth in Section 3.

"Insolvency Event" means (a) Lessee's (i) failure to generally pay its debts as such debts become due; (ii) admitting in writing its inability to pay its debts generally; or (iii) making a general assignment for the benefit of creditors; (b) any proceeding being instituted by or against Lessee (i) seeking to adjudicate it a bankrupt or insolvent; (ii) seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency, or reorganization or relief of debtors; or (iii) seeking the entry of an order for relief or the appointment of a receiver, trustee, or other similar official for it or for any substantial part of its property, and in the case of any such proceeding instituted against Lessee, either such proceeding shall remain undismissed for a period of one hundred twenty (120) days or any of the actions sought in such proceeding shall occur; or (c) Lessee taking any corporate action to authorize any of the actions set forth above in this definition.

"Law(s)" means any constitution, statute, rule of law, code, ordinance, order, judgment, decree, injunction, rule, regulation, policy, requirement or administrative or judicial determination, even if unforeseen or extraordinary, of every duly constituted Governmental Authority, court or agency, now or hereafter enacted or in effect.

"Lease Term" shall have the meaning described in Section 3.

"Legal Requirements" means the requirements of all present and future Laws (including without limitation, Environmental Laws and Laws relating to accessibility to, usability by, and discrimination against, disabled individuals), all judicial and administrative interpretations thereof, including any judicial order, consent, decree or judgment, and all covenants, restrictions and conditions now or hereafter of record which may be applicable to Lessee or to the Property, or to the use, manner of use, occupancy, possession, operation, maintenance, alteration, repair or restoration of to the Property, even if compliance therewith necessitates structural changes or improvements or results in interference with the use or enjoyment of the Property.

"Lessor's Lender" means any lender of Lessor that has a lien on the Property, including any lenders named in any Deed of Trust.

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"Losses" means any and all claims, suits, liabilities (including, without limitation, strict liabilities), actions, proceedings, obligations, debts, damages, losses, Costs, diminutions in value, fines, penalties, interest, charges, fees, judgments, awards, amounts paid in settlement and damages of whatever kind or nature, inclusive of bodily injury and property damage to third parties (including, without limitation, attorneys' fees and other Costs of defense).

"Monetary Obligations" means all Rental and all other sums payable or reimbursable by Lessee under this Lease to Lessor, to any third party on behalf of Lessor, or to any Indemnified Party.

"Notices" has the meaning set forth in Section 24.

"Permitted Amounts" shall mean, with respect to any given level of Hazardous Materials or Regulated Substances, that level or quantity of Hazardous Materials or Regulated Substances in any form or combination of forms which does not constitute a violation of any Environmental Laws and is customarily employed in, or associated with, similar businesses located in the states where the Property is located.

"Permitted Encumbrances" shall mean those covenants, restrictions, reservations, liens, conditions, encroachments, easements, survey exceptions, parties in possession and other matters of title that affect the Property as of the date of Lessor's acquisition thereof and those items which hereafter affect title as permitted under this Lease, including but not limited to those identified in the owner's policy of title insurance issued to Lessor by First American Title Insurance Company or an agent thereof in conjunction with Lessor's acquisition of the Property.

"Permitted Facility" means a gas station with convenience store (and restaurant and postal unit operations within a convenience store), and uses incidental or related thereto including but not limited to a car wash, quick lube/oil change facility, the operation of gaming devices within the convenience store and offices for Lessee's operations, together with uses that are complementary to or extensions of Lessee's gas station and convenience store operations (e.g., quick-service restaurants, deli and sandwich shops, coffee shops, juice shops, postal contract units and/or UPS/Federal Express services) when such uses are not in violation of Legal Requirements or the Permitted Encumbrances.

"Permitted Sublease" has the meaning set forth in Section 23.

"Person" means any individual, partnership, corporation, limited liability company, trust, unincorporated organization, Governmental Authority or any other form of entity.

"Property" means, that parcel or parcels of real estate located at the address set forth in Exhibit B and legally described on Exhibit B attached hereto (which parcels may be fee estates or easement estates), together with all rights, privileges, and appurtenances associated therewith, all buildings, fixtures and other improvements now or hereafter located on such parcels of real estate (whether or not affixed to such real estate).

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"Regulated Substances" means "petroleum" and "petroleum-based substances" or any similar terms described or defined in any of the Environmental Laws and any applicable federal, state, county or local laws applicable to or regulating USTs.

"Release" means any presence, release, deposit, discharge, emission, leaking, spilling, seeping, migrating, injecting, pumping, pouring, emptying, escaping, dumping, disposing or other movement of Hazardous Materials, Regulated Substances or USTs.

"Remediation" means any response, remedial, removal, or corrective action, any activity to cleanup, detoxify, decontaminate, contain or otherwise remediate any Hazardous Materials, Regulated Substances or USTs, any actions to prevent, cure or mitigate any Release, any action to comply with any Environmental Laws or with any permits issued pursuant thereto, any inspection, investigation, study, monitoring, assessment, audit, sampling and testing, laboratory or other analysis, or any evaluation relating to any Hazardous Materials, Regulated Substances or USTs.

"Rental" means, collectively, the Base Annual Rental and the Additional Rental.

"Rent Adjustment" has the meaning set forth in Section 4.B.

"Successor Lessor" has the meaning set forth in Section 21.

"Taking" means (a) any taking or damaging of all or a portion of the Property (i) in or by condemnation or other eminent domain proceedings pursuant to any Law, general or special, or (ii) by reason of any agreement with any condemnor in settlement of or under threat of any such condemnation or other eminent domain proceeding, or (iii) by any other means, or (b) any de facto condemnation that constitutes a compensable taking under applicable law. The Taking shall be considered to have taken place as of the later of the date actual physical possession is taken by the condemnor, or the date on which the right to compensation and damages accrues under the law applicable to the Property.

"Threatened Release" means a substantial likelihood of a Release which requires action to prevent or mitigate damage to the soil, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, ambient air or any other environmental medium comprising or surrounding any Property which may result from such Release.

"USTs" means any one or combination of tanks and associated product piping systems used in connection with storage, dispensing and general use of Regulated Substances.

"WGI" means Winner's Gaming, Inc.

"WGI Agreement" means any and all agreements of Lessee with WGI pursuant to which WGI currently operates gaming machines or devices and related equipment (or the technological evolution thereof) on the Property and any Substitute WGI Agreement (as defined in Section 12.F).

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EXHIBIT B**ADDRESS AND LEGAL DESCRIPTION OF PROPERTY**

PROPERTY ADDRESS: 7695 - 7699 S. Virginia Street, Reno, Nevada (APN 043-011-48)

PROPERTY LEGAL DESCRIPTION:**Parcel I**

The land referred to herein is situated in the City of Reno, County of Washoe, State of Nevada, located within a portion of the South Half (S 1/2) of the Northwest Quarter (NW 1/4) of Section 6, Township 19 North, Range 20 East, M.D.M., and being more particularly described as follows:

Commencing at the Southwest corner as Parcel "C", a found nail and tag on a fence post, as shown on Parcel Map No. 218, File No. 388954, on file in the County Records Office, Washoe County, Nevada; thence North 00°16'56" East, a distance of 579.25 feet to the Northerly side of Longley Lane, Thence along said Northerly side South 69°21'09" West, a distance of 21.41 feet to the true point of beginning.

Thence along the said Northerly line of Longley Lane South 69°21'09" West, a distance of 301.22 feet to the Easterly line of U.S. 395; thence along said Easterly line North 21°04'38" West, a distance of 653.04 feet; thence leaving said Easterly line North 14°55'49" East, a distance of 126.66 feet, thence North 89°52'07" East, a distance of 458.81 feet; thence North 19°19'30" West, a distance of 0.78 feet; thence North 84°51'10" East, a distance of 213.17 feet to the Westerly line of South Virginia Street; thence along said Westerly line South 20°39'19" East, a distance of 257.92 feet; thence leaving said westerly line of South Virginia North 89°40'18" West, a distance of 275.76 feet; thence South 00°16'56" West, a distance of 406.67 feet to the true point of beginning.

Parcel II

A non-exclusive easement for ingress, egress and access by and for vehicular pedestrian traffic and vehicle parking as set forth in that certain mutual parking and access agreement recorded April 12, 1995 in Book 4282, Page 40 as Instrument No. 1885230 of Official Records, Washoe County Recorder's Office, Washoe County, Nevada.

Note: The above metes and bounds legal description appeared previously in that certain document recorded August 27, 1996, in Book 4656, Page 716, as Instrument No. 2024695.

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EXHIBIT 3

EXHIBIT 3

GUARANTY AGREEMENT

This GUARANTY AGREEMENT, dated as of this ^{9^k} day of March, 2007 (this "Agreement"), is made by Jerry Herbst, an individual (the "Guarantor"), for the benefit of Overland Development Corporation Inc. and Larry J. Willard, Trustee of the Larry James Willard Trust (collectively, the "Lessor").

RECITALS:

A. The Lessor and Berry-Hinckley Industries, a Nevada corporation ("BHI"), are parties to that certain Lease Agreement for 7695 South Virginia, Reno, Nevada (the "Lease").

B. The Guarantor desires to enter into this Agreement in order to induce the Landlord to (i) provide consent under the Lease to a change of control of P.A. Morabito & Co., Limited ("PAMCo"), the corporation that owns all the stock of BHI and/or (ii) enter into an amendment to the Lease.

AGREEMENT:

NOW, THEREFORE, in consideration of the premises, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Guarantor hereby guarantees, promises and undertakes as follows:

1. Guaranty. The Guarantor unconditionally, absolutely and irrevocably guarantees the timely payment and performance of each of BHI's obligations arising out of and under the Lease (such obligations, the "Guaranteed Obligations"). The Guarantor's guaranty made hereby is a guaranty of timely payment and performance of the Guaranteed Obligations and not merely of collectibility or enforceability of such obligations.

2. Remedies and Rights of the Lessor. The Guarantor agrees that if and to the extent that BHI either (a) fails to satisfy any of the Guaranteed Obligations and fails to remedy such failure within thirty (30) days after receiving written notice from the Lessor of such failure, or (b) is subject to a pending petition for relief under Chapter 7 or Chapter 11 of Title 11 of the United States Code, the Guarantor will be directly responsible for the full extent of any unsatisfied Guaranteed Obligations. This Agreement 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 the Guarantor 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; or (viii) any allegation or contest of the validity of the Lease or this Agreement. The Guarantor hereby waives any defense to its obligations hereunder that might arise as a result of any of the foregoing, and hereby waives the effect of any fact, circumstance or event of any nature whatsoever that would exonerate, or constitute or give rise to a defense to, the obligation of a surety or guarantor. Without limitation, except to the extent specifically provided in Paragraph 2 hereof, the Guarantor waives any right it may have to require the Lessor, and any obligation the Lessor may have, to proceed first against BHI or exhaust any remedies that it may have against BHI in respect of non-payment or non-performance of the Guaranteed Obligations, before demand for payment or performance by the Guarantor under this Agreement.

The Guarantor acknowledges that the rights and remedies herein provided are not exclusive of any other rights or remedies that the Lessor may otherwise have at law or in equity, and shall not prejudice the Lessor's right to assert any other claim under the Lease.

3. Duration of Agreement. The term of this Agreement will begin on, and this Agreement shall be of no force and effect until, the closing of that certain Stock Purchase Agreement by and among Guarantor, or a company controlled by him, and the stockholders of PAMCo. This Agreement will continue in full force and effect and the obligations of the Guarantor hereunder will not be discharged until the earlier of (i) the date on which the Guaranteed Obligations are fully performed, satisfied and discharged or until BHI's liability to the Lessor under the Lease shall have been completely performed, satisfied and discharged, whichever occurs first, or (ii) upon a change in the control of BHI provided that the Lessor has consented to such change of control, which consent shall not be unreasonably withheld. For the purpose of the foregoing sentence, "change in the control of BHI" shall mean the transfer, on a cumulative basis, of 50% or more of the voting control of BHI to a party not owned, directly or indirectly, by the Guarantor, Edward Herbst, Timothy Herbst or Troy Herbst. Any transfer of Guarantor's interest in BHI other than upon a change in the control of BHI with Lessor's consent pursuant to section (ii) above will not cause this Agreement or Guarantor's obligations hereunder to terminate. The Guaranteed Obligations will not be considered fully performed, satisfied and discharged (a) unless and until all obligations of BHI to the Lessor pursuant to the Lease have been fully and completely performed, satisfied and discharged, or (b) to the extent any claim by the Lessor against BHI remains outstanding.

4. No Assignment. The rights and obligations of the Guarantor hereunder may not be assigned without the prior written consent of the Lessor or the then beneficiary of this Agreement. Any purported assignment in violation of this section shall be null and void. All covenants and agreements in this Agreement made by the Guarantor shall bind and inure to the benefit of its successors and permitted assigns.

5. Integration; Modification; Waiver. This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior understandings of the parties. No supplement, modification or amendment of this Agreement will be binding unless executed in writing by the Guarantor and acknowledged and accepted by the Lessor or the then beneficiary of this Agreement. No waiver of any of the provisions of this Agreement will be deemed to be or shall constitute a continuing waiver. No waiver will be binding unless executed in writing by the party making the waiver.

6. No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights or remedies upon any person other than the Lessor and its successors and assigns.

7. Governing Law. This Agreement will be governed in all respects by the laws of the State of Nevada without regard to conflicts of law principles.

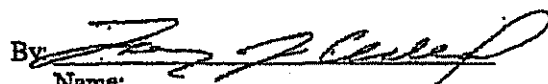

[signature page follows]

IN WITNESS WHEREOF, the undersigned have caused this Guaranty Agreement to be duly executed as of the date first above written.



JERRY HERBST

Each of the undersigned hereby acknowledges and accepts this Guaranty Agreement as of the date hereof.

OVERLAND DEVELOPMENT CORPORATION INC.

By: 
Name:
Title: 

LARRY JAMES WILLARD TRUST

By: 
Name: Larry J. Willard
Title: Trustee

Herbst Lease Guaranty - 7695 South Virginia.DOC